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Problems of Law and Ethics

Tenth Edition

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PEREZ v. KIRK & CARRIGAN
822 S.W.2d 261 (Tex. Ct. App. 1991)

DORSEY, JUSTICE.

Ruben Perez appeals a summary judgment rendered against him on his causes of action against the law firm of Kirk & Carrigan, and against Dana Kirk and Steve Carrigan individually (henceforth all three will be collectively referred to as "Kirk & Carrigan"). We reverse the summary judgment and remand this case for trial.

The present suit arises from a school bus accident on September 21, 1989, in Alton, Texas. Ruben Perez was employed by Valley Coca-Cola Bottling Company as a truck driver. On the morning of the accident, Perez attempted to stop his truck at a stop sign along his route, but the truck's brakes failed to stop the truck, which collided with the school bus. The loaded bus was knocked into a pond and 21 children died. Perez suffered injuries from the collision and was taken to a local hospital to be treated.

The day after the accident, Kirk & Carrigan, lawyers who had been hired to represent Valley Coca-Cola Bottling Company, visited Perez in the hospital for the purpose of taking his statement. Perez claims that the lawyers told him they were his lawyers too and that anything he told them would be kept confidential. With this understanding, Perez gave them a sworn statement concerning the accident. However, after taking Perez' statement, Kirk & Carrigan had no further contact with him. Instead, Kirk & Carrigan made arrangements for criminal defense attorney Joseph Connors to represent Perez. Connors was paid by National Union Fire Insurance Company which covered both Valley Coca-Cola and Perez for liability in connection with the accident.

Some time after Connors began representing Perez, Kirk & Carrigan, without telling either Perez or Connors, turned Perez' statement over to the Hildalgo County District Attorney's Office. Kirk & Carrigan contend that Perez' statement was provided in a good faith attempt to fully comply with a request of the district attorney's office and under threat of subpoena if they did not voluntarily comply. Partly on the basis of this statement, the district attorney was able to obtain a grand jury indictment of Perez for involuntary manslaughter for his actions in connection with the accident. . . .

By his sole point of error, Perez complains simply that the trial court erred in granting Kirk & Carrigan's motion for summary judgment. . . .

With regard to Perez' cause of action for breach of the fiduciary duty of good faith and fair dealing, Kirk & Carrigan contend that no attorney-client relationship existed and no fiduciary duty arose, because Perez never sought legal advice from them.

An agreement to form an attorney-client relationship may be implied from the conduct of the parties. Moreover, the relationship does not depend

upon the payment of a fee, but may exist as a result of rendering services gratuitously.[4]

In the present case, viewing the summary judgment evidence in the light most favorable to Perez, Kirk & Carrigan told him that, in addition to representing Valley Coca-Cola, they were also Perez' lawyers and that they were going to help him. Perez did not challenge this assertion, and he cooperated with the lawyers in giving his statement to them, even though he did not offer, nor was he asked, to pay the lawyers' fees. We hold that this was sufficient to imply the creation of an attorney-client relationship at the time Perez gave his statement to Kirk & Carrigan.

The existence of this relationship encouraged Perez to trust Kirk & Carrigan and gave rise to a corresponding duty on the part of the attorneys not to violate this position of trust. Accordingly, the relation between attorney and client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny as a transaction between trustee and beneficiary. Specifically, the relationship between attorney and client has been described as one of uberrima fides, which means, "most abundant good faith," requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception. In addition, because of the openness and candor within this relationship, certain communications between attorney and client are privileged from disclosure in either civil or criminal proceedings under the provisions of Tex. R. Civ. Evid. 503 and Tex. R. Crim. Evid. 503, respectively.[5]

There is evidence that Kirk & Carrigan represented to Perez that his statement would be kept confidential. Later, however, without telling either Perez or his subsequently-retained criminal defense attorney, Kirk & Carrigan voluntarily disclosed Perez' statement to the district attorney. Perez asserts in the present suit that this course of conduct amounted, among other things, to a breach of fiduciary duty.

