ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT, AND CONFIDENTIALITY: AN OVERVIEW

The Victim Rights Law Center (VRLC) developed this overview of attorneys' various confidentiality and privilege obligations to help attorneys protect the privacy of their survivor-clients. Attorneys funded by the Office on Violence Against Women (OVW) who provide victim services (in addition to legal assistance) not only have jurisdiction-specific obligations but are also responsible for following the Violence Against Women Act (VAWA) confidentiality provisions.

We have also developed client-centered explanations of privilege and confidentiality to help attorneys describe these concepts to their clients. Please request these explanations by contacting us at TA@victimrights.org.

- **Attorney-Client Privilege** is an evidentiary rule that protects confidential communications between an attorney and client from disclosure to outside persons.
- The **Work Product Doctrine** protects documents and other tangibles prepared by an attorney or their representative in anticipation of litigation from disclosure to third parties.
- **Ethical Confidentiality Rules** prohibit a lawyer from disclosing communications with their client to outside persons.
- **VAWA Confidentiality Provisions** protect the disclosure of personally identifying information when attorneys provide victim services.

These four legal protections are discussed below.

Attorneys need to know the specific laws where they practice. Attorney-client privilege, the work product doctrine, and ethical confidentiality rules are jurisdiction-specific. Similarly, the VAWA confidentiality provisions require knowledge of jurisdiction-specific statutory mandates and of case law. For any support with protecting clients' privacy, please contact the VRLC's TA team at TA@victimrights.org.

Attorney-Client Privilege

Jurisdictions in the United States – federal,[1] state, territorial, and in the District of Columbia – have some form of attorney-client privilege. When applicable, the privilege protects an attorney and the attorney's client from being required to testify or otherwise provide testimony (written or oral) that would reveal the content of confidential communications between the attorney and the attorney's client.

[1] There is no federal rule directly on point codifying the privilege, but it is subsumed within F.R.E. 501, which states that the common law privileges apply.

Sometimes referred to as "absolute," the attorney client privilege is widely applied and upheld. That means that if the privilege applies, no one can require the attorney to disclose the privileged information except for the client. This privilege is meant to protect and encourage honest, open communications between attorneys and their clients, which in turn leads to more effective legal services.[2]

The scope of the privilege, when it attaches, exceptions, and waiver of the privilege are covered below.

I. Scope of the Privilege

In order for the privilege to apply, four conditions must be met:

A. There must be a **communication.**
B. The communication must be made between **privileged parties.**
C. The communication must be **confidential.**
D. The communication must be made for the purpose of obtaining or providing **legal advice.**[3]

Each of these requirements is discussed below. Waiver and exceptions to the privilege are also discussed.

A. Communication

The privilege protects "communications." Communications can include not only written and oral communications, but also physical gestures – like nodding or shaking one's head, facial expressions, or holding up a certain number of fingers – so long as the gestures are meant to convey information to the attorney.[4]

Facts do not become privileged simply because they have been communicated to an attorney.[5] For instance, a client could invoke the privilege if asked, "Did you tell your attorney that you

[2] *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (stating that the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

[3] Rest. 3d Law Gov. Lawyers § 68.

[4] Rest. 3d Law Gov. Lawyers § 69(e); *City & County of San Francisco v. Superior Court*, 231 P.2d 26, 30 (Cal. 1951) ("The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney.").

[5] *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981) ("The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning a fact is an entirely different thing. The client cannot be compelled to answer the question 'What did you say or write to the attorney?' but may not refuse to

invited the assailant to your home?" However, the privilege could not be invoked if the client was asked, "Did you invite the assailant to your home?" Similarly, preexisting documents that are not privileged do not become privileged by virtue of sending them to an attorney.[6]

B. **Privileged Parties**

i. Existence of Attorney-Client Relationship

In order for the privilege to attach, there must be an attorney-client relationship. While the existence of a retainer agreement will make this relationship clear, a retainer agreement is not required. Courts generally agree that an attorney-client relationship exists when:

1. The client reasonably believes that they are represented by the attorney;[7] or
2. A prospective client is seeking legal advice from the attorney.[8]

ii. Presence of Third Parties

For the privilege to attach, the communication must generally be between only the attorney and the attorney's client. However, there is an important exception that allows certain other people to be present during the communications. These people can be divided into two groups: attorney agents and client agents.

a. Attorney agents

An attorney's agents are those individuals who assist the lawyer in legal representation. The attorney-client privilege can extend to others "when the purpose of the communication is to assist the attorney in rendering advice to the client."[9] Thus, courts have found that the presence of the following agents will not necessarily destroy the privilege:

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disclose any relevant fact within his knowledge merely because he incorporated a statement of fact into his communication to his attorney.").

