

The Scope of Attorney Confidentiality

Clifton Perry
Auburn University

1. Introduction

The right of confidentiality might be founded on grounds of respect for personal self-regulation. The decision of a self-governing individual to disclose private information to another may be predicated upon the other's autonomous acceptance of the condition of secrecy. An unauthorized disclosure might constitute a breach of secrecy and might well demonstrate a failure of respect for the autonomy of the disclosing party. This is not to say that the disclosure might not be justified, but respect for an individual's right of self-governance would have to figure prominently in the justification, or the breach was necessary to prevent the unjustified breach of third-party autonomy.¹

In certain professional relationships the right of confidentiality might otherwise be justified as *sine qua non* for the very existence and effective functioning of the valued relationship. It is generally argued that without a right and corresponding duty of confidentiality between the party seeking professional help and the professional offering help, respectively, those seeking professional services might suffer a debilitating reluctance to disclose information to the professional which the disclosing party wishes not to be revealed by the professional. This information might prove essential to the professional's treatment of the party seeking help. Yet, because of the party's fear that the professional will disseminate the secret, the professional is not made privy to the secret and the professional services to the party suffer as a result. For example, a patient seeking medical care might keep secret information essential for the physician's proper diagnosis and/or treatment out of fear that the physician will disclose the information to a third party, and thereby impair the help offered by the physician.²

The right and correlative duty of confidentiality also obtains within the attorney-client relationship. Were confidentiality not to infuse the

¹ For respecting autonomy as the central moral concern, see Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. Lewis W. Beck (New York: The Bobbs-Merrill Co., 1959).

² John Stuart Mill, *On Liberty*, ed. D. Spitz (New York: W. W. Norton, 1975).

attorney-client relationship, as it does the physician-patient relationship, similar untoward events might result. For instance, the client might be tempted to withhold what might prove to be beneficial and important to the attorney's representation of the client because the client believed that the attorney was free to publish the information to third parties.

Indeed, within the law there are two safeguards for confidential information. The first is the well-known and frequently misunderstood attorney-client privilege. The second is the professional duty of confidentiality. The distinction between the two is quite an important one in the law. The attorney-client privilege covers only confidential communications between the client or would-be client and the attorney that arise within the scope of representation or potential representation, respectively. The privilege protects such communications against governmental and adversarial demands for disclosure. As such, the privilege is delineated in the federal and state rules of evidence.³

The scope of the professional duty of confidentiality is much broader than that of the privilege. The American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC) details the professional rule and that rule is incorporated within state codes of professional ethics, with or without minor modifications. The MRPC rule of confidentiality (Rule 1.6a) notes that "A lawyer shall not reveal information relating to the representation of the client . . ."⁴ The rule has several enumerated exceptions allowing attorney disclosure of confidential information. The exceptions, however, do not define what is covered under confidentiality, but rather specify the conditions under which what is covered by the Rule (1.6a) may, nevertheless, be disclosed.

Rule 1.6a differs in the scope of confidentiality from that of privilege. Where privilege notes "communications," the rule references "information." Where the privilege refers to "between client and attorney," Rule 1.6a without modification covers all informational sources. Where the privilege covers these communications within and about client representation, the professional conduct rule encompasses all information "relating" to the representation.

³ For example, see the *Federal Rule of Evidence*, Rules §501 and §502.

⁴ See *Model Rules of Professional Conduct* (MRPC), American Bar Association (ABA) 2008, Rule 1.6a: "A lawyer shall not reveal information relating to the representation of a client" The remainder of Rule 1.6a allows for attorney disclosure upon a voluntary and informed client waiver or as necessary for effective representation of the client. Rule 1.6b delineates exceptions to 1.6a. Of course, neither the waiver provision nor 1.6b alter the scope of 1.6a. An attorney is one who is a legal agent of another and who practices the law. A lawyer is one licensed to practice the law. See *Black's Law Dictionary*, 9th ed. (2009), pp. 147 and 968, respectively. I will use "attorney" and "lawyer" as synonyms.