Kirk & Carrigan seek to avoid this claim of breach, on the ground that the attorney-client privilege did not apply to the present statement, because unnecessary third parties were present at the time it was given. However, whether or not the Rule 503 attorney-client privilege extended to Perez' statement, Kirk & Carrigan initially obtained the statement from Perez on

4. An attorney's fiduciary responsibilities may arise even during preliminary consultations regarding the attorney's possible retention if the attorney enters into discussion of the client's legal problems with a view toward undertaking representation.

5. Disclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally prohibited by the disciplinary rules governing attorneys' conduct in Texas. [The court cited the Texas equivalent to Rule 1.6.] In addition, the general rule is that confidential information received during the course of any fiduciary relationship may not be used or disclosed to the detriment of the one from whom the information is obtained.

the understanding that it would be kept confidential. Thus, regardless of whether from an evidentiary standpoint the privilege attached, Kirk & Carrigan breached their fiduciary duty to Perez either by wrongfully disclosing a privileged statement or by wrongfully representing that an unprivileged statement would be kept confidential. Either characterization shows a clear lack of honesty toward, and a deception of, Perez by his own attorneys regarding the degree of confidentiality with which they intended to treat the statement. . . .

In addition, however, even assuming a breach of fiduciary duty, Kirk & Carrigan also contend that summary judgment may be sustained on the ground that Perez could show no damages resulting from the breach. Kirk & Carrigan contend that their dissemination of Perez' statement could not have caused him any damages in the way of emotional distress, because the statement merely revealed Perez' own version of what happened. We do not agree. Mental anguish consists of the emotional response of the plaintiff caused by the tortfeasor's conduct. It includes, among other things, the mental sensation of pain resulting from public humiliation.

Regardless of the fact that Perez himself made the present statement, he did not necessarily intend it to be a public response as Kirk & Carrigan contend, but only a private and confidential discussion with his attorneys. Perez alleged that the publicity caused by his indictment, resulting from the revelation of the statement to the district attorney in breach of that confidentiality, caused him to suffer emotional distress and mental anguish. We hold that Perez has made a valid claim for such damages.

Perez inspired a fine novel, *The Sweet Hereafter*, by Russell Banks. An equally fine movie followed. In both the book and movie, a lawyer is the main character. And unlike many lawyer novels, the portrayals ring true.

Perez was tried on 21 counts of involuntary manslaughter. The jury acquitted him on all counts after less than four hours of deliberation. Coca-Cola paid the survivors and the families of the victims $133 million to settle. The bus company, whose bus had windows difficult to open and only one emergency exit, settled for $23 million. Dallas Morning News, May 6, 1993, at 1A.

It didn't matter that Kirk & Carrigan had only a preliminary meeting with Perez. The attorney-client privilege and the duty of confidentiality protect information gained from a potential client even if no retention ensues. The privilege "applies to all confidential communications made to an attorney during preliminary discussions of the prospective professional employment, as well as those made during the course of any professional relationship resulting from such discussions." Hooser v. Superior Court, 101 Cal. Rptr.

2d 341 (Ct. App. 2000); Restatement §15; Model Rule 1.18. Why are the Rules so generous? Why protect *potential* clients at all?

Here are five questions *Perez* raises:

- How can the court characterize Perez's communications with Kirk & Carrigan as "confidential" if the presence of a third person destroyed the privilege?
- What was the legal basis for Perez's claim?
- What are his damages?
- What about the interests of the firm's other client, Coca-Cola, which apparently wished to cooperate with the D.A. by disclosing what Perez told the lawyers?
- Would Perez have had a claim if Kirk & Carrigan had said only that "the company hired us to represent it because of the accident"?

