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Chapter 6

Selected Issues in Attorney-Client Confidentiality

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Synopsis

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§ 6.01. Introduction.

The legal protection for confidential communications between a lawyer and a client (the "Privilege"), firmly rooted in American jurisprudence since the founding of the country, is and always has been an impediment to finding the truth. Such communications contain relevant information when others seek to investigate the topic on which advice was sought. Logic says that the content of those communications is especially likely to be accurate. Despite relevance and trustworthiness, such information has historically been protected in order to foster a truthful relationship between attorney and client so that valuable legal advice can be given. In the balancing of competing interests, the historic outcome has been in favor of the relationship over the finding of the truth by others. In this current era, that historic balance is increasingly questioned, and pressure is brought to bear as governmental authorities and adversaries attempt to pierce the protection. The confidentiality that exists between lawyer and client involves three separate (and sometimes overlapping) concepts: confidential client information, work-product and privileged communications. All are under attack, although the ability to protect each is slightly different.

§ 6.02. Confidential Client Information.

The broadest category of confidential information is "confidential client information." It is usually thought that the general duty of confidentiality comes from the law of ethics rather than rules promulgated by courts (*i.e.,* work-product, possibly privilege, depending on the status of rules of evidence) or legislatively enacted (*i.e*., privilege, now generally codified although with a common law heritage and sometimes found in rules of evidence).