There is, of course, an additional difference between privilege and the professional duty of confidentiality. The latter protection prevents the duty-bound party, the attorney, from making voluntary disclosures of covered information to third parties. Generally, while the attorney-client privilege will, with some exceptions, protect against governmental demands for covered information, a similar demand by the government for information covered only by the professional duty of confidentiality will prove ineffective.

It is the difference in the breadth of confidentiality between the privilege and the professional rule that causes concern. The Rule appears to cover all information relating to the representation of the client irrespective of whether or not said information is known by others outside of the attorney-client relationship and irrespective of whether or not those third parties owe the client a duty of confidentiality. There is, however, a more modest interpretation of the Rule. A more restrained reading might exclude from coverage that information known by those third parties who are not otherwise obliged by a duty of confidentiality to the client. The considerations favoring the more constricted reading of the Rule may not be individually dispositive. However, under the totality of the considerations, it is contended, the weight favors the narrower readings. It will be argued, therefore, that there are intractable problems with the broad interpretation of the Rule, that these problems may be eliminated through a narrower, more modest reading of the Rule, and that the narrower reading still satisfies the goal ascribed to confidentiality.

Lest it be thought that the referenced dispute is of little moment, it might be noted that an attorney's breach of the rules of professional conduct occasions disciplinary responses by the State Bar. Given the prodigious importance of confidentiality to the relationship between the attorney and the client, a breach of confidentiality by the attorney is of major significance to the State Bar and its response to a breach is not, generally, inconsiderable.

2. The Scope of a Broad Reading

The broad, literal reading of the professional rule would have the Rule cover not merely communications between the client and the attorney to which no one else is privy, but also those to which others are privy, so long as those communications relate to the representation of the client. The broad interpretation of the Rule would protect third-party information that was relevant to the representation of the client. Information, even public information, known widely, would be covered, if it related to the representation of the client. Because the covered information's connection to the representation of the client is that it simply be related to his case, the attorney's obligation of secrecy would seem also to include information that, albeit not directly related, might reasonably lead to information that relates to the representation of the client.⁵

⁵ W. Bradley Wendel, *Professional Responsibility* (The Netherlands: Aspen Publishing, 2004).

It is, of course, true that an attorney could not breach Rule 1.6a by disclosing information to a third party who already knew the information. One cannot *reveal* information to one who already knows the information. That is, if “reveal” means to make known, then one cannot reveal something to one who already knows it. The problem for the attorney wishing to disclose but not reveal pertinent information would be in determining whether the other party already knows the information, and in so determining does not reveal the information in question. Thus, notwithstanding an attorney’s knowledge that non-obligated third parties knew the material information, even public information, the attorney would have to remain silent until the attorney verified that the particular third party already knows the information. This would appear to mean that the disclosure of representationally relevant public information to a third party would violate the professional duty of confidentiality to the client, if the disclosure revealed the public information to a third party who did not already know the information. This would apparently be the case even though the third party could acquire the information, at will, from another source, for example, a public newspaper or the Internet.

3. Counter Considerations

Arguably, there are four considerations gainsaying the broad reading of Rule 1.6a. An initial consideration is concerned with the consistent use of the term “confidentiality.” First, it would appear that the notion of privacy is inherent in the idea of confidentiality. If one wants to keep information confidential, one wants to keep it private. If one were without a privacy interest, one could not expect confidentiality. If information could not be kept private, it could not be held confidentially. It might be wished that the information not be further disseminated but if it were not private, it could not be held confidentially between the party with the previous privacy interest and the party whose reticence is sought.⁶

The above-argued relationship between privacy and confidentiality serves as the underpinning for the constitutional right against unreasonable search and seizure by the government. The Fourth Amendment’s reach of protection is detailed in *Katz v. United States*, 389 US 347 (1967). According to *Katz*, one’s Fourth Amendment protection is circumscribed within the area

