

Example of critical essay attorney client privilege essay

[Law](#), [Criminal Justice](#)



The role that an attorney plays in protecting his client's interests has long included the privilege of confidentiality, in the sense that a client's defender should have the ability to discuss his client's case with full candor, and then decide which elements of that case should make it into the courtroom. This notion has ancient precedents: when Marcus Tullius Cicero was prosecuting the governor of Sicily, during the time of the Roman Empire, he was not allowed to call the governor's defender as a witness. The logic at the time was that if the advocate could testify, then the governor would not be able to trust his advocate fully with his case. Over the course of time, this connection between client and attorney received more definition in British common law. In the 1950 case of *United States v. United Shoe Machinery Corp.*, the court set out five definite requirements for claiming attorney-client privilege: first, the person asserting the privilege must be a client, or must have sought to become a client at the time of disclosure; second, the person connected to the communication must be acting as a lawyer; third, the communication must be between the lawyer and the client exclusively—no non-clients may be included in the communication; fourth, the communication must have occurred for the purpose of securing a legal opinion, legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime; fifth, the privilege may be claimed or waived by the client only (usually, as stated above, through counsel)

(Freedman 1990, 112. Confidentiality is a relationship that is only guaranteed to a client with his attorney (along with a clergyman or psychologist); while a spouse cannot be compelled to testify against another spouse, that spouse may do so voluntarily. In each instance above, breaking

confidentiality would place the client at risk: in the first instance, once the person has become a client, he has begun to trust the safety of the privilege and may already have revealed damaging information; in the second, the privilege only is granted to someone who has demonstrated the professional and academic credentials necessary to practice law and defend the client's interest; in the third, if others were privy to the discussion, then the lawyer would not have control over whether confidentiality was broken by someone other than the client; in the fourth, breaking confidentiality would only be wrong if that confidential information were shared without malice; and in the fifth, because it is the client's legal fate in the balance, the client should be able to choose to release confidentiality. While this has been narrowed slightly further by subsequent adjustments to the Federal Rules of Evidence in American courts, attorney-client privilege remains a strong element in the legal system. The moral issue involved with attorney-client privilege has to do with, as Chapter 7 establishes, the difference between what is permissible and what is obligated. In other words, should attorney-client confidentiality be an element that is allowed for lawyers and their clients, or something that is ethically incumbent on attorneys to maintain for their clients, even if they do not want to do so. Both Bruce Landesman and Lee Pizzimenti indicate that there are already rules in place that, ironically, give privilege two fairly distinct roles: either an option for the attorney to exercise or a violation of ethics in itself - such as in cases where confidentiality could bring harm to society or to other people, where clients have wrought fraud or committed perjury, or where a breach of confidentiality is necessary for the safety of the attorney (and for the payment of the attorney's fee).

Consider, for example, the possibility of a client who has been acquitted for a murder. The defense attorney knows that the client committed it, but he was able to leverage enough doubt against the prosecution's case to get an acquittal: the chain of custody of the murder weapon may have been interrupted, meaning that the client's blood on the knife handle is not reliable evidence. Perhaps the victim's brother had also had a motive and opportunity, and there was no physical evidence. For whatever reason, the preponderance of the evidence did not warrant a finding of guilt beyond a reasonable doubt.

After the acquittal, the client can never be tried again for that crime, except if new evidence emerges - this is the legal concept known as "double jeopardy." However, during their final meeting, the client tells the attorney that he has also committed five other unsolved murders, in a psychopathic boast. Clearly, as an officer of the court, the lawyer has a duty to inform the authorities about this, because the fact that a mass murderer is walking the streets represents an imminent danger to society.

There are few examples that so clearly exemplify the requirement of breaking confidentiality, though. Bruce Landesman considers the main issues to be the dilemma between two obligations: the duty of keeping all communications confidential, and the duty of preventing significant harm to others. Lee Pizzimenti looks at confidentiality from without, instead of within; he places it on a spectrum that ranges between absolute truth and complete deception. His question is that since confidentiality already has exceptions, what should lawyers tell their clients about it? At what point does a limit of

information become deception? Rather than contemplate what it takes to break confidentiality, Pizzimenti questions the degree of honesty that an attorney must have with his client concerning his handling of the information that the client plans to give him?