[6] Rest. 3d Law Gov. Lawyers § 69(j).

[7] *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997) ("[C]ourts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer, reasonably believed that a lawyer represented the client rather than another party, or reasonably believed that a conversation with a lawyer was confidential, in the sense that its substance would not be overheard by or reported to anyone else.").

[8] *Matter of Bevill, Bresler & Schuman Asset Mgmt. Corp.*, 805 F.2d 120, 124 n.1 (3d Cir. 1986) ("The attorney-client privilege protects conversations between prospective clients and counsel as well as communications with retained counsel."); *Richardson v. Sexual Assault/Spouse Abuse Resource Center, Inc.*, 764 F. Supp. 2d 736, 742 (D. Md. 2011) (intake call to SARC was privileged).

[9] *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995).

- Support staff, such as a paralegal, secretary, or receptionist;[10]
- A translator;[11]
- An investigator who will be assisting with the case;[12]
- A physician or mental health provider.[13]

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[10] *United States v Kovel*, 296 F.2d 918, 926 (2d Cir. 1961) ("The complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. The assistance of these agents being indispensable to [the lawyer's work] and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.") (citing to 8 Wigmore, Evidence, §2301). *But see Dabney v. Inv. Corp. of Am.*, 82 F.R.D. 464, 465-66 (E.D. Pa. 1979) (privilege was not available for communications with a law student who was not acting under the direct supervision of a member of the Bar).

[11] *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995); *Farahmand v. Jamshidi*, No. Civ.A 04-542 (JDB) (D.D.C. Feb. 11, 2005) (holding that sending privileged document to plaintiff's son-in-law did not constitute a waiver of the attorney-client privilege where he translated the document).

[12] *Clark v. City of Munster*, 115 F.R.D. 609, 613 (N.D. Ind. 1987) ("Statements made by [the client] to a private investigator employed by his attorney are protected by the attorney-client privilege."). *But see Claude P. Bamberger Int'l, Inc. v. Rohm and Haas Co.*, Civ. No. 96-1041 (D.N.J. Aug. 12, 1997) (finding that memorandum summarizing communications between investigator and client's employees was not privileged because it was not made for the purpose of securing legal advice, but rather was to search for business improprieties within the corporation).

[13] *City & County of San Francisco v. Superior Court*, 231 P.2d 26, 30 (Cal. 1951) ("[W]hen communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination without fear that the latter will be compelled to reveal the information disclosed."); *In re Houseman*, 66 S.W.3d 368, 370 (Tex. Ct. App. 2001) (privilege applied to communications between mental health professional and client when mental health professional was hired by attorney in guardianship proceeding to assess client's mental competency). *But see Murray v. Bd. of Ed.*, 199 F.R.D. 154, 156-57 (S.D.N.Y. 2001) (finding the privilege did not apply where the client met with the psychiatrist on her own behalf rather than at the direction of her attorney in preparation for trial); *Lewis v. State*, 709 S.W.2d 734, 736 (Tex. Ct. App. 1986) (presence of sexual assault survivor's sister and caseworker broke the privilege because the survivor had adverse interests with the sister at the time).

Many jurisdictions have an advocate-client privilege, and all jurisdictions have a psychotherapist-patient privilege. The existence of these "double" privileges may also be grounds for asserting the privilege. *See* Rest. 3d Law Gov. Lawyers § 71, cmt. b ("The presence of a stranger to the lawyer-client relationship does not destroy confidentiality if another privilege protects the communications in the same way as the attorney-client privilege. Thus, in a jurisdiction that recognizes an absolute husband-wife privilege, the presence of a wife at an otherwise confidential meeting between the husband and the husband's lawyer does not destroy the confidentiality required for the attorney-client privilege."). However, this is still a developing area of law, and should not be relied upon in determining whether an advocate or therapist is necessary to the communication. VRLC has various jurisdiction-specific FAQs that can help you identify such privileges and related laws. Please request these FAQs by contacting us at TA@victimrights.org.

