

Lawyer-Client Confidentiality and Privilege: What is the Difference?

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The terms lawyer-client confidentiality and lawyer-client privilege are often used interchangeably and the differences between them may become somewhat blurred. Although both terms address information related to the client that a lawyer cannot reveal and both are used primarily to protect the client's ability to confide freely with the lawyer, they are not synonymous. There are several significant differences with regard to their scope, exceptions, and application.

The primary ethics rule addressing lawyer-client confidentiality is Bar Rule 4-1.6. The Comment states that "(a) fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation..." A violation of the Bar rule may result in disciplinary sanctions.

Absent an exception, confidential information remains confidential during the representation and after the client dies. The lawyer should not reveal confidential information if it will injure the client's interests (absent an exception or legal compulsion), and it should only be disclosed to advance those interests.

A client may give informed consent for the lawyer to reveal confidential information or information that is protected by the privilege and consent may be implied under certain circumstances. The client must give consent to the waiver of confidentiality; however, the privilege may be inadvertently and impliedly waived by the failure to object to testimony about the privileged communications.

In contrast to privilege, the lawyer's ethical duties regarding confidentiality are much more extensive in scope and application, particularly as to what information is protected. Confidentiality applies not only to information received from the client but all information related to the representation, regardless of whether the information came from the client or another source. In addition, confidentiality applies in all situations, not just in litigation.

The lawyer-client privilege is a litigation concept that arose from the principles of evidence. In Florida, the privilege is set forth in F.S. 90.502. The client, or someone acting legally for the client, may claim the privilege, typically through the lawyer. F.S. 90.502(e) states that a lawyer is presumed to have the authority to assert the privilege on behalf of the client. The privilege only protects communications between the client and lawyer in a litigation context, the communications are not protected if available from another source, and the communications are not necessarily protected simply because of the communication to the lawyer. The Comment to Bar Rule 4-1.6 states "(t)he attorney-client privilege and work-product doctrine apply in judicial and other proceedings..."

The “crime-fraud” exception to the privilege in F.S. 90.502(4)(a) permits the disclosure of information communicated to the lawyer if the client attempts to use the lawyer’s services to commit or cover up a crime or fraud.

Bar Rule 4-1.6(b) requires disclosure of confidential information to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another. This mandatory exception is different from the crime-fraud exception to privilege in that it requires the threat of substantial injury or death to require that the information be revealed. There are other exceptions under Bar Rule 4-1.6(c) which permit (but do not require) disclosure by the lawyer.

Even if information is not covered by privilege, it may still be confidential. Depending on the circumstances, a lawyer may also be compelled to reveal the information regardless of whether it is privileged or confidential.

Although the use of the terms “lawyer-client confidentiality” and “lawyer-client privilege may often be used interchangeably, they are very different in concept, scope, and application.

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