

WORK PRODUCT AND ATTORNEY-CLIENT PRIVILEGE AFTER *IN RE: GRAND JURY*: WHERE DO WE GO FROM HERE?

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OBJECTIVES



- Understand the fundamentals of work product protection and attorney-client privilege – and their differences
- Describe the differences in how these protections are applied, and the legal landscape that led to *In re: Grand Jury*
- Earn ethics credit and HAVE FUN DOING IT (mandatory)

| STEP 1: CONFIDENTIALITY

ABA Model Rule 1.6

- “A lawyer shall not reveal information relating to the representation of a client”

Exceptions include:

- Client gives informed consent
- Disclosure is implied to carry out the representation
- To prevent reasonably certain death or substantial bodily harm
- To prevent client from committing a crime/fraud
- To comply with a law or court order

| STEP 1: CONFIDENTIALITY

• Comment 2:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. ... This contributes to the **trust** that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to **communicate fully and frankly** with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

| STEP 1: CONFIDENTIALITY

- **Comment 3:**

The principle of client-lawyer confidentiality is given effect by related bodies of law: the **attorney-client privilege**, the **work product doctrine** and the **rule of confidentiality** established in professional ethics.

The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

| STEP 1: CONFIDENTIALITY

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 1.05. Confidentiality of Information

a) “Confidential information” includes both “privileged information” and “unprivileged client information.”

“Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence ... or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates.

“Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

1) Reveal confidential information of a client or a former client to:

- i. a person that the client has instructed is not to receive the information;
- ii. anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

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