⁶ The following illustrates the necessity of secrecy for confidentiality: “A man goes into the confessional and tells the priest, ‘Father, I am eighty-two years old and last night I made love to two twenty-year-old girls at the same time.’ The priest responds, ‘When was the last time you went to confession?’ The man says, ‘Never, I’m Jewish.’ Taken aback, the priest says, ‘Then why are you telling this to me?’ The old man answers, ‘Gee, I’m telling everybody!’” The communication fails to be covered by any duty of confidentiality the priest owed the confessing party for two reasons. First, the confession is not penitential. Second, the confessing party is making everyone privy. See David Leonard, Victor Gold, and Gary Williams, *Evidence, A Structured Approach*, 3rd ed. (The Netherlands: Wolters Kluwer Publisher, 2012), p. 610.

in which one enjoys a reasonable expectation of privacy.⁷ The so-called “Third Party Doctrine” presents an exception to the acknowledged Fourth Amendment protection. Where one holds out information to a third party, one will fail to enjoy a reasonable expectation of privacy. The numbers one dials by phone (*Smith v. Maryland*, 442 U.S. 735 [1979]), the material one places in an open field (*Oliver v. United States*, 466 U.S. 170 [1984]), and the trash one places at the curb for collection (*California v. Greenwood*, 486 U.S. 35 [1988]) are all examples of the loss of privacy through third-party knowledge. But the failure of privacy in the above examples is of previously private information made public. The initial privacy concern could never arise with information already available or known by third parties, let alone public information. Yet this is just what the broad reading of Rule 1.6a yields.

Second, confidentiality is an essential element in the attorney-client privilege. Privilege does not define confidentiality, but rather protects a narrow class of possible confidential communications between the client and the attorney concerning the latter’s representation of the former.⁸ As noted, more may be held confidential than is covered under the privilege. But the broader scope of the former refers to other information held in the same fashion. That is, consistent use of confidentiality argues that the essential quality of confidentiality rendering communications confidential for privilege must be the same for that which renders information confidential for the professional duty. The difference between the two client protectors is the quantity of included interactions, not the nature of the interactions. Were it otherwise, a different term would have been recommended in order to safeguard against confusion.

In the case of privilege, the failure of confidentiality eliminates the privilege. What vitiates confidentiality is the capture of the attorney-client communication by a third party not already obligated to the client by a duty of confidentiality. If the above consideration is correct, then disclosure of confidential communication to a non-obliged third party by either party also violates the professional duty. Arguably, the same would obtain with that information included within the professional duty not included under the

⁷ In *United States v. Jones*, 132 S. Ct. 945 (2012), Justice Scalia argued that the historical foundation of the Fourth Amendment, i.e., trespass, was not eliminated by *Katz*. Rather, *Katz* supplemented the theory of trespass. Nevertheless, not all of the Court’s members agreed nor did Justice Scalia deny the continuing supreme importance of *Katz*. See *Annotated Model Rules of Professional Conduct*, 6th ed. (Chicago, IL: ABA Publishing, 2007), p. 90; and Ronald D. Rotunda and John S. Dzienkowski, *Professional Responsibility* (Alexandria, VA: Thomson-West Publishing, 2005), pp. 190-255.

⁸ The confidentiality required for privilege and for the professional duty are alike in that both survive the death of the client. This consideration argues in favor of consistency of use of the term. See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

privilege. Thus, case-relevant information obtained by the client, disclosed to the attorney and a non-obligated third party, would compromise the confidentiality of the information. Again, information already in the hands of the non-obligated third party could not be considered confidential.

Because the third party is not also duty-bound to keep the secret, irrespective of whether or not the third party does keep the secret, the secret is now discoverable by others. That is, once privileged communications are promulgated in violation of confidentiality, any interested person may legally discover the communication. A disclosure to one is essentially a disclosure to all. It may be discovered from the original party or the third party because it is no longer privileged.

If the information is already public or known by others, it cannot become privileged simply by having the client discuss the fact with the attorney. The underlying publicly known fact is not covered by privilege. The conversation between the attorney and client about the publicly known fact cannot render the fact privileged even if the fact is related to the attorney's representation of the client.

