

impliedly authorized in order to carry out the representation, and exceptions as stated in paragraph (b).

Under paragraph (a)(1) of § 11.106, practitioner-client confidentiality obtains upon commencement of the practitioner-client relationship. Principles of substantive law external to these proposed rules determining when an attorney-client or agent-client relationship exists also determines whether a client-practitioner relationship exists. Although most of the duties flowing from the practitioner-client relationship attach only after the client has requested the practitioner to render legal services and the practitioner has agreed to do so, the duty of confidentiality imposed by this section attaches when the practitioner agrees to consider whether an attorney-client or agent-client relationship shall be established. Thus, a practitioner may be subject to a duty of confidentiality with respect to information disclosed by a client to enable the practitioner to determine whether representation of the potential client would involve a prohibited conflict of interest under proposed rules 11.107, 11.108, or 11.109.

The observance of the ethical obligation of a practitioner to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance. Almost without exception, clients come to practitioners in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes the client's confidences must be protected from disclosure. Based upon experience, practitioners know that almost all clients follow the advice given, and the law is upheld.

There would be a difference between § 11.106 and attorney-client evidentiary privilege and the work product doctrine. The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the work product doctrine in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work product doctrine apply in judicial and administrative proceedings in which a practitioner may be called as a witness or otherwise required to produce evidence concerning a client. Section 11.106 would not be intended to govern or affect judicial or administrative application of the attorney-client privilege or work product doctrine. The privilege and doctrine were developed

to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the practitioner. The fact that in exceptional situations the practitioner under § 11.106 would have limited discretion, and pursuant to § 1.56, a requirement, to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work product doctrine. The privilege is applicable in certain cases to communications between registered patent agents and their clients. *See, e.g., In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 392–394 (D.D.C. 1978).

A fundamental principle in the client-lawyer or client-agent relationship is that the practitioner maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies 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 applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A practitioner would not be permitted to disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

In addition to prohibiting the disclosure of a client's confidences and secrets, paragraph (a)(2) provides that a practitioner may not use the client's confidences and secrets to the disadvantage of the client. For example, a practitioner who has learned of the abandonment or allowance of a client's patent application may not file a patent application in the practitioner's own

name on a variation or an improvement of the client's invention if doing so may adversely affect the client's ability to market the invention or patent rights. Similarly, information acquired by the practitioner in the course of representing a client may not be used to the disadvantage of that client even after the termination of the practitioner's representation of the client. However, the fact that a practitioner has once served a client does not preclude the practitioner from using generally known information about the former client when later representing another client. Under proposed rules (a)(3) and (d)(2), a practitioner may use a client's confidences and secrets for the practitioner's own benefit or that of a third party only after the practitioner has made full disclosure to the client regarding the proposed use of the information and obtained the client's affirmative consent to the use in question.

*Implied authorized disclosure.* A practitioner is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In patent prosecution, for example, a practitioner and applicant must disclose information material to the patentability of the pending claims. In another example, in litigation a practitioner may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Practitioners in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified practitioners.

*Paragraph (b) of § 11.106* would provide for disclosures adverse to the client. The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a practitioner may foresee that the client intends serious harm to another person.

However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the practitioner to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished. First, the practitioner may not counsel or assist a client in conduct that is criminal or fraudulent. *See* proposed § 11.102(d). *See also Kingsland v. Dorsey*, 338 U.S. 318