

# THE USE AND ABUSE OF THE ATTORNEY CLIENT PRIVILEGE

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A number of issues that are of concern to members of the legal profession remain obtuse and arcane to the general public. One such area of interest to attorneys, often misunderstood by the public, is the attorney-client privilege. This privilege is more limited than a lawyer's ethical obligation to guard clients' confidences and secrets under Rule 1.6 of the Minnesota Rules of Professional Conduct.<sup>Ftn 1</sup> While the obligation under 1.6 exists regardless of the source of the information obtained or the fact that others are aware of the confidences, the evidentiary privilege differs in those respects. Thus, as it regards the evidentiary privilege, a lawyer must advise his client of the privilege, avoid waiving it inadvertently, and assert the privilege in a timely manner. The use of the evidentiary privilege keeps information confidential that may be relevant in the resolution of a pending matter, and therein lies the controversy. Recently, two high-profile cases have put the issue of attorney-client privilege at the forefront of a debate about American jurisprudence.

## THE FOSTER CASE

In *Swidler and Berlin v. United States*,<sup>Ftn 2</sup> the United States Supreme Court addressed the issue of whether a grand jury was entitled to examine notes that a private attorney took in a meeting with the late deputy White House counsel, Vincent Foster, nine days before Foster's suicide.

In oral arguments conducted on June 8, 1998, the issue before the Court was whether a balancing test, approved by the U.S. Court of Appeals for the D.C. Circuit, was appropriate in deciding whether a lawyer's communications with a now-deceased client should be disclosed. Under the proposed test, the statements would be discoverable if their "relative importance is substantial," the statements "bear on a significant aspect of the crimes at issue" and the issue is one "as to which there is a scarcity of reliable evidence."<sup>Ftn 3</sup> At the time the case came before the Court, one of the few reported cases had been decided by a state court and had held that the client's death did not affect the validity of the privilege. But most legal commentators conceded and the American Law Institute's *Restatement of the Law Governing Lawyers* stated that the privilege should not always survive the client.<sup>Ftn 4</sup>

Essentially, the D.C. Circuit resorted to the usual test for overcoming work product privilege; a showing of substantial need plus undue hardship in acquiring the information elsewhere was all that was required. Foster's attorney noted that the work product privilege extended to lawyers as well as clients and that the purpose of the doctrine was to protect the lawyers' thought processes, even after a client's death, creating a zone of privacy for the lawyers who had prepared a client's case.

Justice Kennedy suggested at oral argument that the legal profession "would be poorer" if an attorney could

not assure clients that information disclosed confidentially would be protected after the client's death.<sup>Ftn 5</sup> Many lawyers would agree and after Chief Justice Rehnquist noted that there was little "empirical research in the legal profession" about this topic and suggested that if lawyers and prosecutors were polled, the Court would "have a much better idea of how to decide the case," a poll was conducted by the *National Law Journal* with "only 17 percent supporting the position taken by Independent Counsel Kenneth W. Starr that the privilege ends with death."<sup>Ftn 6</sup>

Two and a half weeks after the argument, in almost summary fashion belying the depth of the debate, the Court, in a 6-3 decision, not only rejected the independent counsel's position that the privilege ends with a client's death.

The Court also refused to support the balancing approach, used by the lower court, that would have allowed the privilege to be breached if the communications were of substantial importance to a criminal matter. While one commentator declared the decision "a complete victory for the legal profession and the clients we represent,"<sup>Ftn 7</sup> another noted that the ruling "promised to have far-reaching consequences for the legal profession--from the White House counsel's office to single shingle practices throughout the USA."<sup>Ftn 8</sup> A "legal ethics specialist" went further, describing "the ruling [as] a huge, and arguably unfair, boost for the profession. It means lawyers are uniquely available for the most confidential of conversations."<sup>Ftn 9</sup>

The *Swidler and Berlin* decision solidifies the attorney-client privilege and serves as a reminder to all of us of our duty to protect that privilege (along with our duty under MRPC 1.6 to protect confidences and secrets). Moreover, the decision promises to have far-ranging implications for the profession for years to come.