If the above is correct, and confidentiality enjoys a consistent usage between the client-protection doctrines of privilege and the professional duty, then notwithstanding the different ranges of covered interactions, it would appear that what would be covered by the broad reading of Rule 1.6a would prove to be an anomaly. The broad reading would leave the professional duty encompassing as confidential publicly held information that concerned the representation of the client. The broad reading would include not only such information told to the attorney by a third party, but also information relayed to the attorney by the client in the presence of others. The parameters of what will be included by the notion of confidentiality may be different between the two concepts, but it cannot be that what is covered in one client protection contradicts the very essence of the concept as used in the other client protection.

The third and related consideration mitigating against a broad reading of Rule 1.6a is that it would appear to constitute a *reductio ad absurdum*. That is, the broad reading of Rule 1.6a appears to lead to ridiculous conclusions. The force of a *reductio ad absurdum* argument is acknowledged in philosophical discourse and also enjoys a telling use in the law. For example, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) the United States Supreme Court (USSC) considered whether, pursuant to 46 U.S.C. 688, the Jones Act, a seaman could advantage himself of a U.S. federal court in a claim against an employer. The act provided that "any seaman who . . . suffered personal injury in the course of his employment" could sue for relief. The plaintiff was a Dane, employed upon a Danish ship, bound in employment by a Danish contract and injured in Cuba while performing his employee duties. The plaintiff sued in the U.S. federal court in New York. The plaintiff's argument for federal court jurisdiction was the literal language of the Act, that is, "any seaman." Such a literal reading, the USSC noted, would include "a hand on a Chinese junk, never outside Chinese waters."

The force of a *reductio* argument goes to the weight of the premises leading to the conclusion. A remedy for a fatuous conclusion following from a set of premises is modification of at least one premise.

In light of the foregoing, it is arguable that the broad reading of Rule 1.6a leads to less-than-serious conclusions. For example, the attorney who discloses to another attorney a particular brilliant solution she arrived at in a prior case would violate the Rule notwithstanding that she ensured that the attorney to whom she relayed her insight could not discover the identity of the client, the case, or the ultimate outcome of the case. Since the attorney's legal epiphany was "information relating to the representation of a client," the attorney's disclosure would be proscribed. However, this sort of attorney disclosure occurs not only in legal publications, but also by others reporting on the particular case in which the legal insight arose or was employed. The same information could be disclosed by various parties, but the attorney would incur a disciplinary response were he or she to do likewise. Is this because the information is confidential?

Recalling that the broad proscriptive scope of Rule 1.6a would encompass not merely information directly relating to the representation of the client, but also information that might reasonably lead to information directly relating to the representation of the client, compliance with the professional duty would seem most improbable. Consider an attorney who talks to the lover of a client who authorities only suspect of burglarizing a local jewelry store. The attorney might reasonably infer that the lover's new ring was the product of the burglary and the client was the miscreant who misappropriated the ring given to the lover. The attorney would not be allowed to disclose the inference nor the facts upon which the inference is based, according to Rule 1.6a. But also covered by the broad reading of Rule 1.6a would be an attorney's remark that she felt effusively joyous, upon learning of the paucity of information obtained by the police in their investigation of the burglary. Moreover, so also would the attorney's remark to a third party that she had investigated the reliability of the news reporter who conducted the media's independent investigation of the facts obtained by the police in its investigation. But this seems clearly unreasonable and surely not confidential.

Perhaps more absurdly, consider a case where a former client now suffers amnesia and wishes to talk with the attorney who, he discovers, may have previously represented him. The former client asks the attorney if she represented him and about the nature and details of the representation if she did. Arguably, on pain of violating Rule 1.6a the attorney would not be unreasonable to suffer considerable reluctance to "reveal" the information about the representation to the former but now forgetful client. However, the attorney might refer the client to a newspaper article which covered the case.

