

TEXAS LAWYER

COMMENTARY

Keeping Secrets: ‘Til Death Do Us Part?

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Lawyers and mental health professionals jointly deal with a variety of people. Does the obligation to maintain client confidences extend beyond the client/patient’s death? This article explores the nuances of these key professional obligations, their ethical foundations, and how these obligations are impacted by legal processes and publicly accessible information.

Attorney-Client Confidentiality

Ethical Foundation and Scope

The duty of confidentiality for Texas attorneys is primarily rooted in Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. Confidential information is defined as including two crucial aspects:

1. Privileged information protected by attorney-client privilege.
2. Unprivileged client information acquired during representation.

The scope of the duty to maintain client confidentiality is extensive, covering virtually all information related to the client or furnished by the client during the course of representation. What's in the balance? Attorneys must walk a tightrope regarding their duty of candor to court versus their duty to be loyal to their client and to represent that client zealously, all while maintaining client confidentiality.

Exceptions and Disclosure

While the “big print” prohibits disclosure, there are specific circumstances where an attorney may or must reveal confidential information.

Permissive Disclosure

- When expressly authorized by the client.
- To comply with court orders, ethics rules or other laws.
- To prevent a client from lying to the court.
- To prevent the client from committing a criminal or fraudulent act likely to result in death or substantial bodily harm.
- To prevent child abuse.

Mandatory Disclosure

- When required to correct false evidence presented to a court.
- To prevent facilitating a client’s criminal or fraudulent act—note, however, Texas Center for Legal Ethics Opinion 692, which states:

“The lawyer should ... alert the client to the potential civil and criminal implications of his false testimony. If the client refuses to correct the false testimony (sic: given in a deposition), the lawyer is not obligated to disclose the true facts, but he may have professional discretion to do so if one of the provisions in Rule 1.05(c) is satisfied. Whether or not the lawyer is permitted to disclose the true facts, he may also seek to withdraw in accordance with the Rules (though he is not required to).”

Impact of Grievances or Malpractice Actions

When an attorney faces a grievance or a malpractice action, the confidentiality rule is modified to allow for self-defense. Texas Rule of Professional Conduct 105(c)(6) permits disclosure of confidential information “to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer.” This exception is narrow, and discretion must be used, to ensure that only information required for the lawyer’s defense is revealed.

Survival After Client’s Death

The duty to maintain client confidentiality generally survives the client’s death. However, there are exceptions, particularly in matters involving the deceased client’s estate. In such cases, the attorney may disclose information necessary to settle disputes among heirs or other parties. Canon 4 of the Code of Ethics and Professional Responsibility of

the Paralegal Division of the State Bar of Texas states: “A paralegal shall preserve and protect the confidences and secrets of a client.” The duty to maintain confidences extends to the attorney’s support staff.

Psychologist-Patient Confidentiality

Ethical Foundation and Scope

Psychologist-patient confidentiality is governed in part by the Texas State Board of Examiners of Psychologists rules, specifically Rule 465.12. This rule mandates that psychologists protect confidential information obtained in practice or consultation. There are many other guidelines to which psychologists who perform child custody evaluations must be aware of. HIPAA may also apply.

Exceptions and Disclosure

Psychologists may disclose confidential information under specific circumstances:

- With written consent from the patient or legal guardian.
- When required by law, such as in cases where the psychologist is subpoenaed to testify and/or must report suspected child abuse or elder abuse.
- To protect the patient or others from imminent physical harm.
- In legal proceedings where the psychologist’s services are an issue.

Impact of Grievances and Complaints

When facing a complaint, psychologists may disclose confidential information to defend themselves in legal or administrative proceedings. In most cases, the psychologist will notify their malpractice insurance

carrier. The carrier will suggest or provide an attorney to represent the psychologist. Here, the attorney will want to review the entire case file. The psychologist is now the attorney's client. The attorney must now safeguard the confidences in the psychologist's file and must limit disclosures to what is necessary for their defense.

Survival After Patient's Death

Like attorney-client confidentiality, psychologist-patient confidentiality generally survives the patient's death. Exceptions may apply in some cases. These include cases involving the deceased party's estate, and in criminal cases and/or in wrongful death cases.

Appellate Process

During appeals, confidentiality remains crucial. However, certain information may become part of the public record:

1. Court filings: Legal arguments and factual summaries in appellate briefs may contain previously confidential information, making that information a matter of public record.
2. Published opinions: Appellate court decisions often discuss case details, potentially revealing confidential information.
3. Oral arguments: These are typically public and may involve discussion of confidential matters.

Publicly Available Information

Once information becomes part of the public record, it may lose its confidential status, including the following circumstances:

1. Media coverage: High-profile cases often receive media attention, potentially exposing confidential information.
2. Online court records: Many jurisdictions provide online access to court records, making case information readily available unless proactive steps are taken to enter a confidentiality or protective order as to patient records.
3. Professional disciplinary records: Some states publish disciplinary actions against attorneys and psychologists, which may include details of breaches of confidentiality.

Conclusion

The duties of confidentiality for attorneys and psychologists are fundamental to their professional relationships and to the integrity of their respective disciplines. While these obligations are robust and generally survive the client or patient's death, they are not absolute. Both attorneys and psychologists must navigate complex ethical landscapes, maintaining some sense of equilibrium between the mandate to maintain confidentiality with legal requirements, ethical canons, and public interest.

Legal and mental health professionals must remain vigilant in protecting confidential information beyond the death of a client and/or patient, while recognizing that legitimate exceptions exist to that general rubric. By understanding the nuances of these rules and their applications in various contexts, including grievances and appeals, we can better serve our clients and patients while upholding the highest ethical standards of our respective professions.

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