# *Confidentiality, Privilege, and Work Product: Some Important Differences*

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**Ethics Watch**

The ethical duty of confidentiality, the attorney-client privilege, and the work product doctrine are three concepts that lawyers frequently use but which are often confused. This article discusses the relationship and important differences among these concepts.

South Carolina Rule of Professional Conduct 1.6(a) expresses the ethical duty of confidentiality. Subject to certain exceptions the rule prohibits lawyers from revealing information "relating to the representation" under all circumstances, whether in connection with court proceedings or otherwise. The ethical duty applies to situations in which compulsion is directed to the lawyer to provide such information—for example, when the lawyer receives a subpoena for a client file or is being deposed about a client communication. In situations of compulsion the lawyer has an ethical duty to raise a claim of attorney-client privilege or work product. See SCRPC 1.6, comment 14.

However, the ethical duty is not limited to situations of compulsion. For example, in connection with the use of technology, lawyers have an obligation to take reasonable steps to protect the confidentiality of client information. Indeed, the ABA recently amended Model Rule 1.6 to state: "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." Rule 1.6(c) adopted August 2012. Thus, lawyers have an obligation to use reasonable means to protect client information when using e-mail, cloud computing services, and social networks.

The ethical duty applies to any information that relates to the representation regardless of form (electronic, documentary, or oral) and regardless of source (client, third party, independent investigation by lawyer). What about public information—for example, information that is in pleadings filed in court or that is in depositions taken in cases? The language of Rule 1.6 does not support an exception for "public information," and the comments do not refer to this possibility. In *Sealed Party v. Sealed Party,* 2006 WL 1207732 (S.D. Tex. 2006), the federal District Court in Texas held that the Texas Rules of Professional Conduct do not provide an exception to the duty of confidentiality to reveal either "public" or "generally known" information. On the other hand, the Restatement takes the view that "generally known" information is not subject to the duty of confidentiality. Restatement (Third) of the Law Governing Lawyers §59. Under the Restatement view, information that has been revealed to others remains subject to the duty of confidentiality unless it is generally known. Information about the law, legal institutions, and similar matters is not subject to the duty of confidentiality even though the lawyer may acquire such information while working on a client matter, as long as the lawyer does not otherwise disclose client confidences. Id. comments d and e. The rules of some jurisdictions, such as New York, provide exceptions for widely known public information. NYRPC 1.6(a). Since public record information is not necessarily excepted from the duty of confidentiality, lawyers who use social media to promote their practice should avoid discussing the specifics of client matters without the informed consent of their clients, preferably obtained in writing. In addition, because communications about "results obtained" on behalf of a client may be misleading, lawyers who discuss client cases on their websites or on social media sites, even with client consent, should include an appropriate disclaimer that prior results are no guarantee of similar outcomes in the future. See SCRPC 7.1, comment 3.

By contrast to the ethical duty of confidentiality, the attorney-client privilege is a rule of evidence that deals with the question when a lawyer may be compelled in court or other official proceedings or investigations to reveal information received from or given in confidence to a client. The scope of the attorney-client privilege depends on the rules of evidence applicable in each jurisdiction. In *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010), an administrative proceeding to determine whether Tobaccoville was a "tobacco product manufacturer" under South Carolina law, the Supreme Court reaffirmed the elements of the attorney-client privilege that it had previously stated in *State v. Doster,* 276 S.C. 647, 284 S.E.2d 218 (1981):

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. Id at 651, 284 S.E.2d at 219-20.

Communications are protected by the attorney-client privilege only if an attorney-client relationship is first proven and the communications were intended to be confidential: "In order to establish the privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential

nature. In general, the burden of establishing the privilege rests upon the party asserting it." *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). At the time of the communication, the lawyer must be acting as a legal advisor. *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984). The trial judge determines the application of the privilege after a preliminary inquiry into the facts and circumstances surrounding the communication. See *Doe v. The Ward Law Firm, P.A.*, 353 S.C. 509, 579 S.E.2d 303 (2003). The attorney-client privilege extends beyond the death of the client. See *State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981).

