Ensuring the confidentiality of client information is among the first ethical duties of every lawyer in every representation. The difficulty of protecting confidences has only increased as law offices and law practices have become inescapably interconnected through communications technology. Maintaining client confidences is no longer an easy matter of locking paper files in a file cabinet or refraining from speaking about client matters. Now, the ethics rules require attorneys to be competent in understanding and managing the way law office technology can threaten client confidences. The program will cover the scope of confidentiality, confidentiality’s relationship to the duty of competence and the attorney-client privilege, the ethical duty to instruct and supervise paralegals with regard to confidentiality, and when an attorney may – or is required to – break client confidences.

- Advanced ethical issues in maintaining confidentiality of client information
- Determining the scope of confidentiality – what isn’t confidential?
- Relationship of duty of confidentiality to the duty of competence
- Competence in ensuring law office and communications technology protects confidences
- Interaction of duty of confidentiality and attorney-client privilege
- Ethical duty to instruct non-attorney staff on confidentiality

**Speakers:**

Sue C. Friedberg is a partner in the Pittsburg office of Buchanan, Ingersoll & Rooney, PC. She is associate general counsel of the firm and responsible for guiding its attorneys in meeting the standards of ethical law practice. She supervises the firm's conflicts of interest review process and new business intake functions, and provides counsel for the firm as a business entity. Earlier in her career, she focused on corporate finance, securities law, and general business transactions. Ms. Friedberg earned her B.S., magna cum laude, from Georgetown University and her J.D., cum laude, from the University of Pittsburg School of law.
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Hot Topics in Protecting Client Confidentiality

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Confidentiality: Hot Topics

- Understanding the scope of confidentiality – what is/isn’t confidential?
- Law firm technology -- duty of confidentiality meets duty of competence
- Nonlawyer assistance
- Distinguishing confidentiality from attorney-client privilege
- Confidentiality and joint representation
- Inadvertent and unauthorized disclosure
- When is disclosure of client confidences permitted or required?
Rule 1.6 – Confidentiality*

- What is “confidential?”
- “(a) A lawyer shall not reveal information relating to the representation of a client unless . . . .”

* All Rule citations herein are to ABA Model Rules of Professional Conduct as amended August 2012
“The confidentiality rule . . . applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, *whatever its source.*”

“[L]awyer may not disclose such information except as authorized or as required by [these Rules] or other law.”
Rule 1.6 – Comment [4]

- “[P]rohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person”
- Hypos ok if “no reasonable likelihood” cat comes out of the bag as to client and situation involved
Former client

- Rule 1.6 cmt. [18]
  - “The duty of confidentiality continues after the client-lawyer relationship has terminated.”
Rule 1.9(c)

- Sets forth the prohibitions on use and disclosure of Rule 1.6 information as to former clients.
- Applies not just to a lawyer who formerly represented a client, but also a lawyer whose present or former firm formerly represented a client.
Rule 1.9(c)(1)

Cannot “use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known”
Confidentiality and Technology

Duty of Confidentiality
+ Duty of Competence
+ Technology

= Challenge of Protecting Data Security
Basic Standard for Protecting Information under Rule 1.6

Comments:

- Duty to “act competently to safeguard information…against inadvertent or unauthorized disclosure…. [Comment 18]
- Obligation to “take reasonable precautions to prevent the information from coming into the hands of unintended recipients” [Comment 19]
New Rule 1.6 subsection adopted August 2012:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
Reasonable efforts depend on:

- Sensitivity of the information
- Likelihood of disclosure without “additional safeguards”
- Cost of additional safeguards
- Difficulty of implementing safeguards,
- Possible adverse affect of safeguards on representation of clients
Other considerations:

- Client instructions (more or less security)
- Data privacy laws
- Reliance on third party service providers
- Data storage v. data transmission
Data Privacy Laws

Legal obligations to:

