

## Chapter 6

# The Attorney-Client Privilege and Associated Confidentiality Concerns

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### § 6.01. Introduction.

Confidentiality is central to the practice of law. Indeed, confidentiality is a good part of the bedrock on which both litigation and transactional practices are built.

A lawyer’s duty to protect client communications and information is variously embodied and enforced: the attorney-client privilege is a critical component of evidence law; the work product doctrine provides important immunity against the discovery of attorneys’ files and mental impressions; and state ethics rules make confidentiality a professional responsibility concern. In fact, the attorney-client privilege has always been narrowly construed and enforced,<sup>2</sup> and it has always been capable of being waived by almost any voluntary disclosure running contrary to its assertion.<sup>3</sup> In many instances lawyers too casually assume the application of the privilege, or do not appreciate the ease with which it may be waived.<sup>4</sup> Similarly, lawyers

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<sup>2</sup> See, e.g., *People v. Urbano*, 26 Cal. Rptr. 3d 871, 874-76 (Cal. Ct. App. 2005)(holding that privilege did not apply to defendant’s statements to lawyer in courtroom made so loudly that they could be easily overheard by others).

<sup>3</sup> *Gray v. Bicknell*, 86 F.3d 1472, 1482 (8th Cir. 1996); *Profit Mgmt. Dev., Inc. v. Jacobson, Brandvik & Anderson, Ltd.*, 721 N.E.2d 826, 835 (Ill. App. Ct. 1999).

<sup>4</sup> See *Lugosch v. Congel*, 219 F.R.D. 220, 235 (N.D.N.Y. 2003)(explaining that “[c]ontrary to too quick to assume the application of the work product doctrine and overlook the fact that

often are too quick to assume the application of the work product doctrine and overlook the fact that the client has the ability to waive it. Finally, many lawyers unfortunately do not appreciate the broad confidentiality obligation imposed by state ethics rules. It is against this backdrop that these materials briefly examine the current contours of the attorney-client privilege, work product doctrine, and related confidentiality concerns.

### § 6.02. Privilege, Immunity and Confidentiality.

Confidential communications between attorneys and clients are protected from discovery by the attorney-client privilege and often by work product immunity. These doctrines are separate and distinct from lawyers' duty of confidentiality under ethics rules.

#### [1] — The Attorney-Client Privilege.

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications,<sup>5</sup> and it has now been widely codified. The privilege is intended to “ensure full disclosure by clients who feel safe confiding in their attorney.”<sup>6</sup> Only full and frank communications between clients and their attorneys allow attorneys to provide effective, expeditious and informed representation.<sup>7</sup> Additionally, recognizing the privilege encourages the public to seek early legal assistance.<sup>8</sup>

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the client has the ability to waive it. Finally, many lawyers unfortunately do not appreciate the broad confidentiality obligation imposed by state ethics rules. It is against modern and ill-informed perceptions,” the attorney-client privilege is narrowly construed and “riddled with exceptions,” and that it is a “less than sacrosanct rule” subject to “waivers upon waivers”).<sup>5</sup> *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)(reversed 124 F.3d 230); *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999); *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007)(quoting *Upjohn Co. v. United States*, 449 U.S. 383 (1981)); *In re Miller*, 584 S.E.2d 772, 782 (N.C. 2003); *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263 (Pa. Super. Ct. 2007); *Doe v. Maret*, 984 P.2d 980, 982 (Utah 1999).

<sup>6</sup> *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 798 (Wis. 2002).

<sup>7</sup> *See In re Miller*, 584 S.E.2d at 782-83 (quoting and citing cases).

<sup>8</sup> *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 461-62 (Colo. Ct. App. 2003)(quoting *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court*, 718 P.2d 1044