Cases making claims against lawyers for improper release of a client's confidential information are rare, but the doctrinal basis for them is clear. Bye, a lawyer, had represented Thiery in a personal injury action. Before the matter ended, Bye asked Thiery if his nurse-investigator could use Thiery's medical records to teach a class at a community college. Bye said Thiery would be paid $500 and that all identifying information would be removed. Thiery agreed. Thiery then claimed that Bye had failed to remove some identifying information and sued for malpractice. Citing Rule 1.6, the agreement, and agency rules, the court reversed summary judgment for Bye. Bye had an obligation to maintain Thiery's confidential information during and after the relationship. Nor did Thiery need an expert witness to prove her case. "A layperson would have little difficulty understanding the duty Bye accepted in his letter to Thiery or determining whether Bye's failure to assure the redaction was completed was a breach of his obligation to his client. We have concluded as a matter of law that Bye owed a duty to maintain the confidentiality of Thiery's records." Thiery v. Bye, 597 N.W.2d 449 (Wis. Ct. App. 1999).

The most notorious recent instance of an unauthorized disclosure of a confidence — maybe the most notorious one ever — was the outing of Harry Potter author J.K. Rowling as the author of *The Cuckoo's Calling*, written under the pseudonym Robert Galbraith. Chris Gossage, a partner at Russells, Rowling's law firm, disclosed her identity to a friend. The friend then revealed the pseudonym to a journalist using Twitter and the story appeared in the Sunday Times. Russells then informed Rowling's agent that its own lawyer had been the source of the revelation. Rowling sued and the firm made a "substantial" charitable donation to settle. The Independent, July 31, 2013. Following disclosure, the book went from nowhere to bestseller. Gossage was fined £1,000.

Privileged Information and Ethically Protected Information: What's the Difference?

These two legal categories (privileged communications and ethically protected, or confidential, information) are quite distinct but they are often confused because each has protection of information (and sometimes the same information) as its goal. The two doctrines have different legal pedigrees and create different rights and duties. So it's important to understand the differences,

Confidential Information. A lawyer's confidentiality duties derive from agency and fiduciary duty law as well as the professional conduct rules. Rule 1.6 defines a category of information (described as "information relating to the representation of a client") that a lawyer may not voluntarily *reveal* unless there is an exception (as in, e.g., Rules 1.6(b), 1.13(c), and 3.3(c), all of which we will study) or the client has given consent, which may be implied. Nor may the lawyer *use* such information about a current client to his "disadvantage" (Rule 1.8(b)); *reveal* such information about a former client (Rule 1.9(c)(2)); or *use* such information about a former client to the client's "disadvantage" unless the information is "generally known" (Rule 1.9(c)(1)). Information is confidential whoever may be the source. For example, a conversation with an eyewitness to an accident is confidential but not privileged because the client was not the source.

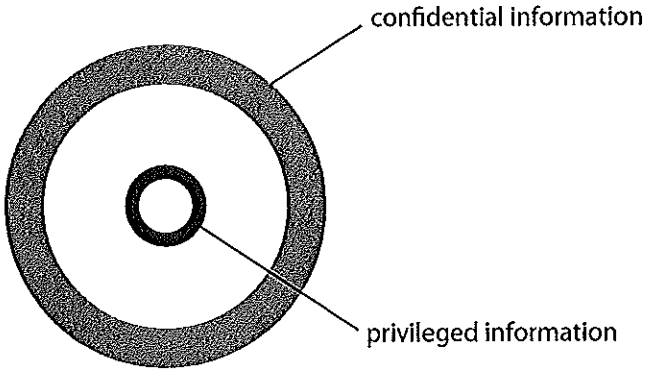
The Attorney-Client Privilege. The law of evidence is the basis for the attorney-client privilege. The privilege protects communications between a lawyer (or his agent) and a client (or agents of a client). The definition of the privilege may appear in case law or statute. Unenacted Federal Rule of Evidence 503 is a fair statement of the privilege and influential even though Congress chose not to adopt specific privilege rules. Many states use substantially similar language. The rule (which also uses the word "confidential") provides in part:

> A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. . . .
>
> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest,* or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

* This situation is discussed in chapter 5B3.