- Protect personally identifiable information (PII)
- Protect medical information under HIPAA
- Properly dispose of information
- Give notice of unauthorized access to personally identifiable information
Rule 1.1 Competence

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
Duty to Supervise

New 1.6 (c) “requires a lawyer to act competently to safeguard information...against inadvertent or unauthorized disclosure by...other persons or entities who are participating in the representation of the client or who are subject to the lawyer’s supervision.”
[Comment 18]
Data Security – Recycling

- 11/17 paralegal at Minnesota law firm donates paper from law firm recycling bin to local elementary school

- First grader uses paper to make drawing for mother

- Mother sees personal medical information and law firm logo on back of drawing

- Mother notifies school and media – media interviews woman whose information is on back of drawing
10/10/11 Baltimore law firm employee loses hard drive on train ride home from work

- Hard drive not encrypted and contained drive had detailed medical records of patients suing a doctor/client of firm
- Insurance company that retained firm required to file state law notice of breach
ABA Formal Opinions and state bar opinions have analyzed ethics of using wide range of emerging technologies:
- Third party computer maintenance and billing
- IT vendors
- Devices with storage media (printers, copiers, scanners, faxes, thumb drive, external drives etc.)
- Wireless transmission of confidential information
- Cloud storage (online data backup service)
Supervising Nonlawyers

“Lawyers with managerial authority within a law firm [shall] make reasonable efforts to establish internal policies and procedures designed to provide to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm…will act in a way compatible with the professional obligations of the lawyer.” [Rule 5.3 Comment [1]]
Supervision of Nonlawyers
Inside Firm:

- Firm managers accountable to high standard
- Employees and independent contractors
- Appropriate instruction and supervision as to ethical aspects
- Take into account no legal training and not subject to professional discipline
Supervision; Nonlawyers Outside Firm

- New comment [3] to 5.3 applies same high degree of accountability to firm managers
- Services provided in manner compatible with professional obligations of lawyer
- Reasonable efforts include terms of arrangements concerning the protection of client information
Data Security—Ethical Expectations

- Supervise in accordance with high Rule 5.3 standard
- Contractually obligate providers to protect client confidentiality
- Due diligence provider’s capabilities and procedures to protect confidentiality
- Stay current with changes in technology and threats to confidentiality or engage knowledgeable consultants
- Maintain device inventory and life cycle protections
- Document disposal procedures and third party compliance
Confidentiality v. privilege

Rule 1.6 info
You represent two partners jointly in contract negotiations with a third party. One of the partners, Archie, reveals to you information potentially damaging to the clients and known only to him. Are you permitted to share this information with the other partner/client, Barb?
Joint Representation

- All information related to the matter must be shared with all co-clients. Rule 1.7 Comment [31]
- “…the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.”
- Absent informed consent, lawyer will have to withdraw if one client wants to keep from the other information material to the representation
- Confidential information disclosed cannot be "recalled" if a conflict arises
Inadvertent disclosures

Two sides to the risk facing attorneys:

- Taking appropriate precautions to prevent inadvertent sending
- What to do if you’re the recipient?
Purloined/Stolen Documents

The risk is almost exclusively about what to do if you’re the recipient.

- Can you retain and use?
- Do you have to return documents unread and, if so, to whom?
- Is there another choice?
Rule 4.4(b)

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
New Definition of Inadvertent:

“A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.” [Rule 4.4 Comment 2]
Avoiding Inadvertence

- Metadata and metadata scrubbing software
- Encryption
- Password protections
- Other precautionary practices of note
  - Labeling “CONFIDENTIAL”
  - Use multiple levels of document review
  - Be proficient with the technology you use
A Brief History of Modern Guidance on These Ethical Issues

- ABA Formal Op. 92-368
- ABA Formal Op. 94-382
- ABA Formal Op. 05-437
- ABA Formal Op. 06-440
- ABA Formal Op. 11-459
- ABA Formal Op. 11-460
- ABA Model Rule 4.4(b) (2012)
Two cases dealing with unauthorized disclosures

