

Attorney-client



Running Head: ATTORNEY-CLIENT PRIVILEGE Attorney-Client Privilege: How Far is Too Far? YOUR Attorney-Client Privilege: How Far is Too Far?

This paper will create a hypothetical scenario between an attorney and her client where the attorney-client privilege would apply. Following that, an added fact to the same instance will demonstrate an occasion where not only does attorney-client privilege not apply, it would be a violation of the law for the attorney to not report to the authorities regarding the privileged information.

In this case, John Doe has retained Ms. Smith to represent him in defense of a murder charge where he is guilty. During the course of the client interview and conversations, Mr. Doe has advised his attorney that he did, in fact, kill the person for which he has been arrested. While Ms. Smith did not solicit this information during the discussion, she is now privy to the fact that her client is guilty. This revelation, however, does not require Ms. Smith to notify the authorities. As an officer of the court, she is precluded from putting a witness—in this case Mr. Doe—on the stand if she knows that the witness will commit perjury; but she is not mandated to turn her client in as a result of the attorney-client privilege. It should be noted that the right to have one's discussions with an attorney kept private is absolute in the United States. In fact, courts " have considered the attorney-client privilege to be among the most fundamental testimonial privileges in the legal system" (Kressel, 2006, p. 413). The reason for this is clear, and was recently set forth by Silbert & Joannou (2006) as necessary because it " protects confidential communications between an attorney and his client and exists to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and

administration of justice" (Silbert & Joannou, 2006, p. 1225). Thus, with just these facts, it is understood that Mr. Doe is safe from prosecution as a result of his attorney's knowledge; he won't be put on the stand to testify in his own defense, but he will not be revealed as the murderer by Ms. Smith either. His secret is safe with his attorney, who will mount an aggressive defense and force the prosecution to prove its case beyond a reasonable doubt.

Only one added fact could change this dynamic and actually reverse the situation. Assuming all facts as provided above, add the fact that during their conversations, Mr. Doe not only reveals that he is the killer, but is holding the child of the victim hostage in his basement. At this point, Ms. Smith has no alternative; she is a mandatory reporter and must, as an officer of the court, reveal to authorities that a second victim is being held against her will. If Ms. Smith fails to notify authorities, she is a co-conspirator in an active kidnapping. As Kedem (2005) points out, "...attorney misconduct gives rise to conspiracy liability in a variety of circumstances--for instance, attorney-client conspiracies to commit health care fraud or to obstruct justice" (p. 1824). In this case, Ms. Smith would be liable for obstruction of justice, lose her law license, and likely be put on trial and imprisoned herself. She cannot be aware of first-hand testimony regarding a crime during commission and fail to report it. The best she can do in this case is to notify authorities and attempt to mitigate her client's exposure, e. g., in return for disclosure of the location and safe return of the child, the prosecution will take the death penalty off the table, and the client will plead to murder and serve a life sentence.

It only takes one change in the facts of a case to alter the attorney's position

from a confidant to an informer. The difference here is that Ms. Smith may aggressively represent a murderer; she cannot, however, harbor a fugitive and conspire to obstruct justice.

References

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