As with so many legal issues, the sense of the question comes down to a difference of niceties that can actually become quite significant - the difference between " may" and " must." Obviously, lawyers may exercise confidentiality for communications with their clients. At what point, though, does that become an obligation? The ethics in this situation are admittedly a complicated topic. The amount of information that an attorney must shield as opposed to protect is the open question here.

What, for example, does it mean to maintain confidentiality? Clearly, the literal meaning of this phrase is clear - keeping communications strictly between the two involved parties. However, the motivation behind that becomes a factor for attorneys to consider, and the murkier the ethical grounds become, the more quickly personal factors can lead attorneys to justify breaking the privilege. As Landesman points out, there are laws on the books that allow for the breaking of confidentiality not only for protection of the general welfare, but also for the interests of the attorney - even financial ones. The general terms of these exceptions allow for a significant amount of leeway. Landesman also indicates that the " interpersonal dynamic" between attorney and client will inform the strength of the confidentiality. Because the client wants to remain the possessor of the information, and only wants the attorney to use the information for the

client's benefit, the sharing of that information is a significant risk. The various matrix of needs, possible consequences, and motivations will determine how ironclad that confidentiality turns out to be. If the client and attorney have a combative relationship, the attorney is less likely to hold confidentiality in as high of a regard, which means that the conditions that would allow the attorney to breach that confidentiality would become easier to satisfy.

The gray area in which this ethical issue is left to forage is large enough to inspire the plots of many a thriller. But the ultimate question is to decide the moral answer to where the line of confidentiality should be drawn.

Landesman suggests two binding rules that would make laws more consistent in North American courts: mandating the revelation of information when that would prevent "serious bodily harm" or death for others, while permitting the revelation of information about actions that might lead to "foreseeable harm" or "wrongful activity"; and mandating that lawyers reveal perjury from clients, when the clients commit it.

There is some validity to the first rule that Landesman suggests. Obviously, if an officer of the court knows that the possibility of death or violence exists, especially coming from a client that he is protecting, then he has the duty to make others aware of that danger. That has long been a part of the doctrine of attorney-client privilege - as well as the privilege that extends to other professions as well, including that bond involving therapists. Failure to warn others of impending danger could be seen as a form of complicity in the violence that ensues; it should be incumbent on attorneys to report

knowledge of potential situations like those. While this may not be the most common reason for breaching confidentiality, it is the one with the fewest gray moral tones to it.

However, as to the second rule, mandating the revelation of perjury, this is a more questionable requirement. If an attorney is defending a person accused of a crime, should it not be incumbent on the state to prove all of that without the testimony of the defendant? Because defendants are not even required to appear on their own behalf, because they cannot be compelled to testify against themselves, one could also argue that an accused will say whatever is necessary to receive acquittal. A defense attorney who knows that his client is guilty is still charged with providing an impassioned defense. If the client chooses to testify, and the defense attorney knowingly omits asking the client whether or not he actually committed the crime, it is extremely likely that the prosecuting attorney will then step up and ask that same question in cross-examination. If the accused then testifies that he did not commit the crime, even though he did, that would constitute perjury. It would not be possible for the defense attorney to then notify the court of this act of perjury without ruining his client's chances at acquittal - thus going against his own mandate to provide an impassioned defense. Because revealing client perjury could undo the entire work of representation, it would not be compatible with the rest of the attorney-client relationship for the law to require this. The entire criminal defense system has been set up to ensure that the accused must be convicted without the prosecution depending on evidence from the defendant. R RRequiring the accused's

attorney to reveal lies that the accused tells on the stand would breach the spirit behind attorney-client privilege. William B. Jones, who served as a judge in the United States District Court in the District of Columbia, wrote that it was not proper for an attorney to expose his client's perjury, even if he knows the client's testimony to be false (Freedman, 327).