Protecting Privilege: FRE 502(b)

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following FRCP 26(b)(5)(B)
FRCP 26(b)(5)(B)

- If privileged or work product is produced inadvertently, producing party must promptly notify recipient.
- Recipient must promptly return, sequester, or destroy it and any copies and must act reasonably to retrieve if already disclosed.
- Recipient must not use or disclose until resolution of claim and can promptly present to court under seal for determination.
FRE 502(c)

When made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if:

(1) would not be a waiver under FRE 502 if had been made in Federal proceeding; or

(2) is not a waiver under the law of the State where disclosure occurred
“And, notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.”
Rule 1.6(a) – Authorized Disclosures

- Client consents after consultation
- Disclosure impliedly authorized by client *in order to carry out the representation*
Rule 1.6(b) – Permitted Disclosures

- Rule 1.6(b) sets forth a number of disclosures in a “may reveal” category.
- In determining if you are in a “may reveal” situation, there is a two-part test:
  - You have to reasonably believe disclosure is necessary
  - Necessary to do 1 of 5 things
Rule 1.6(b)(1)-(6)

- (1) prevent reasonably certain death or substantial bodily harm
- (2) prevent the client from committing a crime or fraud resulting in substantial financial or property harm when lawyer’s services used in furtherance of crime or fraud
(3) prevent/mitigate/rectify reasonably certain substantial financial or property harm from client’s crime or fraud involving use of your services

(4) to secure legal advice about your own compliance with the Rules
Rule 1.6(b)(1)-(6) (cont.)

- (5) “to establish a claim or defense in a controversy between lawyer and client, or a civil claim against lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client”
- (6) comply with court order/other law
Rule 1.6(b)(1) cmt. [6]

- Recognizes the overriding value of life and physical integrity
- In play if harm to be suffered imminently or present and substantial threat to occur in future if lawyer does not act
“The client can, of course, prevent such disclosure by refraining from the wrongful conduct.”

Important references to Rule 1.16 and Rule 1.13

[8] When lawyer does not learn of the crime or fraud until it has been consummated.
Could otherwise be argued to have been impliedly authorized . . .

Does not explicitly address whether you can disclose if client instructs you not to, but answer has to be that you can
Rule 1.6(b)(5) cmt. [10]-[11]

- The realm of self-defense and claims against clients is what this exception is all about.

- 3rd parties – “Where practicable and not prejudicial to the lawyer’s ability to establish the defense, the lawyer should advise the client of the third party’s assertion and request that the client respond appropriately.”
Rule 1.6(b)(6) cmt. [12]-[13]

- [12] When other law supersedes 1.6 is beyond the scope of the rules.
- [13] Addresses what is required of a lawyer when tribunal orders disclosure
Rule 1.6 cmt. [14] (cont.)

Contains vital points, often overlooked:

- Disclosure no greater than reasonably believed necessary to vindicate
- Made in a manner that limits access to the tribunal or others with need to know
- Seek appropriate protective orders or other arrangements “to the fullest extent practicable”
PROFESSIONAL EDUCATION BROADCAST NETWORK

Compendium of Cases Citations for:
ETHICS AND CLIENT CONFIDENCES: AN ADVANCED GUIDE

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Attorney-Client Privilege/Work Product


Privilege and Work Product in Derivative Actions. Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), is the leading case on the ability, in some cases, of plaintiffs in derivative actions to obtain the files of lawyers representing the entity relating to the conduct leading to the claim. In In re International Systems & Controls Corporation Securities Lit., 693 F.2d 1235 (5th Cir. 1982), the Fifth Circuit held that Garner applied to privilege but not to work product. In Sigma Delta, LLC v. George, 2007 U.S. Dist. LEXIS 94213 (E.D. La. Dec. 20, 2007), the court discussed both cases in context of attempt to discovery a lawyer's file, which was prepared during and for litigation.