Inquiry about an attorney's agents is a fact-sensitive and jurisdiction-specific inquiry; caution should be used when introducing third parties to the communications between attorneys and clients.

b. Client agents

When reasonably necessary to the consultation, including to facilitate communication, the presence of third parties on behalf of the client may not break the privilege. The client must intend for the communications to remain confidential, despite the presence of the third person.

Courts differ widely in how broadly they define client agents, with some holding that the presence of the third person must be strictly necessary and others taking a more nuanced view. However, the stronger the need for the third person, the more likely a court will find that the privilege attaches. Generally, but not always, a person who is present merely for moral support will break the privilege.[14] If there is another role (such as to assist an individual with a disability, to interpret or translate, or to otherwise help make communications clearer) a court is more likely to find the privilege remains.[15]

Some courts have found that the privilege may attach notwithstanding the presence of a third person who has the following relationship with the client.

- Spouse;[16]
- Parent;[17]

[14] *Wichansky v. Zowine*, No. CV-13-01208-PHX-DGC (D.Ariz. Sept. 29, 2015) (finding friend who attended attorney-client sessions broke privilege when he was there just for support); *Swyear v. Fare Foods* Corporation, No. ("Here, it appears that Swyear's mother was present during the initial consultation to provide emotional or moral support. While the Court is not unsympathetic to Swyear's position, the presence of her mother during the consultation waived the attorney-client privilege."); *Fox v. Alfini*, 432 P.3d 596, 602 (Colo. 2018) (presence of parents of 30-year-old stroke victim deemed not necessary, and privilege therefore broken, when the victim had no signs of stroke and did not otherwise display a need for parents to assist her in communicating with her attorney). *But see Accomazzo v. Kemp*, 319 P.3d 231, (Ariz. Ct. App. 2014) (presence of parents did not break the privilege where they were there to support the daughter, help the daughter understand the legal process, and the daughter intended that the communications remain confidential); *Stroh v. General Motors Corp.*, 213 A.D.2d 267, 268 (N.Y. App. Ct. 1995) (presence of daughter of elderly client did not destroy the privilege when the daughter transported her to the law office and "put her sufficiently at ease to communicate effectively with counsel").

[15] *Stevens v. Brigham Young University-Idaho*, No. 4:16-cv-00530-DCN (D. Idaho 2018) (presence of friend, who was there to assist client with her disabling anxiety, did not break the privilege).

[16] *U.S. v. Rothberg*, 896 F. Supp. 450, 454 n.7 (E.D.Pa. 1995) (noting, without discussion, that communication between client and lawyer with wife present did not waive privilege). *But see State v. Gordon*, 504 A.2d 1020, 1025-26 (Conn. 1985) (presence of spouse was not necessary to the representation and therefore her presence broke the attorney-client privilege protection).

[17] *United States v. Bigos*, 459 F.2d 639, 643 (1st Cir. 1972) (presence of father did not break the privilege where the record showed the intent to preserve confidentiality); *Accomazzo v. Kemp*, 319 P.3d 231, (Ariz. Ct. App. 2014) (presence of parents did not break the privilege where they were there to support the daughter and the daughter

- Other family member[18] or friend[19]

C. Confidential Communications

The communications made must be intended to be "confidential" when they are made.[20] The underlying information, however, does not need to be confidential; the substance of the information communicated is not typically determinative.[21]

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intended that the communications remain confidential); *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (presence of father did not break the privilege when parties intended the communication to be kept privileged, and the father acted "in a normal and supportive parental fashion" in being at the conference with his son and the attorney); *Schreiber v. Kellogg*, No. 90-5806 (E.D. Pa. Oct. 19, 1992) ("[I]t appears that defendant's father was taking an ordinary parental interest and advisory role in his son's legal affairs. The presence of a parent in such a capacity at a meeting with his son and his attorney does not defeat the attorney-client privilege."); *De Los Santos v. Superior Court*, 613 P.2d 233, 236 (Cal. 1980) (statements made by a minor to his parent as guardian ad litem in connection with questions asked by the minor's attorney were privileged). In addition, some states have a statutorily-recognized parent-child privilege. VRLC has jurisdiction-specific FAQs and other resources to help understand the various privacy laws that may come into play when representing minors. Please request these resources by contacting us at TA@victimrights.org.