The privilege allows both lawyer and client "to refuse to disclose" a communication between them despite a subpoena. The refusal could otherwise lead to contempt of court. A subpoena can reach information that is confidential under Rule 1.6 but not privileged. In re Original Grand Jury Investigation, 733 N.E.2d 1135 (Ohio 2000) (incriminating letter discovered by lawyer's investigator subject to grand jury subpoena because it is not privileged under Ohio rules). But if the same lawyer had *voluntarily* revealed the letter (i.e., without the command of a subpoena), he might be guilty of a disciplinary violation and (as in *Perez*) subject to civil liability for breach of fiduciary duty or malpractice.

Much information that is confidential under ethics rules will not be privileged because *the source* of the information is not the client or its agents. (The information may be protected as work-product, however.) On the other hand, all privileged communications will also be confidential. Think of the two categories as concentric circles. One category is nested in the other. The inner (smaller) circle contains privileged information only. The outer circle comprises all information within the inner circle plus all other information "relating to the representation of a client" — that is, from any source.



In addition to civil liability, as in *Perez*, the use or disclosure of confidential information can lead to professional discipline. After her client replaced her with other counsel, Donna Tonderum revealed confidential information to the prosecutor in order to ensure a conviction. (I'm not making this up.) She was suspended for at least three years. In re Tonderum, 840 N.W.2d 487 (Neb. 2013). Disclosing a client's confidences on a consumer website in response to the client's negative evaluation of the lawyer merits discipline. Matter of Skinner, 740 S.E.2d 171 (Ga. 2013). A partner at a major U.S. firm was publicly censured after he gave a court pleading to a Business Week reporter who requested it. The partner, who was not assigned to the case, did not realize that the pleading was under seal. Even if the pleading were not under seal, however, it constituted a client confidence. "[R]espondent's failure to take adequate precautions to safeguard confidential materials of a client, even if considered unintentional, was careless conduct that reflects adversely on his fitness to practice law." In re Holley, 729 N.Y.S.2d 128

(1st Dept. 2001) (case of "first impression"). Careless disposal of client files can get a lawyer into trouble. In re Litz, 950 N.E.2d 291 (Ind. 2010) (putting closed client files next to town dump's recycling bin violates Rule 1.6; shredding recommended).

Misuse of confidential information can be criminal. United States v. O'Hagan, 521 U.S. 642 (1997), upheld the securities fraud conviction of a major law firm partner who used nonpublic information of a firm client to purchase options in the target of the client's expected tender offer.

Unless there's an exception, the confidentiality duty continues forever, even after the client's death. Whether privilege survives death depends on the jurisdiction but in most places it does. Swidler & Berlin v. United States, 524 U.S. 399 (1998) (rejecting Whitewater prosecutor Kenneth Starr's effort, after deputy White House Counsel Vince Foster's suicide, to discover communications with Foster's lawyer).

Policies Behind the Privilege and Confidentiality Rules

What purposes do the privilege and confidentiality rules serve? Two are often mentioned. The first is empirical. "By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation. This, in turn, serves 'broader public interests in the observance of law and administration of justice.'" Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009).

The empirical argument relies on an intuition — some would say common sense — about how people behave. But we have no test of this prediction. Will clients really conceal information from or lie to lawyers if communications are not protected as fully as they now are? Will they do so even knowing that an ignorant lawyer is likely to be less effective? As it happens, no communications are absolutely protected. Both the confidentiality duty and the privilege have exceptions, discussed presently, yet there is no evidence, even in the least protective jurisdictions, that the exceptions reduce client trust. A further problem with the empirical argument is that it does not work well for confidential (but unprivileged) communications from third parties whom the lawyer discovers on her own. For example, an eyewitness to a construction site accident, who was just walking by, will not be less or more forthcoming depending on the lawyer's confidentiality duty to her client.