Exhaustive (90+ pages) study of privilege, co-client rule, common interest rule, corporate families, and related concepts. In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007).


Federal Circuit in infringement case explains extent of waiver when opinion of counsel relied upon. In re EchoStar Communications Corp., 448 F.3d 1294 (Fed. Cir. 2006).


When does presence of insurance broker at lawyer-client conversation waive the privilege? Sony Computer Entertainment Am., Inc. v. Great Am. Ins. Co., 229 F.R.D. 632 (N.D. Cal. 2005). When they cannot show that he needed to be there to assist in the defense.


Communications with auditors protected by work product. Vacco v. Harrah’s Operating Co.,

When do lawyers in corporate internal investigation represent interviewed employees? In re Grand Jury Subpoena, 415 F.3d 333 (4th Cir. 2005).


. . . but, designating a person as a testifying expert does not finally waive the privilege until the person is actually produced to testify or the employing party produces communications. Shooker v. Superior Court, 4 Cal. Rptr. 3d 334 (Cal. App. 2003).

Employees using company E-mail to communicate with their personal lawyers may have waived privilege. In re Asia Global Crossing Ltd., 322 B.R. 247 (S.D.N.Y. 2005), and Scott v. Beth Israel Med. Ctr. Inc., 847 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007). But, in Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. App. Div. 2010), the court said the privilege applied where the employee used her personal E-mail account.

Privilege waived when tax accountant shares privileged memorandum to law firm defending accountant with law firm for their mutual client: finding of no "common interest" agreement. Denny v. Jenkens & Gilchrist, S.D.N.Y., No. 03 Civ. 5460 (SAS), 11/23/04.


Sharing E-mail to lawyer with adult daughter does not waive work product protection. United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).


"Selective waiver." Tenth Circuit adopts majority rule rejecting "selective waiver." *In re Qwest Communications Int’l., Inc.*, 450 F.3d 1179 (10th Cir. 2006). Excellent discussion of history and authorities.


Lawyer for one party ("Lawyer") received in the mail a CD containing confidential documents, including one privileged document, from an unidentified third party. Soon thereafter Lawyer filed discovery responses clearly revealing receipt of the CD. The other party moved to disqualify Lawyer for having seen the documents. The trial court denied the motion, and in this opinion the Nevada Supreme Court affirmed. The court held that, while Nevada Rule 4.4(b) relates only to documents "inadvertently" disclosed, and that the rule does not apply to this matter, a lawyer's only duty in this circumstance is to do what Lawyer did -- reveal receipt to the other side. The court's analysis was very similar to that of the ABA Ethics Committee in Op. 11-460 (Aug. 2011). This was also the approach of N.Y. City Op. 2012-1 (2012).

O'Shea v. Epson Amer., Inc., 2010 U.S. Dist. LEXIS 62809 (June 4, 2010). Law Firm 1 and Law Firm 2 represented Employee in a wrongful termination matter. Employee claims he was terminated because he had expressed concern about the quality of Employer's printers. Later Firm 1 and Law Firm 2 filed a consumer class action against Employer relating to the quality of
Employer's printers (this case). There was overlap between Employee's claims and the class action claims. Employer moved to disqualify Law Firm 1 and Law Firm 2 in this case because of their interaction with Employee in the wrongful termination matter. In this opinion the court denied the motion because Employer could not show that Employee was in possession of "privileged or confidential information likely to give Plaintiffs an unfair advantage in this case."

Lawyer receiving other side's privileged documents by mistake not disqualified because his client had been privy to the information already. Applied Digital Solutions, Inc. v. Vasa, 941 So. 2d 404 (Fla. App. 2006). A similar holding relying upon Applied Digital Solutions is Manning v. Cooper, 2008 Fla. App. LEXIS 7218 (Fla. App. May 21, 2008).