Pizzimenti, as stated earlier, analyzes the issue from a completely different point of view. Instead of analyzing what it would take to break confidentiality, he looks at the various components of confidentiality to assess how many of them are actually necessary. He reduces the spectrum of choices down to four:

Lawyers do not say a word to their clients concerning confidentiality

Lawyers say that, in general, all information that comes from a client is kept in confidence

Lawyers intentionally give a misleading view of what attorney-client privilege does and does not protect

Lawyers could disclose all of the limits to the attorney-client privilege, and the full significance of the concept as it affects their relationship

Before we jump right on the bandwagon of the fourth choice, from the sheer virtue of its complete and total disclosure, it is worth looking at the ethical issues at hand. These include the general welfare of the client, the client right to self-determination, the lawyer's obligation to provide the best representation, the lawyer's duty to tell the truth, and trust in the attorney-client relationship. If we consider the first option (simply saying nothing),

then we are relying on the attorney's commitment to providing the best type of representation. Because there are some situations in which the attorney is bound (and at times required) to disclose confidential information to other parties, by simply saying nothing, the attorney is claiming that he knows best about the case, and that the client should simply spill all of his information and let the attorney sort through it all and manage it. This does impede the client's right to self-determination, because the client is making decisions about confidential information without the benefit of knowing everything that his attorney might do with that information. If the attorney actually does not commit to providing optimal representation, then the outcome could be disastrous for the client, if he reveals incriminating information, and the attorney believes that his own interests would be best served through giving the information away, or if the attorney mistakenly surrenders information that he was not required to, through sheer incompetence. In either way, following the first suggestion is awfully dependent on the ethics of a profession that has long been accused of lacking them.

If we consider the second option (making a general statement that all information is kept in confidence), then there is a possibility that the client will be misled – because all information is not kept in confidence, depending on the parameters involved. The client's right to self-determination is compromised, because he is led to believe a state of affairs that is not necessarily true. However, if we can rely on a lawyer's duty to provide the best representation, then one could also expect the lawyer to control the

flow of information coming from the client, and to attempt to forestall conversations that would lead to the attorney having to reveal some of the information that had been held confidential. This will make the client the most likely to trust the attorney, because the knowledge of attorney-client privilege is well grounded in popular culture, given the proliferation of television shows that are legal dramas. This also gives the client more information than simply saying nothing - which could actually produce better outcomes than total disclosure - but back to that in a moment.

The third option involves direct misleading, in the form of prevaricating about the actual scope of content that attorney-client privilege covers. Because this actually involves an active distortion of the truth, this is the least palatable of the four, particularly given the attorney's duty to give his client optimal representation. It is hard to see how being directly untruthful would constitute best practices.

This brings us to the fourth option, which is full disclosure. This could actually hamper the client's success of acquittal, because if the client knows what is and what is not covered by attorney-client privilege, he may be less likely to share information with the attorney that could come in handy at trial. For example, if a client is accused of murdering his brother, and that client had been running a crystal meth ring with his brother and his brother's girlfriend, and the client had been planning on running off with the meth, the money, and the girlfriend, and then the girlfriend had double-crossed all of them and shot her boyfriend, framing the client in the process while fleeing the country with the money, the client might not want to reveal that he had been part of

the meth ring, if it seems that his attorney would have to divulge that. As a result, he would have no credible motive to give to the police or the prosecution to make the suddenly absent girlfriend a suspect. This brings us back to the second choice as the best one that Pizzimenti puts out there.

It is certainly ironic that withholding information can provide better results than full disclosure. This brings us back, though, to the notion that the lawyer is the professional in the situation, charged with analyzing all elements of it dispassionately and then managing it to his client's best interests. This may mean that the attorney is the only one who should truly know everything.

Works Cited

Allhoff, F. J. Vaidya, A. (2008). Professions in Ethical Focus. Lawyers' Obligations and Virtues. Broadview Press, Toronto.

Freedman, Monroe H. (1990). Understanding Lawyers' Ethics. New York: Bender.