

IN PRACTICE

LEGAL PROFESSION

The Lawyer-Client Privilege Is Not Absolute

Not all communications will be considered confidential

BY DENNIS M. GONSKI

Every lawyer knows that there is an attorney-client privilege; a lawyer must preserve the confidentiality of client communications made during the sanctity of a professional consultation. The concept of client privacy cedes from England's "common law." Similar expectations of privacy also permeate both the "Search and Seizure" Clause of the Fourth Amendment, and also Article I, paragraph 7 of the New Jersey Constitution.

The Statute

Today in New Jersey, there is a "lawyer-client privilege" codified in N.J.S.A. 2A:84A-: "...communications between lawyer and his client in the course of that relationship and in professional confidence are privileged. ..." This same statute also defines who may claim protection as a "client": "...a person or corporation or other association

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that, directly or through the authorized representative, consults a lawyer...for the purposes of retaining the lawyer or securing legal services or advice from him in his professional capacity."

A causal reading of this statute might lead one to believe that in New Jersey essentially all communications made by a client to a lawyer are protected. Does not every "client" come to a lawyer expecting to create a lawyer-client relationship, during the course of which the client discloses his name, address and other personal information, all presumably with an expectation (at least on the client's part) that such information will be kept confidential by the lawyer?

The rule in New Jersey is, however, that not all information given by a client to a lawyer is deemed confidential. Indeed, certain client information (such as a client's name and address) is not per se protected by the lawyer-client privilege. The court cases in which the confidentiality of such administrative information has arisen, speak with phrases such as "consistent with the necessities of judicial policy" and "the asserted purpose the privilege is designed to serve" —

phrases that bespeak a case-by-case determination.

Disclosure of 'Administrative' Information

Clearly the New Jersey Supreme Court does not view all client to attorney disclosures as privileged. Over a half century ago, the Supreme Court wrote: "[most] of the authorities hold that while the privilege protects against the disclosure of confidential communications from the client to his attorney, it is not intended to permit the concealment by the attorney of the identity of his client." *State v. Toscano*, 13 N.J. 418, 424 (1953).

A distinction exists between information which is necessary to the attorney-client relationship, and that which is not. A general communication, such as information imparted by a client to an attorney, having nothing to do with the professional purpose upon which the legal consultation is based — is simply not privileged. There is no privilege afforded to information that is unrelated to the legal advice being sought from a lawyer. Indeed, attorneys frequently request and obtain a client's actual or electronic address in order to forward correspondence or bills for fees, or for other purposes having nothing to do with the actual rendering of legal advice or professional service. Insofar as a client's address is concerned, the general rule is: In the absence of an "unusual circumstance," the identity and address of a client employing an attorney is not a confidential communication within the

privilege of the attorney-client relationship.

What then is an “unusual circumstance” sufficient to warrant protection of a client’s address? One example appeared in *In re Nackson*, 114 N.J. 527 (1989) (a case where a client, who had jumped bail, consulted attorney about a fugitive warrant and the attorney refused to disclose client’s whereabouts to a grand jury). In *Nackson*, the Supreme Court ruled that in that particular circumstance, the client’s identity and whereabouts are “privileged” — because the information was given to the attorney with a client’s expectation of confidentiality, and the information was directly related to advice proffered by the attorney.

A Clash Between ‘Truth’ and Confidence

There is and always will be tension between the attorney-client privilege and the “search for truth.” On the one hand, “justice” is best served by affording litigants every reasonable avenue of discovery. Gamesmanship is to be discouraged; discovery rules are to be liberally construed. Public policy demands full and complete disclosure of all facts in the court’s quest for the truth, and ultimately to the triumph of justice.

On the other hand, public policy equally demands encouragement and promotion of sound legal advocacy by protecting the full and frank private communication between attorneys and their clients. The Supreme Court recently confirmed that the goal of the lawyer-client privilege is to encourage free and full disclosure of information from the client to the attorney, which in turn benefits the public, who is well served by sound legal counsel based on full candid and confidential exchanges. *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010).

Yet, at times a choice must be made between: “truth” and “privacy.” Both values are not always compatible. The resulting compromise is to “balance” the need of confidentiality against the societal need for disclosure.

A Three-Part Balancing Test

In 1979, the Supreme Court, *In re Kozlov*, 79 N.J. at 243-44, offered a three-part test for “balancing” the competing interests of lawyer-client confidentiality, with the societal need to discover information which “but for” the privilege would be available to mete out justice. To perforate the privilege, three things must appear: (1) There must be a legitimate need to reach the evidence sought to be shielded; (2) there must be a showing of relevance and materiality of that evidence; and (3) it must be shown by a fair preponderance of the evidence, including all reasonable inferences, that the information cannot be secured from any less intrusive source.

This “balancing” test is said to promote the use of the privilege as a “shield,” and not as a “sword.” This test has been applied to the disclosure of a client’s address.

The ‘Fraud’ Exception to the Privilege

Fraud always trumps the lawyer-client privilege. The privilege evaporates as soon as it becomes apparent that its enforcement will promote the commission of a crime or fraud. Evid.R. 504(2) expressly provides exceptions: “Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud...”

Notably, a distinction exists between “fraud” and “crime.” A “criminal” act is narrowly defined by statute. “Fraud,” however, may be either “actual” or “equitable.” New Jersey courts have given the term “fraud” an expansive meaning. Acts constituting “fraud” may be as broad and varied as the human mind can invent. As a result, the lawyer-client privilege will not prevent discovery of client information (even a confidential address) if to do so would “mock justice” or constitute a fraud upon the court.

The notion that “fraud” trumps the privilege was most notably paraphrased by Justice Cardozo: “[t]here is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused.” *Clark v. United States*, 289 U.S. 1 (1933).

An Ethics Issue

Protection of client information also falls within the “Rules of Professional Conduct.” Here too, a “relating to representation” test is applied to determine “confidentiality.” And, here too, there are exceptions: “(a) A lawyer shall not reveal information relating to representation of a client unless the client consents...except as stated in paragraphs (b), (c), and (d).”

RPC 1.6(a) states the general rule that shields information “relating to” the representation of a client. The subparagraphs (b), (c) and (d) override the shield when the enforcement of the privilege would facilitate substantial financial harm to another or would constitute a criminal, illegal or fraudulent act upon a tribunal.

‘In Camera’ Compromise

The accepted method for resolving issues involving disclosure of potentially privileged information — is for an in camera inspection by the court. Although disclosure to the court may, to some extent, dilute the effectiveness of the attorney-client privilege, the Supreme Court has ruled that this limited intrusion is but minor when balanced against the significantly greater competing values involved. Such a procedure also comports with common notions of fundamental fairness and best alleviates the tension between the conflicting policies at stake.

In New Jersey, the lawyer-client privilege is not absolute. The propriety of disclosure (or not) will depend upon the circumstance under which the privilege arises. What might at first appear to be a “confidential” communication, may ultimately turn out not to be so — bringing to mind Lord Bromwell’s ancient quip: “The matter does not appear to me now as it appears to have appeared to me then.” (*Andrews v. Styrap*, 26 L.T. 704, 706).

The simple matter of the confidentiality of a “client’s” address is not so simple after all. ■