Client Has the Good Stuff. N.Y. Op. 945 (Nov. 7, 2012). Lawyer represents H in a divorce proceeding. H tells lawyer that H has access to W's E-mails, including W's communications with W's lawyer. H has not given Lawyer the E-mails nor has H told Lawyer what was in the E-mails. In this opinion the committee opines that, absent extraordinary circumstances, Lawyer is not required to tell W's lawyer about the E-mails. The opinion discusses in some detail the applicability of Rules 1.6, 3.3, 4.4(b), and 8.4(d).

ABA Formal Op. 11-460 (Aug. 4, 2011). This opinion assumes that an employer searches its computer system and captures communications between an employee and the employee's personal lawyer. The employer gives the communications to its outside law firm. The opinion asks whether the outside law firm must notify the employee's lawyer of these events. The opinion declines to apply MR 4.4(b) to this situation because the communications were not "inadvertent," a term used in the rule. The opinion warns, however, that "other law" may compel some form of notification. The cases and opinions on this "other law" are inconsistent. One approach the opinion suggests is to ask the court for directions before reading the communications.

Class members providing former employer's privileged documents to class counsel results in disqualification of class counsel and severance of class members. Hall v. County of Los Angeles, 2005 Cal. App. Unpub. LEXIS 1139 (Feb. 9, 2005).

Divorce action. Wife steals husbands documents, some privileged, and gives them to her lawyer. What is the lawyer to do? Fla. Op. 07-01 (June 2007).

NY City Op. 2003-04 is an excellent review of authorities that follow or deviate from ABA Op. 92-368.


Speaking loudly to lawyer in presence of others does not preserve the privilege. People v. Urbano, 26 Cal. Rptr. 3d 871 (Cal. App. 2005).


Work Product. Trying to depose the other side's lawyer. Must be showing of undue hardship to get non-core work product. In re Baptist Hospitals of Southeast Texas, 172 S.W.3d 136 (Tex. App. 2005).

Attorney-client privilege involving joint defense agreement among corporation and officers. If corporation waives, privilege as to individuals also waived, unless communications not related to corporate affairs. In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001).


The privilege in Illinois: district court resolves two issues: (1) inserting issue as waiver, and (2) member of "control group" and corporate privilege. Dexia Credit Local v. Rogan, 2004 U.S. Dist. LEXIS 25635 (N.D. Ill. Dec. 20, 2004). But, in Lama v. Preskill, 818 N.E.2d 443 (Ill. App. 2004), in a 2-1 decision the court held that a plaintiff relying on the “discovery rule” to defeat a statute of limitations claim waives her attorney-client privilege for communications with her lawyer.


Privilege waived as to one set of lawyers by suing another set of lawyers. Ward v. Graydon, Head & Ritchey, 770 N.E.2d 613 (Ohio App. 2001).

Premature release by court of defendant’s sealed documents to plaintiff’s lawyer gets plaintiff’s lawyer disqualified. Then, the Texas Supreme Court reverses, In re Nitla S.A. de C.V., 92 S.W.3d 419 (Tex. 2002). The exact same thing happened in the following case, and the court followed Nitla, Coral Reef of Key Biscayne Developers, Inc. v. Lloyd’s Underwriters at London, 911 So. 2d 155 (Fla. App. 2005).


Accountants’ communications under Kovel, and the "common-interest" doctrine. Cavallaro v. United States, 284 F.3d 236 (1st Cir. April 1, 2002).


Commissioner of Rev. v. Comcast Corp., 2009 Mass. LEXIS 31 (Mass. March 3, 2009). Court held that communications between an in-house corporate counsel and outside tax accountants consulted by him regarding the structuring of a sale of stock mandated by an antitrust consent judgment are not protected by the privilege, but are protected by work product immunity.

Court cannot order limited exposure of privileged documents to the other side. In re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2001).