[18] *Stroh v. General Motors Corp.*, 213 A.D.2d 267, 268 (N.Y. App. Ct. 1995) (stating: "We are here presented with an aged woman required to recall, and perhaps relive, what was probably the most traumatic experience of her life. Her daughter selected the law firm to represent her, transported her to the law office, and put her sufficiently at ease to communicate effectively with counsel" and finding the privilege applied). *But see United States v. Stewart*, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003) (forwarding otherwise privileged document to the client's daughter broke the attorney-client privilege); *Matter of Guardianship of Walling*, 727 P.2d 586, 592 (Okla. 1986) (presence of grandmother broke the privilege when she was not reasonably necessary for the transmission of the communication).

[19] A friend or non-family member could be necessary to communications. However, the majority of case law has found a friend present for moral support does break the privilege. *See Total Marketing Technologies, Inc. v. Angel Medflight Worldwide Air Ambulance Serv.*, No. 8:10-cv-2680-T-33TBM (M.D. Fla. June 22, 2012) (presence of friend, who was at meeting in a supportive role, broke the privilege); *United States v. Evans*, 113F.3d 1457, 1463 (7th Cir. 1997) (presence of friend for moral support broke the privilege); *People v. Doss*, 514 N.E.2d 502, 505 (Ill. Ct. App. 1987) (finding it was reversible error to accord privilege to the attorney-client communications where the third party was merely providing moral support who despite his "low intelligence level. . . needed no help getting across what was important to the[] attorney").

[20] Rest. 3d Law Gov. Lawyers § 71 ("A communication is in confidence . . . if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege.")

[21] *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 388 (D. D.C. 1978) ("[T]he Court finds that the communication need not be of confidential information for the privilege to apply. Instead, the Court holds that a Client communication is privileged if it was made with the intention of confidentiality, and an Attorney communication is privileged if it would directly or indirectly reveal confidential communications by the client and if it was considered confidential by the client.").

As discussed above, the presence of a non-privileged party tends to show that there was no expectation of confidentiality, which destroys the privilege. Speaking with an attorney in a public space (such as an elevator with other passengers or where others can easily overhear) can also destroy the privilege.[22]

In addition, the communications must be intended to remain confidential. That means that subsequently sharing an otherwise privileged communication with a third party can break the privilege.[23]

D. Legal Advice

Finally, the communications must be made for the purpose of obtaining legal advice.

Generally, courts have held that background information (such as the existence and purpose of the attorney-client relationship,[24] the client's identity,[25] and fees paid[26]) are not privileged.

When a communication contains both legal advice and non-privileged content, many courts apply the "predominant" or "primary" purpose test. Under this test, if *one* of the significant purposes of the communication was to obtain legal advice, the privilege will apply to the whole communication.[27]

II. Exceptions to the Privilege

[22] Rest. 3d Law Gov. Lawyers § 71(c) ("The circumstances may indicate that the communicating person knows that a nonprivileged person will learn of it, thus impairing its confidentiality. For example, a client may talk with a lawyer in a loud voice in a public place where nonprivileged persons could readily overhear.").

[23] *People v. Harris*, 442 N.E.2d 1205, 1208 (N.Y. 1982) (finding no expectation of confidentiality when client spoke to attorney over the phone with police officer and another person present).

[24] *Constand v. Cosby*, 232 F.R.D. 494, 503 (E.D. Pa. 2006) ("However, the fact of whether the lawyers gave plaintiff legal advice is not protected by the attorney client privilege and must be disclosed.").

[25] *Lefcourt v. U.S.*, 125 F.3d 79, 86 (2d Cir. 1997) ("As a general rule, a client's identity and fee information are not privileged.").

An exception exists when the revealing of the client's identity would itself reveal a confidential communication. *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 957 F.3d 505, 510 (5th Cir. 2020).

[26] *Berliner Corcoran & Rowe LLP v. Orian*, 662 F. Supp. 2d 130, 134 (D. D.C. 2009) ("[T]he weight of authority holds that communications relating solely to the payment of attorneys' fees are not covered by the attorney-client privilege unless they reveal confidences about the nature of legal services rendered.").