The second reason offered to protect client information, especially where the client is a biological person, is normative. Regardless of the effect on a client's willingness to be candid or the quality of the lawyer's work if she is not, protecting a client's confidences honors her autonomy and privacy. She should be in control of information about her legal matter, except as she explicitly or implicitly delegates that control to enable the lawyer to protect her interests. Conversely, the lawyer, who is asking for the client's trust,

should not be permitted to betray that trust by disclosing or misusing the client's information.

But how high should we elevate a client's autonomy and privacy interests? What if keeping mum will result in harm to others? The harm can be physical or financial. The lawyer may have unwittingly aided the client's harmful conduct. The conduct may be fraudulent or criminal. When should a lawyer be allowed, or even required, to "blow the whistle" on a client to protect others? We discuss the relevant exceptions below.

Though rarely offered as a justification for confidentiality rules, the bar's sense of professional identity may also be influential. Go to a bar committee meeting where the rules are debated. Many lawyers view the existence of confidentiality rules as closely tied to how they see themselves as professionals. And this is true even of lawyers who have never had to confront confidentiality dilemmas in their own practice.

Exceptions to the Privilege or the Ethical Duty

"What you tell me and my advice are privileged and confidential. Anything we learn representing you will not be disclosed without your permission and only for your benefit."

If you got ten dollars each time a lawyer said something like this to a client, you'd soon be in the one percent. (Well, not quite.) Sure, this assurance puts clients at ease and encourages candor. But it's wrong, wrong, wrong. In several circumstances, lawyers may choose to reveal, or may be required to reveal, information clients wish to hide. As we saw, confidential information that is not also privileged, because the client is not its source, is subject to subpoena. The following examples are among the important exceptions to (or exclusions from) either the privilege or the duty of confidentiality or both.

Self-Defense and Legal Claims

A lawyer "may reveal [confidential] information . . . to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the 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." Rule 1.6(b)(5). A lawyer can defend himself if a client or third parties charge him with wrongdoing.

In an old but leading case, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), Goldberg had been an associate in a law firm when the firm handled a registration statement for a client. The firm rejected Goldberg's view that certain information omitted from the statement had to be revealed. Goldberg quit and gave the SEC a detailed affidavit, with supporting documents. Three months later Goldberg was named as one of several defendants in a civil action arising out of the registration statement. In a successful effort to extricate himself from the case, he gave the affidavit to the plaintiff's lawyers. In ruling on a motion to disqualify the plaintiff's lawyers for receiving confidential information, the Second Circuit found Goldberg's conduct proper. He had not provided information to the lawyers in order to enable them to bring the case, the court said. He was a victim, not an instigator. The complaint against Goldberg alleged violation of civil and criminal statutes and sought damages of more than $4 million.

> The cost in money of simply defending such an action might be very substantial. The damage to [Goldberg's] professional reputation which

> might be occasioned by the mere pendency of such a charge was an even greater cause for concern. Under these circumstances Goldberg had the right to make an appropriate disclosure with respect to his role in the public offering. Concomitantly, he had the right to support his version of the facts with suitable evidence.

See also People v. Robnett, 859 P.2d 872 (Colo. 1993) (rule's authority to reveal is not restricted to proceedings initiated by a former client); In re Robeson, 652 P.2d 336 (Or. 1982) (lawyer facing charge filed with disciplinary committee by third party may reveal client confidences).

Goldberg did not have to wait until the trial to defend himself. In fact, had Goldberg known in advance that he was about to be sued, he could have revealed the information even before the action was filed. In In re Friend, 411 F. Supp. 776 (S.D.N.Y. 1975), the court applied *Meyerhofer* where a lawyer and his former client were both under criminal investigation. To avoid indictment, the lawyer wanted to give the grand jury documents that would tend to exonerate him but which the client claimed were privileged. The court approved. "Although, as yet, no formal accusation has been made against Mr. Friend, it would be senseless to require the stigma of an indictment to attach prior to allowing Mr. Friend to invoke the exception . . . in his own defense."

