TRANSFORMATION OF THE ETHICAL BOUNDARIES OF THE ATTORNEY-CLIENT PRIVILEGE IN RESPONSE TO THE GROWING COMPLEXITY OF THE MODERN BUSINESS WORLD[1]

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ABSTRACT

According to Judge Richard Posner, there has been an "enormous growth in the demand for legal services and . . . [a] huge increase in the size of the profession in response to that growth." The large increase in the number of licensed attorneys and the growing demand for expertise in certain precisely delineated areas of law resulted in a growing specialization among lawyers. This increased specialization of the legal profession, however, has resulted in changes in the manner in which clients, particularly institutional clients, are represented and has created new challenges in the legal system, including, for example, instances when clients are represented by more than one attorney. Multiple representations, in turn, have created ethical issues about the boundaries and application of the attorney-client privilege in this context. This article will analyze the development and current status of the issue and propose a two-step process to the application of the attorney-client privilege in instances of multiple representation and subsequent legal malpractice cases.

1. Attorneys distinguish between accusations of violations of their ethical code that are frequently raised in Attorney Registration and Disciplinary Commission ("ARDC") proceedings and negligence-based legal malpractice lawsuits seeking damages in the court of law. *See* Ann Peters, *The Model Rules As a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609 (1993); *see also* N. Gregory Smith, *Ethics v. Professionalism and the Louisiana Supreme Court*, 58 LA. L. REV. 539 (1998) (discussing the relationship between legal ethics and legal malpractice). This article will forego this distinction as it will primarily focus on the broad understanding of the ethical principles and their application to the legal profession.

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The proposed solution will also potentially apply to a number of relevant scenarios.

I. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege has been a permanent part of American jurisprudence since early common law and constitutes the foundation of the attorney-client relationship.[2] Initially, the privilege was created to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in observance of the law and administration of justice."[3] The policy underlying the privilege seeks to encourage "frank and candid disclosure" of all applicable information by the client, so that a lawyer is able to provide adequate advice.[4] The renowned evidence scholar, Professor John Wigmore, defines the attorney-client privilege as applying to anyone (1) seeking any kind of legal advice (2) from a professional, involving (3) communications that took place for that purpose, (4) confidentially (5) by the client, thereby subjecting such communications to (6) permanent protection (7) from disclosure by the legal adviser (8) except if confidentiality had been waived.[5]

Contrary to popular belief, the attorney-client privilege is not absolute and may be waived by the client.[6] This waiver gives the lawyer a right to reveal confidential information, sometimes without express permission of the client.[7] There are two defined categories of

2. *See* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 32.27 (5th ed. 2000) (citing Berd v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577), the earliest decision addressing the attorney-client privilege).

3. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). *Cf.* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 861 (1998) (suggesting that confidentiality should not be required in the attorney-client relationship because compliance with the privilege "generates significant unnecessary costs in the preservation of the secrecy, the proof of that preservation, and the resolution of disputes surrounding it").

4. 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, § 32.28 (5th ed. 2000). *See also Upjohn*, 449 U.S. at 390 ("[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.").

5. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 at 554 (McNaughten rev. ed. 1961).

6. *See In re* Grand Jury, 651 N.E.2d 696, 700 (Ill. App. Ct. 1995).

7. *See, e.g.,* Craig C. Martin & Mathew H. Metcalf, *The Fiduciary Exception to the Attorney-Client Privilege*, 34 TORT & INS. L.J. 827, 831 (1999) ("In appropriate circumstances, the attorney-client privilege will be abrogated to serve other interests deemed to be more important from a broad policy perspective.").