Trustee/Bank tried to conceal conflict; crime-fraud issues; bank subordinated trust's rights to its rights on loan made by the trustee's banking side. First Union National Bank v. Turney, 824 So. 2d 172 (Fla. App. 2001).

Wide-ranging opinion on privilege by Wisconsin Supreme Court. Lane v. Sharp Packaging Systems, Inc., 640 N.W.2d 788 (Wis. 2002).


Communications that are "extra-judicial" are limited. XYZ Corp. v. United States, 348 F.3d 16 (1st Cir. 2003).


Former director granted access to corporation's privileged documents. Inter-Fluve v. District Court, 112 P.3d 258 (Mont. 2005).

Privilege of outside directors' communications with their personal lawyers cannot be waived by bankruptcy trustee for company. Ex parte Smith, 942 So. 2d 356 (Ala. 2006).

Law firm opposes production of documents, not on privilege grounds, but on "no jurisdiction" grounds. Ratliff v. Davis Polk & Wardwell, 354 F.3d 165 (2d Cir. 2003).


Privilege in fiduciary context. Wachtel v. Health Net, Inc., 482 F.3d 225 (3d Cir. 2007). This opinion involves the attorney-client privilege in the context of representation of fiduciaries. The ruling was narrow. The court held that insurance companies that sell policies to ERISA plans are not subject to the “fiduciary exception” to the attorney-client privilege.

Establishing crime-fraud in the Ninth Circuit. In re Napster, Inc. Copyright Lit., 479 F.3d 1078 (9th Cir. 2007).


Good discussion on the differences between the privilege and duty of confidentiality under ethics rules. Adams v. Franklin, 924 A.2d 993 (D.C. App. 2007).


Seventh Circuit addresses: (1) the common interest doctrine; (2) crime-fraud findings; and (3) exception to the tax practitioner privilege. United States v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007).

Lawyer may maintain opinion work product protection where lawyer did not know of client’s crime/fraud activities. In re Green Grand Jury Proceedings, 492 F.3d 976 (8th Cir. 2007).


Insured's examination under oath to casualty insurer not discoverable. Reynolds v. State, 963 So. 2d 908 (Fla. App. 2007).


Analysis of privilege in corporate context, where lawyers and non-lawyers share communications, are copied, etc. In re Vioxx Prods. Liab. Lit., 501 F.Supp.2d 789 (E.D. La. 2007) (August 14, 2007).


Sending E-mail with a single privileged document, as opposed to discovery of many documents, not inadvertent; privilege/work product waived. Great American Assur. Co. v. Liberty Surplus
Criminal case; court scoffed at “privileged” or “work product” designations on documents.  

Trademark infringement case. The plaintiff submitted a privilege log containing communications with its general counsel. The defendant moved for production of those communications because the general counsel was only an inactive member of the California Bar. The magistrate judge held that because the general counsel was not an active member of any bar, and because the plaintiff’s failure to ascertain that fact was not reasonable, the privilege did not apply. In this opinion the district judge reversed, holding that Gucci did not have a duty to ascertain the lawyer’s admission status in order to maintain the privilege.

Law Firm was engaged by an accounting firm partnership (“BDO”) to evaluate its criminal exposure arising out of its marketing fraudulent tax shelters. For a brief period Law Firm represented individual partners in connection with their compensation. In this criminal prosecution against several of those partners arising out of the fraudulent tax shelters, those partners sought an order preventing the government from using communications between BDO and Law Firm. BDO had waived the attorney-client privilege. In this opinion the court ruled that the government could use the communications between BDO and Law Firm relating to the criminal evaluation, but could not use communications relating to the compensation arrangement. In connection with the first holding the court held that the partnership was distinguishable from the partners as to the privilege waiver.

Corporation under no duty to ascertain whether in-house lawyer general counsel is properly admitted or credentialed in order to preserve privilege.