[27] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.D.C. 2014); *Smith-Brown v. Ulta Beauty, Inc.*, No. 18 C 610 (N.D. Ill. June 27, 2019) (collecting cases). Not all jurisdictions follow this approach; check your jurisdiction for the applicable test.

There are exceptions to the attorney-client privilege, but many are largely applicable in corporate settings[28] or multi-client settings.[29] Of general applicability, courts consistently recognize the crime-fraud exception.[30] Under this exception, when a client speaks with an attorney in order to further an ongoing or future crime or fraud, the communications are not privileged.[31] Statements about a past or completed crime, however, are generally privileged unless the client is seeking advice on how to cover up the crime.[32]

III. Waiver of the Privilege

The client, not the attorney, holds the attorney-client privilege. That means that the attorney cannot waive the privilege, even after the client's death, unless they do so while acting as the client's agent.[33]

The privilege can be waived explicitly. This occurs when a client, or the attorney on the client's behalf, discloses privileged communications to an unprotected third party.[34]

The attorney-client privilege can also be implicitly waived in the following circumstances:

1. When a client testifies concerning the attorney-client privilege;
2. When a client places the relationship directly at issue; or
3. When a client asserts reliance on an attorney's advice as an element of a claim or defense.[35]

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[28] For example, the fiduciary exception allows for a corporation's shareholders to pierce the corporation's attorney-client privilege.

[29] When there is a joint representation, the common interest exception means that neither client can assert the attorney-client privilege against the other client if there is a subsequent litigation relating to the subject matter of the prior joint representation.

[30] *U.S. v. Zolin*, 491 U.S. 554, 562-63 (1989).

[31] *In re Grand Jury Proceedings*, 417 F.3d 18, 22 (1st Cir. 2005).

[32] *Id.*

[33] *Swidler & Berlin v. U.S.*, 524 U.S. 399, 410-11 (1998).

[34] *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, (9th Cir. 1981) ("[I]t has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject.") (collecting cases).

[35] *Regions Bank v. Kaplan*, No. 8:12-cv-1837-T-17MAP (M.D. Fla. Sept. 25, 2015). *See also United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) ("[A] client's offer of his own or his attorney's testimony as to a specific communication constitutes a waiver as to all.").

Waiver must be intentional. Accordingly, a court may find no waiver if the disclosure was inadvertent, the holder of the privilege took reasonable steps to protect the disclosure, and the holder promptly took reasonable steps to rectify the error.[36]

Work Product Doctrine

The work product doctrine protects documents and other tangibles prepared by an attorney or an attorney's representative in anticipation of litigation from disclosure to third parties.[37] Work product immunity can also extend to third parties, such as third-party consultants.[38] Unlike with the attorney-client privilege, the documents do not need to be "communications" or relate to confidential matters.

The purpose of the doctrine is to allow attorneys to develop their theory of the case without worrying that it will be discovered by their adversary.[39]

The work product doctrine is considered a qualified immunity. Materials are subject to discovery by the opposing party if that party shows that it "has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[40]

However, even upon this showing, an attorney's mental impressions, conclusions, opinions, or legal theories are generally protected from disclosure.[41]

As with the attorney-client privilege, the work product protections can be waived upon voluntary disclosure[42] and are subject to the crime-fraud exception.[43]

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[36] F.R.E. 502(b).

[37] F.R.C.P. 26(b)(3)(A).

[38] F.R.C.P. 26(b)(A).

[39] *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

[40] F.R.C.P. 26(b)(3)(A)(ii). *See also Jinks-Umstead v. England*, 232 F.R.D. 142, 147 (D.D.C. 2005) (finding even if there were substantial need, the work product doctrine would not be overcome because the information could have been obtained by other means, such as through discovery).

[41] F.R.C.P. 26(b)(3)(B); *Security Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 32 (D. Conn. 2003) (stating that the work product doctrine was waived as to a memorandum discussing investigative findings where the individual spoke about the memorandum at deposition; however, the mental impressions and opinions of counsel would not be waived because the testimony was limited to findings and the bases therefor).

[42] *United States v. Nobles*, 422 U.S. 225, 239-40 (1975).