Arguably, these conclusions reached under the broad reading of the professional duty seem unreasonable. The unreasonable ramifications of a literal, broad reading of the professional rule and the lack of consistency in the use of the notion of confidentiality between the professional duty, on the one hand, and other areas of the law, including the law of privilege, on the other,

constitute considerations for either a narrow rule or for at least a narrower reading of the rule. Additionally, however, an equally weighty consideration against the broad reading of the professional duty is that the problems noted above are suffered at no benefit to the client's protected privacy.

The final reason for rejecting the broad reading of the professional duty is that it is completely unnecessary, given the obligation's purpose. The accompanying comments for Rule 1.6a note the utilitarian purpose of the professional duty of confidentiality.⁹ As noted above, attorney confidentiality is designed to elicit client disclosure to the attorney so that the attorney may process all information necessary to ensure the best and most effective representation of the client. The expressed idea is that the client will be reluctant, if not refuse, to disclose information to the attorney if the attorney might voluntarily disclose said information to third parties. But if the contended harm to the client by the attorney's disclosure is that people outside the attorney-client relationship will know such information, then the harm has already occurred where the information the attorney disclosed is already known by others outside the relationship, even if it is not known by the individual to whom it is revealed. There is, after all, a difference between promulgating client information not previously known outside of the attorney-client relationship and repeating client information previously promulgated and known by parties who are not under a duty of confidentiality to the client. The goal is not clearly compromised by the latter disclosure, whereas it is compromised by the former disclosure.

If the above is correct, then it would appear that the broad reading of the duty of confidentiality suffers from problems of inconsistency of usage and absurdity of application, and all without necessity. The purpose of the professional duty may be fulfilled with a more narrowly read rule that is consistent with the other areas of the law, including the other client protector of confidentiality (privilege) and without suffering practitioners to unintuitive and unnecessary practices. As suggested above, such a rule would read "reveal" as entailing that the information has not been revealed beyond the parties to the professional relationship unless perhaps to one who also suffered a duty of secrecy to the client. This reading of the attorney's duty of confidentiality conforms to the confidentiality requirement of the attorney-client privilege and allows the distinction to be detailed where information might exceed communication and the type of attorney behavior to be curtailed. The narrow reading of the rule has the added benefit of restricting the extent of "relating to" to actual, confidential information.

4. Conclusion

Does the above, if correct, suggest that an attorney may reveal information the broad reading would keep secret and the client would just prefer that the attorney not repeat notwithstanding that said information is

⁹ See *Model Rules of Professional Conduct*.

already known by others who do not themselves suffer a duty of nondisclosure? Is the only harm to the client by an attorney's practice of disclosing already disseminated information to non-obligated parties that privacy has been breached? Assuredly not. But the reason is not because the information is confidential, but because it might appear to the client and to others that the attorney is not fully the client's advocate. There are other professional, ethical obligations the attorney owes to the client besides confidentiality.¹⁰

The attorney owes the client a duty of loyalty. This obligation includes a duty of attorney competency and zealous advocacy. The attorney must, within the scope of representation, always comport himself or herself to further the interests of the client within the limits of the law. The duty of loyal advocacy would prevent the attorney from unnecessarily repeating already known information the attorney knew or should know the client wished not repeated and the repeating of which might appear disloyal to the client.¹¹

This is not to suggest that the duty of attorney confidentiality is not also a function of the attorney's duty of loyalty. Rather, because attorney confidentiality does not exhaust attorney loyalty, there is no reason to include attorney disclosures of non-confidential information within the duty of confidentiality just so that the disclosures will also fall within the attorney's duty of loyalty.

¹⁰ See MRPC, Rules 1.1 (competency), 1.3 (diligence), 1.7, 1.8, 1.10, and 1.11 (avoiding conflicting interests).

¹¹ Pursuant to California's Fair Political Practices Commission's 2012 announcement, already public financial disclosure statements of state judges would be published on the Commission's public website. State judges did not complain because the information was confidential; indeed, they could not so complain because the information was already public. The re-publication was simply deemed disadvantageous to those already subject to an electoral process.

