

The Attorney-Client Privilege Rules and Legal Education

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The focus of these hearings is on recent attacks on the attorney-client privilege as being too broad. However, in my testimony, I want to bring to the Task Force's attention one significant area in which the current privilege rules are *too narrow*, to the detriment of American legal education. It may seem surprising to argue for even a modest expansion of the attorney-client privilege rules these days, but a small change to the privilege waiver rules could have a significant impact on the efforts of American law schools and the practicing bar to provide law students with much-needed "experiential" education.

The current attorney-client privilege waiver rules in most jurisdictions provide that the privilege is waived if confidential communications between an attorney and a client take place in the presence of a third party who is not strictly necessary to the lawyer's representation of the client.¹ The law generally does not distinguish between law students and other third parties for purposes of this rule.² Thus, no matter how

¹ See, e.g., *Wesp v. Everson*, 33 P.3d 191, 197 (Colo. 2001); *State v. Romeo*, 542 N.W.2d 543, 548 (Iowa 1996); *Commonwealth v. Senior*, 433 Mass. 453, 744 N.E.2d 614, 617-18 (2001); *State v. Rhodes*, 627 N.W.2d 74, 85 (Minn. 2001); *Doe v. Poe*, 700 N.E.2d 309, 310, 92 N.Y.2d 864, 677 N.Y.S.2d 770 (1998).

² See, e.g., *People v. Doe*, 99 Misc. 2d 411, 415, 416 N.Y.S.2d 466, 469 (Sup. Ct. 1979); *State v.*

valuable the learning experience of observing an experienced practitioner interact with an actual client, the mere presence of law students observing the meeting could destroy the client's right to assert the attorney-client privilege. Attorneys who might otherwise be willing to act as volunteer mentors may have to exclude students from client meetings in which confidential information might be disclosed, or risk waiving their client's rights.

Although discussion of the waiver rules typically focuses on the importance of the privilege to the client, the privilege does not protect the client's secrets for privacy's sake, but rather is directed at the proper working of the legal system as a whole, and the attorney-client relationship within it. The true beneficiary of the privilege is not the individual client so much as the overall administration of justice, which depends on frank and open attorney-client communication.³ However, the quality of legal education in this country is also critical to the proper working of the legal system and of the attorney-client relationship, and the privilege waiver rules unnecessarily impede students' opportunities for experiential education.

Lender, 266 Minn. 561, 565, 124 N.W.2d 355, 359 (1963); *Dierstein v. Schubkagel*, 131 Pa. 46, 54, 18 A. 1059, 1060 (1890) ("A law student is, in this respect, on no higher plane than a blacksmith retained in a like service."); *Barnes v. Harris*, 61 Mass. (7 Cush.) 576, 578 (1851).

³ See, e.g., *In re Investigating Grand Jury*, 593 A.2d 402, 406 (Pa. 1991).

Although there are some exceptions to the third-party waiver rules for law clinic students⁴ and necessary employees of the lawyer,⁵ these exceptions do not cover all situations in which law students legitimately may be present for educational purposes. Thus, by including law students in the category of “third parties” (other than the attorney and client) who trigger a waiver of the attorney-client privilege, the waiver rule obstructs an important opportunity for experiential learning.

Experiential education is a critical, effective way for students to learn lawyering skills and ethical judgment. Legal educators recognize that certain skills are learned primarily through hands-on experience and are best learned in an authentic setting (i.e., with real clients).⁶ Among the essential lawyering skills that are learned primarily by experience are communication skills, client interviewing and fact investigation skills, problem solving, client counseling skills, and ethical decision making skills. Additionally, the ability to develop and function effectively within the lawyer-client relationship itself is at the very core of a lawyer’s work. Law students

⁴ Under the student practice rules of all states, certified law students (usually those enrolled in law school clinical programs) are authorized to perform certain lawyering tasks for clients under the supervision of an attorney and are thus protected by the attorney-client privilege either implicitly or by specific language. *See, e.g.*, ARIZ. SUP. CT. R. V. 38; OHIO SUP. CT. R. FOR THE GOVERNMENT OF THE BAR II; WASH. ADMISSION TO PRACTICE R. 9 (d) (6); MASS. SUP. JUDICIAL CT. R. 3:03.

⁵ *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290.

⁶ *See, e.g.*, J. P. OGILVY, LEAH WORTHAM & LISA G. LERMAN, LEARNING FROM PRACTICE, A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS 3 (1998).

should have every opportunity to learn and practice these skills to prepare themselves for their future responsibilities as lawyers.

However, in most American law schools, students may graduate having very little experience in many of the skills that lawyers must possess to represent clients competently and ethically. Although they spend hundreds of classroom hours learning legal analysis and doctrine, law students often have very limited opportunities to learn other essential skills. Surveys of practicing lawyers reveal the widespread belief that law schools fall short in teaching many essential lawyering skills.⁷

Although law schools provide some opportunities for experiential learning in live-client clinics, law clinics are expensive learning vehicles, so they typically accommodate only a fraction of a school's students. This is in sharp contrast to the typical education of novices in another learned profession that requires theoretical knowledge, analytical ability, and practice skills: medical students are exposed to live clients and clinical practice early, sometimes even in their first few months of medical school.⁸ Law students, however, may finish their years of law school and be licensed to the bar without ever having had exposure to a real client.

⁷ See, e.g., John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction*, 26 WM. MITCHELL L. REV. 327, 335 (2000); Bryant G. Garth & Joann Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993).

⁸ David Stern, *Outside the Classroom: Teaching and Evaluating Future Physicians*, 20 GA. ST. UNIV. L. REV. 877, 893 (2004).

Whatever the merits of *requiring* law clinic experience of all law students, the reality in many American law schools is that it would be too expensive to provide clinical training for all students. And yet, despite the urgent need for affordable experiential learning opportunities for law students, the attorney-client privilege waiver rules may impede attempts by law schools and practicing lawyers to provide students with such contact with clients. At the very least, any uncertainty about the privilege waiver rules has a chilling effect on lawyers who would otherwise be willing to include students in client meetings that are rich with educational potential.

The Report of the ABA Task Force on Law Schools and the Profession recognized the practicing bar's shared obligation with law schools to educate future members of the profession.⁹ However, the third party waiver rules of the attorney-client privilege limit the important contributions that the bar could make toward legal education by providing low cost experiential learning opportunities with real clients.

In summary, the privilege waiver rules effectively exclude law students from important and affordable opportunities for experiential learning. This represents the law's failure to acknowledge the direction of modern legal education and the practical attempts by law schools and the bar to enhance the competence and ethical development of future members

⁹ AMER. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT--AN EDUCATIONAL

of a profession that is criticized frequently on grounds of competence and ethics. I urge the Task Force to recommend that states amend their student practice rules¹⁰ to specifically exempt law students from the third-party waiver rule of the attorney-client privilege.

CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992)[the "MACCRATE REPORT"].

¹⁰ Many states' student practice rules are based on the ABA MODEL STUDENT PRACTICE RULE (1969) (reprinted in *Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. & MARY L. REV. 353, 476-79 (1973)), which was partly intended to encourage [experiential] clinical education.