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PRIVILEGE AND CONFIDENTIALITY...OR IS IT CONFIDENTIALITY AND PRIVILEGE?

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As so many lawyers readily and knowingly acknowledge, the duty of confidentiality and the attorney-client privilege are not the same. However, in my talks with lawyers, there seems to be considerable, albeit unacknowledged, confusion about how exactly they are different and the extent of the duty of confidentiality.

The attorney-client privilege is an evidentiary rule which holds that an attorney is incompetent to testify "concerning any communication made to the attorney by such attorney's client in that relation, or such attorney's advice thereon, without the consent of such client." V.A.M.S. 491.060(3). The statute has been construed to be declaratory of the common law rule without limiting or diminishing the common law rule. *State ex rel. Great American Insurance Co. v. Smith*, 574 S.W.2d 379 (Mo. 1978). Thus, in addition to the statutes requirements, courts have held that for the privilege to attach:

- 1) the information be transmitted by voluntary act of disclosure;
- 2) between a client and his lawyer;
- 3) in confidence; and
- 4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted. *Id.* at 384.

Note that at the heart of the privilege is protection of communications between the attorney and client.

Confidentiality, of course, is an ethical obligation on the part of the lawyer to protect confidences and information from disclosure. It attaches not only to "matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *M.R.P.C. 4-1.6 Comment*.

This bears repeating. Confidentiality imposes an ethical duty on the lawyer to protect from disclosure not only matters communicated in confidence by the client but also to all

information relating to the representation, **whatever its source**. For the limited exceptions to this duty, refer to M.R.P.C. 4-1.6 and its Comment.

Note that at the heart of the duty of confidentiality is not just its protection of communications between the attorney and client but also information known by the lawyer relating to the representation.

So what does confidentiality, as opposed to privilege, attach to? Does it attach to:

- 1) topics covered by the client and attorney in discussing the representation;
- 2) facts the attorney learns from an adverse party during deposition;
- 3) results of scientific studies the attorney has conducted on behalf of the client;
- 4) scenes depicted in photographs taken by the attorney's investigator on behalf of the client;
- 5) notes of witness interviews;
- 6) legal research, pleadings and briefs?

Yes. Yes. Yes. Yes. Yes. And, yes.

As these examples illustrate, when considering whether information is confidential, if it falls within the definition of "all information" and it came to the attorney from "whatever" source, it is confidential and the attorney may not reveal it without client consent or implied authorization and must protect against its disclosure. As the terms "all" and "whatever" are, generally speaking, fairly broad and inclusive, they will pull within their ambit just about the entire gamut of what an attorney knows about his client's matter.

But wait, you may say, a pleading filed with the court is a public record, so confidentiality no longer attaches to it, right? Maybe not, but what is more likely is that the fact of the pleading having been filed and the information therein will still be considered confidential. There is no exception in Rule 4-1.6 providing that confidentiality "leaves" information that has become generally known. That a lawyer is permitted to reveal confidential information "when appropriate in carrying out the representation" (*M.R.P.C. 4-1.6 Comment*) does not mean that having done so, the information is not still protected from disclosure if it would be inappropriate to do so.

It matters not, therefore, that the entire world knows the same information that the attorney has learned relating to the representation, or that the attorney has used the information in an appropriate manner to further the purpose of the representation, the information is still confidential and the attorney's duty to protect it from subsequent disclosure remains.