But there are limits. David Bryan had a romantic relationship with a current client (a bad move and often unethical, see Rule 1.8(j)). After it ended and she had new counsel, Bryan revealed embarrassing confidential information to third parties that "exceeded that which was reasonably necessary to defend against [the client's] allegations." The court held that the exception "requires that the disclosure be made in some type of legal forum: to establish a claim, to establish a defense, or to respond to allegations in any proceeding. The rule does not permit disclosure of information relating to the representation in any other setting." In re Bryan, 61 P.3d 641 (Kan. 2003), publicly censured Bryan in a lengthy opinion that reads like a soap opera.

Equivalent self-defense exceptions have been recognized for the privilege. Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 937 N.E.2d 533 (Ohio 2010). In-house counsel may also use Rule 1.6(b)(5) to prove claims against their employers for retaliatory discharge or unlawful discrimination. Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173 (3d Cir. 1997).

Waiver

Clients can waive confidentiality. Rules 1.6(a), 1.8(b), and 1.9. The more interesting debates are about privilege. Waiver of privilege may be explicit or implicit. Waiver will be inferred when the client puts the confidential communication in issue in a litigation. In United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991), the court ruled that if a defendant in a securities fraud case were to testify to his "good faith" belief in the "lawfulness" of his

conduct, he would thereby waive the privilege for communications from his former counsel tending to contradict him. This is about fairness. A client cannot selectively cite counsel's advice in defense of a position and then deny its opponent access to other parts of the advice that may undermine the defense. But a client who opens himself up this way only waives "the privilege with respect to what has been put 'at issue.'" It is not a blanket waiver of all communications. Clair v. Clair, 982 N.E.2d 32 (Mass. 2013) (also holding that the party asserting an "at issue" waiver must show that the privileged information is "not available from any other source").

Clients may waive the protection of the attorney-client privilege by revelation of all or part of a confidential communication to a third person. In In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988), Martin Marietta gave the U.S. attorney a Position Paper describing why it should not be indicted. Later, a former employee of Martin Marietta was indicted for fraud and sought to subpoena this information in his defense. The court held that "the Position Paper as well as the underlying details are no longer within the attorney-client privilege."

One circuit has long recognized a "limited waiver" when a company shares privileged information with the SEC but then seeks to protect the same information in private litigation. Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc) ("To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."). Every other circuit court to consider the doctrine has rejected it, concluding that recognition of a limited waiver is not necessary to encourage communications with counsel—the goal of the privilege in the first place—and might be used for manipulative or tactical ends. In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (collecting cases).

Contrast In re von Bulow, 828 F.2d 94 (2d Cir. 1987). Claus von Bulow was convicted of attempting to murder his wife, Martha, but the Rhode Island Supreme Court reversed, and, on retrial, he was acquitted. Alan Dershowitz of Harvard Law School, who had been von Bulow's appellate lawyer, then wrote a book about the case called *Reversal of Fortune: Inside the von Bulow Case.* (It later became a pretty good film.) Thereafter, in a civil action against Claus brought by Martha's children from a prior marriage, the plaintiffs "moved to compel discovery of certain discussions between [Claus] and his attorneys based on the alleged waiver of the attorney-client privilege with respect to those communications related in the book." The court held that publication of the book was a "waiver by von Bulow as to the particular matters *actually disclosed* in the book," but no waiver of undisclosed conversations on the same or related subjects. The result would be opposite if a client made selective disclosure of privileged information in court. The "fairness doctrine" would then "requir[e] production of the remainder." But the "fairness doctrine" does not apply when "the privilege-holder or his attorney has

made extrajudicial disclosures, and those disclosures have not subsequently been placed at issue during litigation."