Scout Corp. No. 1 merged with Scout Corp. No. 2, with the latter being the surviving entity. No. 2 brought a replevin action against No. 1’s former lawyer (“Lawyer”) to recover her files pertaining to No. 1. Lawyer resisted, claiming attorney-client privilege. The trial court ruled for No. 2, and in this opinion, the supreme court affirmed. The court held that No. 2, the surviving entity, owns the privilege previously owned by No. 1, citing *CFTC v. Weintraub*, 471 U.S. 343 (1985), and *Tekni-Plex, Inc. v. Meyer and Landis*, 674 N.E.2d 663 (N.Y. 1996).
Genovese v. Provident Life & Accident Ins. Co., 2011 Fla. LEXIS 621 (Fla. March 17, 2011). The court held:

when an insured party brings a bad faith claim against its insurer, the insured may not discover those privileged communications that occurred between the insurer and its counsel during the underlying action.

Gen-Probe Inc. v. Becton, Dickinson & Co., 2012 U.S. Dist. LEXIS 49028 (S.D. Cal. April 6, 2012). Co. A (plaintiff in this case) hired Co. B to develop a product. Co. B hired C, an independent contractor, to help develop the product. The resulting contracts provided, in effect, that all rights to the product would be assigned to Co. A. In this case the defendant sought to discover all communications between Co. A's outside counsel and C. In this opinion the magistrate judge held that the communications were privileged.

Confidentiality - Duty under Ethics Rules


Ore. Op. 2011-184 (March 2011). ABA Op. 98-411 (1998) had discussed a lawyer's duty of confidentiality when seeking advice about a client matter from a lawyer from another firm. The upshot was that the inquiring lawyer had to use a hypothetical and not reveal the client's identity without the client's consent. In this opinion the Oregon Bar Board of Governors reaffirmed the ABA position, adding that the same principles apply with the use of new technologies such as listservs.
Violation of Rule 1.6(a) where lawyer reveals information that is publicly available. Iowa Sup. Ct. Att'y Disc. Bd. v. Marzen, 2010 Iowa Sup. LEXIS 23 (Ia. March 19, 2010).


ABA Formal Op. 11-459 (Aug. 4, 2011). This opinion discusses the duties of a lawyer communicating with a client where the lawyer has reason to believe that the client is using a system that might be susceptible to interception by a third party. Basically, the lawyer should warn the client of the consequences of this interception. The opinion discusses in some detail those cases and opinions that deal with the client's use of her employer's system to communicate with her personal lawyer. It is a good research tool on that point.

Pa. Op. 2011-200 (undated). This is an excellent discussion of cloud technology and the use of that technology by lawyers. It analyzes the applicable ethics rules and concludes that lawyers may use cloud technology if they are careful to protect client information.

Restriction of Practice. N.Y. Op. 858 (March 17, 2011). The committee held that a company could require in-house lawyers to sign confidentiality agreements without causing a violation of N.Y. Rule 5.6(a)(1), provided that the agreement does not go beyond the lawyers' confidentiality obligations under Rules 1.6 and 1.9.


California. No right of self-defense disclosures of client information in action by third parties.


Lawyer discovers that court submission was false and must withdraw it. N.Y. Op. 781 (Dec. 8, 2004).

Unremarkable opinion on reasonableness in using technology to communicate. Cal. Op. 2010-179 (undated)


Unencrypted E-mail OK. Audrey Jordan, *Note, Does Unencrypted E-mail Protect Client Confidentiality?*, 27 Am. J. Trial Advoc. 623 (Spring 2004).