## THE TOBACCO LITIGATION

One of the more neglected revelations from the recently completed tobacco litigation was the apparent misuse of the attorney-client privilege by lawyers on behalf of the tobacco industry, as evidenced in recently released documents and files.

The solution adopted by the tobacco companies was to have their "scientific" research conducted under the close consultation, and sometimes under the management, of their lawyers. The idea was that bad findings could be held back as lawyer-client confidences, whereas good findings could be described as the product of scientific inquiry.<sup>Ftn 10</sup>

Obviously, our first loyalty as attorneys must be to our clients. It is unusual for attorneys to be sanctioned for abusing the attorney-client privilege. Further, as noted earlier, we have obligations under both the attorney-client privilege and under MRPC 1.6 to keep certain matters confidential. Yet a lawyer, who intentionally conceals documents that should be disclosed, withholds evidence or acquiesces to perjured testimony, or who helps to commit or conceal a continuing wrongful act, will be subject to disciplinary proceedings.

In this area, timing is a major consideration. Suppressing research or destroying documents prior to any lawsuit request certainly raises moral issues but not always ethical concerns. On the other hand, the Rules of Professional Conduct clearly prohibit lawyers from aiding clients in making false statements or participating in the creation of false evidence. Finally, failing to turn over documents, or destroying them when subject to a court order, is far more than an ethical violation; such conduct may well constitute

obstruction of justice in violation of the criminal code.

For over three decades, the parade of lawyers involved in this abuse of the attorney-client privilege came from some of the most well-known law firms in the nation. Perhaps their behavior serves to remind us that when the stakes are high, the clients powerful, and the fees huge, some of our best lawyers fail to meet the test, folding under the weight of expediency and self-interest. As one commentator noted, "It seems not unfair to characterize the activity as assisting in fraud on the public . . . all of us in the legal profession will pay the price."<sup>Ftn 12</sup>

The attorney-client privilege is both an honor and a duty. While recently recognized by the highest court in the land as the cornerstone of the attorney-client relationship, the misuse of that same privilege can undermine the entire foundation of our profession. We all *do* pay the price and we will continue to do so as long as there are lawyers out there who rationalize the collapse of their ethical and moral values while taking the path of least resistance.

## NOTES

<sup>1</sup> See *MRPC 1.6 Confidentiality of Information*.

<sup>2</sup> *Swidler and Berlin v. United States*, 97-1192, \_\_\_ U.S. \_\_\_ (1998).

<sup>3</sup> *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997).

<sup>4</sup> See "Court Finds Little Law But Much Argument On Post-Death Attorney-Client Privilege," ABA/BNA Lawyer's Manual on Professional Conduct, 6/10/98, p. 259.

<sup>5</sup> *Ibid*, p. 261.

<sup>6</sup> *Marcia Coyle*, "Your Answer, Mr. Rehnquist," *The National Law Journal*, 6/15/98, A.13.

<sup>7</sup> *Marcia Coyle*, "Foster Privilege Ruling May Help Bruce Lindsey," *The National Law Journal*, 7/6/98, A.10.

<sup>8</sup> *Kevin Johnson*, "Justices deny Starr's request for notes of Foster," *USA Today*, 6/26/98, 3A.

<sup>9</sup> *Edward Felsenthal*, "Supreme Court, in Setback for Starr, Fortifies Attorney-Client Privilege," *The Wall Street Journal*, 6/26/98, B.7.

<sup>10</sup> *Geoffrey C. Hazard*, "Tobacco Lawyers Shame the Entire Profession," *The National Law Journal*, 5/18/98, A.22.

<sup>11</sup> See *Milo Geyelin*, "Tobacco's Foes Target Role of Lawyers," *The Wall Street Journal*, 4/23/98, B1; see also, *Diana Henriques*, "Tobacco Lawyer's Role Is Questioned," *The New York Times*, 4/23/98.

<sup>12</sup> *Hazard*, *ibid*.