



Your Legal Counsel

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The Lawyer Client Privilege Against Disclosure of Confidential Communications Between Them : How Sacred Is It?

Must a lawyer keep all the secrets his or her client communicates in their confidential discussions? That is a question that has been debated over the past several years. What if the client discloses that he or she is about to commit a criminal act that may cause bodily harm or death to another? Must the lawyer keep that a secret?

Before we look at the answer to this question you need to know something about the attorney-client “privilege.” A “privilege” in this context means a right not to reveal what is disclosed to your attorney in confidence.

Most are familiar with the privilege against self-incrimination which arises out of the U.S. Constitution’s Fifth Amendment. Remember that O.J. did not testify in his criminal trial; he could not be compelled to do so, as he had the right to “remain silent” and not take the stand in his defense. A jury is told that no inference of guilt is to be drawn by this silence. However, once acquitted, he did not have the same privilege in the civil case against him (watch out Kobe B., who has a criminal case pending and another civil case filed against him, if the criminal case is dismissed and there is no threat of future prosecution). We all know that Scott Peterson will not testify in his criminal case, and Martha Stewart, likewise, did not say a word in hers – in court!

Back to the attorney-client privilege of confidentiality, which is part of the fabric of our common law. It is codified in the California Evidence Code. In actions in federal court, normally the court will follow the state’s law on privilege. The Business and Professions Code of our state requires the lawyer to maintain this confidence; it is an ethical violation to breach this duty of confidence.

In California, this privilege provides that the “client. . .has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and the lawyer.” As a general rule, the attorney-client “privilege” protects, and allows, the client as the “holder” of the privilege to prevent disclosure of all confidential communications between the client and the lawyer in order to facilitate candid and open discussions so the lawyer can provide appropriate representation and protect the client’s interests. Bear in mind that the lawyer is ethically bound to keep these confidential communications a secret. It is the client’s privilege, and only the client can give up that protection – that is, “waive” that protection.

I rely heavily on this privilege in my counseling and representation of my clients. I advise them right off that whatever we discuss in our office, on the phone or in letters or emails is confidential. This applies even if my office staff is present. They are an extension of this privilege so they must protect confidential attorney-client communications as well. If you, as a client, talk to them about confidential matters, it is as if you are talking to me. This applies from the first contact onward, whether you are paying a fee by the hour or on a contingency fee arrangement. This protection of confidentiality also applies in our first contact or meeting – even if I am not charging, which I normally do not for initial consultations. Having a fee arrangement does not affect whether the privilege exists. It is the purpose of the meeting, and if the lawyer is being contacted for purposes of providing legal representation or advice, then the privilege applies.

That privilege can be “lost,” however, or “waived,” to use the legal term, if the client intentionally discloses the substance of the confidential communication to others who are not within the framework of the protection, such as a non-involved family member or friend. While inadvertent communications do not result in a waiver, I counsel my clients not to discuss what is discussed with my office or me with anyone unless I direct them to. Once the client walks out of the office, lips must be sealed. Remember the World War II expression about secret intelligence: “Loose lips sink ships.” Well, we apply the same principle to lawyer-client confidences.

Now to the question raised above: Is the lawyer duty bound to maintain this confidence when the client discloses potential criminal acts by that client which may cause bodily harm or death to someone? The answer is, “No.” But permission to disclose such has only recently been adopted in California, which is the last state in the U.S. to modify the duty of attorney-client confidentiality with a new rule, effective July 1, that gives the lawyer discretion to act on such information without risking a violation of professional ethics. It applies only to future conduct, and not past acts. One of its purposes is to allow the lawyer to try to talk the client out of committing wrong because of the threat of disclosure. There is even talk about applying the same principle to “economic fraud,” such as the Enron scandal. That is, the lawyer would have discretion to disclose to authorities a potential economic fraud that a client was contemplating (remember this exception to the privilege does not apply to past acts). But the chances of adding another exception to the privilege are not great, at least at this time.

The point here is that in balancing the principle of encouraging candid disclosure against the potential for bodily harm or death to another, the interests of the latter prevails. The lawyer does not have to choose confidentiality over human life. The need to protect human life trumps the need to protect client confidences in this very narrow circumstance. Otherwise, the rule of confidentiality prevails, as it should.

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