[43] *Jinks-Umstead v. England*, 232 F.R.D. 142, 146 (D.D.C. 2005) ("Work product protection can be overcome by a showing that the client consulted with the attorney in furtherance of a crime or fraud.).

Attorney-Client Confidentiality

Separate from the attorney-client privilege are confidentiality rules. These rules, often referred to as the rules of professional conduct, are typically found in jurisdictions' ethics codes. Attorneys owe a duty of confidentiality to their clients, which covers all information learned during the attorney-client relationship.[44] A breach of confidentiality can lead to disciplinary proceedings and attorney sanctions.

The duty of confidentiality is broader than the attorney-client privilege. Confidentiality covers all information pertaining to the legal representation, not just information learned from the client. This breadth is intended to safeguard client confidences and trust[45] and to allow the attorney to fully develop the facts essential to the representation.[46]

Unlike the attorney-client privilege, which is focused on what others can obtain from the attorney or client during discovery and litigation, exceptions to attorney-client confidentiality focus on when the attorney can disclose client confidences other than through compulsion of law. As with the above two doctrines, these confidentiality rules are jurisdiction- and fact-specific.

The American Bar Association provides a model rule on confidentiality, which all states have adopted to some extent. However, there is great variation among the states as to which of the exceptions are included in each state's rules of professional conduct.[47]

Under the Model Rule 1.6, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation,[48] or the disclosure is permitted by paragraph (b)."[49]

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[44] *See* ABA Model Rules of Prof'l Conduct (hereinafter "Model Rules"), Rule 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).").

[45] *See, e.g., Matter of Venie*, 395 P.3d 516, 524 (N.M. 2017) ("The confidences that clients share with their attorneys must be vigorously protected as the attorney-client relationship cultivates the trust imperative to the attorney's efficient representation of the client.").

[46] *State v. Boatwright*, 401 P.3d 657, 662 (Kan. Ct. App. 2017).

[47] *See* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf.

[48] Commentary to the Model Rule lists as examples that an attorney may be impliedly authorized "to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to the matter." Model Rules, Rule 1.6, Cmt. 5.

[49] Model Rules, Rule 1.6(a).

Under ABA Rule of Professional Conduct 1.6(b), an attorney may reveal information relating to the representation of a client to the extent the attorney reasonably believes the disclosure is necessary in certain circumstances. These circumstances include:

1. To prevent reasonably certain death or substantial bodily harm;[50]
2. To prevent the client from committing a future crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, when the client has used the attorney's services to further the crime;[51]
3. To prevent or mitigate substantial injury to the financial interests or property of another that is reasonably certain to result, or has resulted, from the client's commission of a crime or fraud, when the client has used the attorney's services to further the crime;[52]
4. To seek legal advice about the attorney's compliance with the rules;
5. To establish a claim or defense between an attorney and client;[53]

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[50] Jurisdictions differ as to whether an attorney is permitted or required to disclose in this circumstance. *Compare In re Grand Jury Investigation*, 902 N.E.2d 929, 931 (Mass. 2009) ("While nothing in rule 1.6(b) required Attorney Doe to disclose [the client's] communications to the judge or police, he had discretion to do so.") *with* F.S.A. Bar Rule 4-1.6(b) (When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary (1) to prevent a client from committing a crime; or)2) to prevent a death or substantial bodily harm to another.").

There may also be exceptions requiring disclosure in your jurisdiction's child or elder abuse reporting statutes. VRLC has jurisdiction-specific FAQs and other resources to help understand the various privacy laws that may come into play when representing minor. We also have access to jurisdiction-specific information about protecting the privacy of elders and adults with disabilities. Please request these resources and information by contacting us at TA@victimrights.org.

[51] What is "reasonably certain" is subjective and can lead to sanctions against an attorney who reveals information too readily. *See The Florida Bar v. Knowles* 99 So.3d 918, 922 (Fla. 2012) (finding it was improper for attorney to disclose client's statement that she would do anything to avoid deportation, including lying to the court, because there was not a sufficient basis for the attorney to reasonably believe that her client was going to commit a crime by lying to the court at the upcoming hearing).