If a client reveals materials that are subject to the attorney-client privilege to a third party, the privilege is waived as to all communications between the attorney and client relating to the same subject matter (often called a "subject matter waiver"). In *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984), the court stated:

> Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject. Id. at 538, 320 S.E.2d at 46-47.

In federal court Federal Rule of Evidence 502 determines when inadvertent disclosure of material amounts to a waiver of the attorney-client privilege or work product protection and under what circumstances a subject matter waiver occurs.

In *Tobaccoville USA, Inc. v. McMaster*, above, the Supreme Court held that documents shared by the Attorney General of South Carolina with other attorneys general in connection with tobacco regulation and enforcement were subject to the "common interest doctrine." The Court noted that the doctrine was not a privilege but rather an exception to the rule that disclosure of material subject to the attorney-client privilege to a third person amounts to a waiver of the privilege. The Court limited its decision to the particular facts of the case, so recognition of the common interest doctrine in criminal or civil cases in South Carolina remains unresolved. For an argument in favor of the doctrine, see John P. Freeman, *The Common Interest Rule*, S.C. Law. May-June 1995 at 12. The doctrine is recognized, however, in many jurisdictions and by the Restatement (Third) of the Law Governing Lawyers in §76 (2000).

The work product doctrine, a discovery rule recognized by the U.S. Supreme Court in the leading case of *Hickman v. Taylor*, 329 U.S. 495 (1947), prevents discovery of materials prepared "in anticipation of litigation" unless the party seeking discovery makes a special showing that the party has "substantial need" for the materials and cannot obtain equivalent materials without "undue hardship." See FRCP 26(b)(3). Although client confidences may be embodied in attorney work product, the work product doctrine is designed to preserve the proper functioning of the adversarial system—to allow attorneys to prepare their cases without fear that material prepared in anticipation of litigation will be available to the opposing side.

South Carolina recognizes the work product doctrine as articulated by the Supreme Court in *Hickman v. Taylor*. See SCRCP 26(b)(3) (wording of South Carolina rule is slightly different from federal rule). The doctrine does not apply, however, to materials submitted to expert witnesses on which those witnesses base their opinions. See *South Carolina State Highway Dept. v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973).

In *Tobaccoville USA, Inc. v. McMaster*, above, the S.C. Supreme Court held that the work product doctrine did not apply to documents shared by the Attorney General of South Carolina with the National Association of Attorneys General in connection with tobacco regulation and enforcement. The doctrine requires a document to be prepared "in anticipation of litigation." This requirement is met when the preparer faces an actual or potential claim. The mere possibility of a claim is insufficient to invoke the protection of the work product doctrine. Materials prepared in the ordinary course of business or pursuant to regulatory requirements are not subject to the doctrine. The primary motive for the preparation of the document must be the anticipation of litigation. The Court found that work product protection was not available on the facts of the case:

> The work product doctrine is not implicated here because these documents were not created because of the prospect of litigation, but perhaps more accurately were created because of efforts to enforce a settlement from previous litigation. 387 S.C. at 294, 692 S.E.2d at 530.

The work product doctrine is broader than the attorney-client privilege. In *United States v. Stewart,* 287 F. Supp.2d 461 (S.D.N.Y. 2003), Martha Stewart had written an e-mail to her attorney about the facts of her prosecution for insider trading. While the e-mail would have been protected by attorney-client privilege, Stewart waived the privilege by forwarding a copy of the e-mail to her daughter. However, even though the privilege had been lost, the Court found that the e-mail was subject to work product protection because it was prepared in anticipation of litigation. Moreover, Stewart's disclosure of the e-mail to her daughter did not waive work product protection because waiver of work product is subject to different standards than waiver of privilege. Disclosure of work product material does not waive its protection unless the disclosure substantially increases the risk that the adverse party, the government in this case, would gain access to the material. See Restatement (Third) of the Law Governing Lawyers §91(4) (2000). See also *Rhode Island v. Lead Industries Assn., Inc.*, 2013 R.I. Lexis 73 (Powerpoint presentation by associate general counsel to board of directors of paint company listing the company's insurance coverage was protected work product regardless of whether privilege applied because presentation was in anticipation of litigation). ■