The Crime-Fraud Exception to Privilege

Communications between clients and counsel are not privileged when the client has consulted the lawyer in order to further a crime or fraud, regardless of whether the crime or fraud is accomplished and even though the lawyer is unaware of the client's purpose and has done nothing to advance it. See United States v. Doe, 429 F.3d 450 (3d Cir. 2005); In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996). Every litigator is aware of this rule and the dangers and advantages it carries. If the exception applies, a lawyer may get many unguarded communications that her opponent made while believing they were secret.

But the communication must be meant to further the fraud or crime:

> In delineating the connection required between the advice sought and the crime or fraud, we have repeatedly stated that the legal advice must be used "in furtherance" of the alleged crime or fraud. We have rejected a more relaxed "related to" standard. . . . Most recently, we observed, "[a]ll that is necessary is that the client misuse or intend to misuse the attorney's advice in furtherance of an improper purpose." It is therefore clear from prior precedent that for advice to be used "in furtherance" of a crime or fraud, the advice must advance, or the client must intend the advice to advance, the client's criminal or fraudulent purpose. The advice cannot merely relate to the crime or fraud.

In re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014).

Applying the Exception. This is a bit technical but a lot may ride on it. Say in a civil case (Boe v. Joe), Joe asserts the attorney-client privilege and Boe wants to contest the assertion on the ground of the crime-fraud exception. Must Boe actually prove a crime or fraud in order to discover the allegedly privileged information? Sometimes the ultimate issue in the case will be the very same alleged crime or fraud. Unless something is done, this can lead to a "chicken and egg" problem, in which a party has to prove her case in order to get information to prove her case. Courts have avoided this problem by establishing a second (lower) burden of proof to invoke the crime-fraud exception. Although this lower burden is variously phrased, the differences are not significant. In re Grand Jury, 475 F.3d 1299 (D.C. Cir. 2007), put it this way:

> To overcome a claim of privilege, the government must "make a prima facie showing of a violation sufficiently serious to defeat the privilege"; such a "violation is shown if it is established that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme"; and the government's burden of proof is satisfied "if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud."

The Ninth Circuit imposed a more demanding standard in civil cases in In re Napster, Inc. Copyright Litig., 479 F.3d 1078 (9th Cir. 2007).* The party seeking the allegedly privileged information must prove the crime or fraud by a preponderance of the evidence. A lower burden was deemed insufficiently respectful of the privilege. A preponderance burden is not lower than a civil case burden but (to avoid the "chicken and egg" problem) the circuit explained that the judge will be able to weigh the content of the very communication at issue in deciding whether the crime or fraud has been proved.

In Camera Review. The Supreme Court has told us that the trial court may review the allegedly privileged information in camera when deciding if the opponent of the privilege has met the (lower) burden of proving the crime-fraud exception. United States v. Zolin, 491 U.S. 554 (1989). *Zolin* creates an even lower burden of proof for an in camera review:

> Before engaging in in camera review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person" . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

But what evidence may a trial judge consider in determining whether this burden is met? (This has now become a "chicken and egg and chicken and egg" problem, *et cetera.*) The *Zolin* Court wrote that "the threshold showing to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged."

The Effect of Confidentiality Exceptions on Privilege. Jeffrey Purcell was a legal services lawyer in Boston. His client, Joseph Tyree, had been discharged as a maintenance worker at an apartment building and ordered to vacate his apartment. While Tyree was meeting with Purcell, he threatened to burn down the building. The state rule permitted Purcell to alert the police, which he did. They found incendiary materials in Tyree's home. When Tyree was indicted, Purcell was subpoenaed to testify. He successfully challenged the subpoena, citing the privilege. Purcell acted properly in revealing Tyree's intention to commit a crime, the court said, but that act did not waive the privilege. The crime-fraud exception would only apply if Tyree had sought to use Purcell's assistance to commit a crime. As the court saw it, "an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct." But lawyers "will be reluctant to come forward if they know that the information that they disclose may lead to adverse consequences to their clients." Purcell v. District Attorney for the Suffolk District, 676 N.E.2d 436 (Mass. 1997).