[52] Commentary to the Model Rules clarifies that this exception "addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated." Model Rules, Rule 1.6, cmt. 8. However, this exception does not apply when a person has committed a crime or fraud and then employs the lawyer for representation concerning that offense because the attorney's services must have been used to perpetrate the fraud. *Id. See also In re Mack*, 519 N.W.2d 900, 902 (Minn. 1994) (finding a violation of Rule 1.6, among others, when attorney knew that client lied in a deposition to cover up financial fraud, but did nothing to correct it).

[53] This rule also generally allows an attorney to reveal client confidences if necessary to establish or collect a lawyer's fee. *See generally In re Disciplinary Proceedings Against Boelter*, 985 P.2d 328, 334 (Wash. 1999) (attorney was permitted, but not required, to reveal client confidences or secrets in litigation to recover fees if he reasonably believed the disclosure to be necessary); ABA Formal Opinion 10-456 (July 14, 2010) ("A lawyer may disclose information protected by the rule only if the lawyer 'reasonably believes [it is] necessary' to do so in the lawyer's self-defense"); *In re Disciplinary Proceedings Against Thompson*, 847 N.W.2d 793, 800 (Wis. 2014) (stating that the attorney must have genuinely believed the disclosure to have been necessary, and the lawyer's belief must be objectively reasonable).

6. To comply with a law or court order; or
7. To detect and resolve a conflict of interest arising from an attorney's change in employment, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Like with the attorney-client privilege, the duty of confidentiality extends through the termination of the attorney-client relationship and does not end with the client's death.[54]

VAWA Confidentiality

Victim service providers who receive funding from OVW have additional legal confidentiality requirements under VAWA.[55] OVW-funded attorneys are subject to these requirements when they provide OVW-funded victim services. Victim services include "legal advocacy" and "accompaniment and advocacy through medical, civil or criminal justice, immigration, and social support systems.. .."[56] However, VAWA defines "legal assistance" separately from victim services.[57] "Legal assistance" includes assistance in specific matters and proceedings. If OVW-funded attorneys provide services that meet the definition of "victim services," then they must adhere to the VAWA confidentiality provisions. If an attorney only provides legal assistance to a client, and does not provide any victim services, then the VAWA confidentiality provisions would not apply to their legal work. **IMPORTANT NOTE:** Amendments to VAWA in 2022 incorporate "legal assistance" with "victim services." These amendments go into effect on October 1, 2022.

VAWA[58] prohibits disclosure of personally identifying information or individual information collected in connection with victim services requested, utilized, or denied by the individual without:

- the informed, written, reasonably time-limited consent of the individual,
- a statutory mandate to disclose,
- a mandate to disclose created by case law, or
- a court order to disclose the information.[59]

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[54] *McNelis v. Crain*, 78 N.E.3d 1237, 1241 (Ohio Ct. App. 2016).

[55] 34 U.S.C. § 12291 and 28 C.F.R. § 90.4.

[56] 34 U.S.C. § 12291(a)(44).

[57] 34 U.S.C. § 12291(a)(19).

[58] The Family Violence Prevention and Service Act (42 U.S.C. § 10402) and the Victims of Crime Act (28 C.F.R. § 94.115) also have similar nondisclosure provisions. VRLC has a Comparison Chart with these laws which you may request by contacting us at TA@victimrights.org.

[59] 34 U.S.C. § 12291(b)(2) and 28 C.F.R. § 90.4(b)(3)(i).

Personally identifying information is defined as "individually identifying information for or about an individual," including information likely to lead to disclosure of the individual's location.[60] It includes:

- first and last name;
- home or other physical address;
- contact information (including email or telephone number);
- Social Security number, driver license number, passport number, or student identification number; and
- any other information that would serve to identify the individual, including date of birth, racial or ethnic background, or religious affiliation.[61]

These confidentiality obligations attach to the entire program that is providing victim services, even if not everyone within the program is providing victim services (as defined by 34 U.S.C. § 12291(a)(44)).[62]

The VRLC hopes this overview helps attorneys, especially those funded by OVW, to understand, and to explain to their clients, their various confidentiality and privilege obligations. VRLC has also developed several client-centered explanations of the key obligations. Please contact us at TA@victimrights.org to access these explanations or for more information about this overview.

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[60] 34 U.S.C. § 12291(a)(20).

[61] *Id.*

[62] 34 U.S.C. § 12291(b)(2) (describing these obligations as attaching to the grantee or subgrantee organization).