Confidentiality duties of former in-house lawyers in suing former employer. *Spratley v. State Farm Mut. Automobile Ins. Co.*, 78 P.3d 603 (Utah 2003). The plaintiffs are former State Farm in-house lawyers. The have sued State Farm for a number of torts relating to their alleged force resignations. They took confidential documents with them when they left. They attached some of these documents to their complaint. The trial court ordered the plaintiffs to return all confidential
documents and to refrain from disclosing any client confidences while prosecuting their claims. The trial court also disqualified the plaintiffs’ law firm because it had been privy to the confidential information. The Utah Supreme Court reversed. It ruled that the self-defense exception to Rule 1.6 applied. It ruled that the trial court could protect State Farm with procedures such as filing evidence under seal. It ruled that while the plaintiffs had to return any original documents they had taken, they had a right to keep copies. Lastly, the court reversed the order disqualifying plaintiffs’ law firm, saying that the practical effect of the trial court’s ruling was to deny the plaintiffs the ability to hire counsel. A very similar case involving a former general counsel that relies heavily on Spratley is Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607 (Fla. App. 2004).


Good discussion on the differences between the privilege and duty of confidentiality under ethics rules. Adams v. Franklin, 924 A.2d 993 (D.C. App. 2007).


Parties changing employers taints case, causing dismissal. Alpha Funding Grp., Inc. v. Continental Funding, LLC, 2008 N.Y. Misc. LEXIS 4767 (N.Y. S. Ct. Aug. 15, 2008). Alpha and Continental were competitors in the mortgage brokerage business. A group of employees left Alpha and joined Continental. Alpha sued the employees and Continental for theft of trade secrets and a host of other torts. Law Firm represented Continental and the employees. After the case was a year or so old, the ringleader of the defendant employees and several other defendants re-joined Alpha. For that reason Continental moved to have the case dismissed. In this opinion the court granted the motion, saying that the restored employees, including the ringleader, would have much privileged and confidential information irretrievably tainting the case against the remaining defendants.

Lawyer’s obligation when she learns that she has prepared a brief based upon client's misrepresentations. D.C. Op. 350 (Oct. 2009).

North Carolina State Bar v. Sossomon, 2010 N.C. App. LEXIS 1768 (N.C. App. Sept. 7, 2010). A lawyer was suspended for one year in part because he violated North Carolina’s version of MRs 1.6(a) & 1.8(b).
Fla. Op. 10-3 (Feb. 1, 2011). Lawyer represented Client until Client's death. Lawyer does not represent the personal representative of the estate. The personal representative requests information about Client from Lawyer. In this opinion the committee held, in effect, that Lawyer's duty of confidentiality survived Client's death, and that Lawyer can only make disclosures that would be consistent with the deceased Client's wishes.

*In re Botimer*, 214 P.3d 133 (Wash. 2009). Lawyer was suspended in part because he had revealed to the IRS his former client's erroneous tax returns. That disclosure did not fit within the exceptions to Washington's version of Rule 1.6. Further, federal tax law only required the tax preparer to call the errors to the client's attention, not to the IRS's attention.

*How an Unsolicited E-mail from a non-Client Might Cause an Attorney-Client Relationship and Duty of Confidentiality and How to Avoid that Result*. Wis. Op. EF-11-03 (July 29, 2011).

*Svorinic v. Svorinic*, 2012 BCSC 826 (CanLII) (S. Ct. B.C. June 4, 2012). Lawyer represents H in this family law case. Lawyer had previously represented W's prior husband in another court proceeding. W moved to disqualify Lawyer in this case. In this opinion the court granted the motion. The court ruled that, although Lawyer never represented W, Lawyer became privy to W's confidential information in the earlier case, and there was a risk Lawyer would use that information in this case.

*Williams v. Crown Liquors of Broward, Inc.*, 2012 U.S. Dist. LEXIS 86938 (S.D. Fla. June 5, 2012). Defendant had provided confidential information to the lawyer for Plaintiff pursuant to a non-disclosure agreement ("NDA") signed by Plaintiff's lawyer and Plaintiff's accountant. Because Plaintiff indicated that the accountant would testify, Defendant moved to disqualify Plaintiff's lawyer. In this brief opinion the court denied the motion. The court distinguished this case from those in which disclosure of confidential information to the other party had been inadvertent.