* *Napster* was "abrogated" on the issue of interlocutory appellate jurisdiction in Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009).

While it makes sense to permit a lawyer to reveal confidences without thereby waiving the privilege, why was Tyree's threat within the privilege at all? Compare United States v. Alexander, 287 F.3d 811 (9th Cir. 2002) (lawyer for criminal defendant alerted authorities to client's threats of physical violence then asserted privilege when subpoenaed before grand jury to testify to the threats; *held* the threats were not privileged because not made "in order to obtain legal advice").

Future Crimes or Frauds

Distinct from the crime-fraud privilege exception (but easily confused with it) is an exception to the duty of confidentiality that may permit (or in some states require) a lawyer to reveal confidential information to prevent future financial crimes or frauds, or to avoid or mitigate "substantial" financial injury from a completed crime or fraud, if the lawyer's services are being or have been used to commit the crime or fraud (unwittingly we would hope). Read Rule 1.6(b)(2) and (b)(3) to see the scope of this exception.

The confidentiality exception in Rule 1.6(b)(1) is a special case. It permits lawyers to reveal confidences to prevent death or substantial bodily harm, whoever is the actor and even if there is no crime. A lawyer may learn that a company (whether or not a client) is selling a defective product that can cause death or serious injury. This exception would apply, for example, to the General Motors lawyers who learned about the defective ignition switches that had already resulted in some accidents and deaths. See chapter 10.

A small number of states *require* lawyers to reveal confidential information to prevent serious violence or, in a few places, to prevent significant financial harm from fraud. New Jersey, which is among the states least protective of client confidences, provides in Rule 1.6 (emphasis added):

> **(b)** A lawyer *shall* reveal [confidential] information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
>
> > **(1)** from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another. . . .

By contrast, many states, including New York and California, have not adopted Rule 1.6(b)(2) and (b)(3). Because the confidentiality exceptions vary from place to place, if you ever find yourself facing this dilemma, you need to figure out which jurisdiction's rules will apply—see Rule 8.5(b)—and check the language of its rule.

The "Fiduciary" Exception

Many courts hold that a beneficiary is entitled, on a proper showing, to communications between a fiduciary, like a trustee, and counsel for the

fiduciary because the lawyer's ultimate client is the beneficiary, not the fiduciary. The English and American antecedents of this exception are traced in United States v. Jicarilla Apache Nation, 564 U.S. ____ (2011).

The same issue arises in shareholder derivative actions. Plaintiff shareholders may seek otherwise privileged information between company counsel and management, claiming that they are the ultimate beneficiaries of counsel's work and therefore stand in the shoes of the corporate client. The leading case here, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), held that the shareholders might prevail but must show why the privilege "should not be invoked in the particular instance." Among the factors to consider were the following (with brackets added for convenience):

> [1] the number of shareholders and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

While *Garner* has been broadly followed, endorsement has not been universal. See the discussion in *Jicarilla Apache Nation*, supra. However, the *Garner* test got a big boost when the Supreme Court of Delaware, the state where many large U.S. companies are incorporated, adopted it. Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264 (Del. 2014).

Noisy Withdrawal

The idea here is that when a lawyer must withdraw from representing a client because of criminal or fraudulent behavior, and is either not permitted or does not wish to reveal confidential information to alert the victim as she exits, she may wish or be required to retract any oral or written representations that she may have made and that the client may be using for the illegal purpose. The retraction is what makes the withdrawal "noisy." A noisy withdrawal is not a full-blown exception to confidentiality because the lawyer says only that she retracts something, not why. Noisy withdrawals are recognized in Rules 1.2 comment [10] and 4.1 comment [3] and discussed in chapter 9 on negotiation.