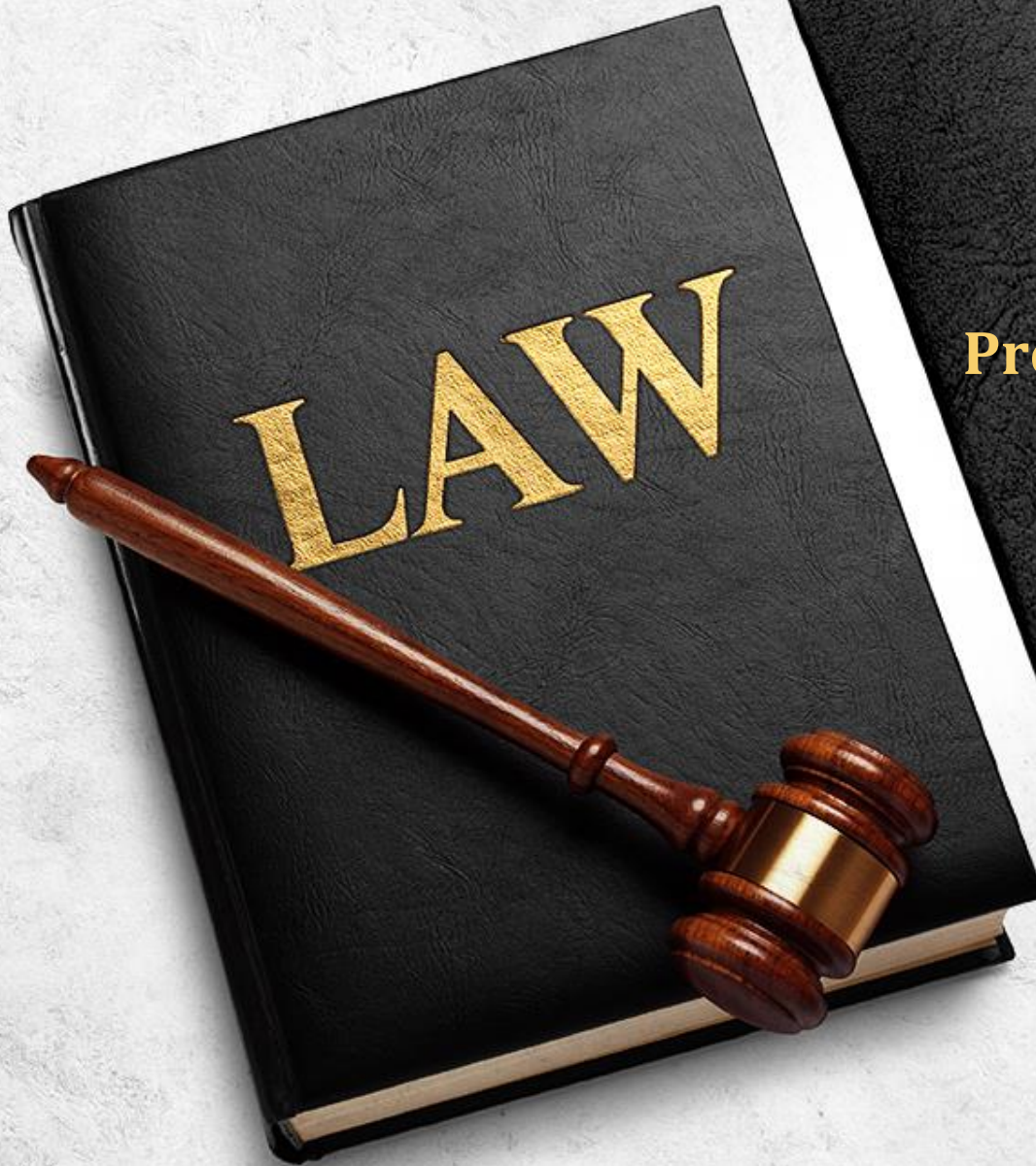


Legal Ethics

Lecture 09

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The Work Product Doctrine

- **Basic Rule:**
 - Material prepared by a legal professional or firm
 - In anticipation of litigation
 - Is not discoverable by the other party in court or in pre-trial discovery
- **Reason:**
 - A legal professional needs to be able to keep good notes without having to worry that those notes will later help the other side upon being discoverable (i.e. it would reveal information she worked hard to get at and/or reveal trial strategy).
- **Caveats:**
 - Does not apply to the evidence itself (i.e., the documents that were the source of the work product or the identity of the witnesses)
 - It is discoverable if the other side demonstrates a **substantial need** and is unable to obtain the information or its equivalent without undue hardship



The Work Product Doctrine: Nature of the Rule

- A rule of discovery
- NOT an evidentiary rule or an ethical rule
- **Thus:**
 - It protects the right to not reveal information sought of an attorney or employee of a law firm
 - It applies in court to some extent; but mostly, it's relevant to pre-trial discovery
 - It must be asserted by the attorney or legal professional of whom the discovery is being sought; if it is revealed, even by accident, it's too late
- *Hickman v. Taylor*, 329 U.S. 495 (1947)
 - **Opposing counsel must demonstrate necessity, justification, or undue prejudice for access to counsel's written statements, private memoranda, and personal recollections.**



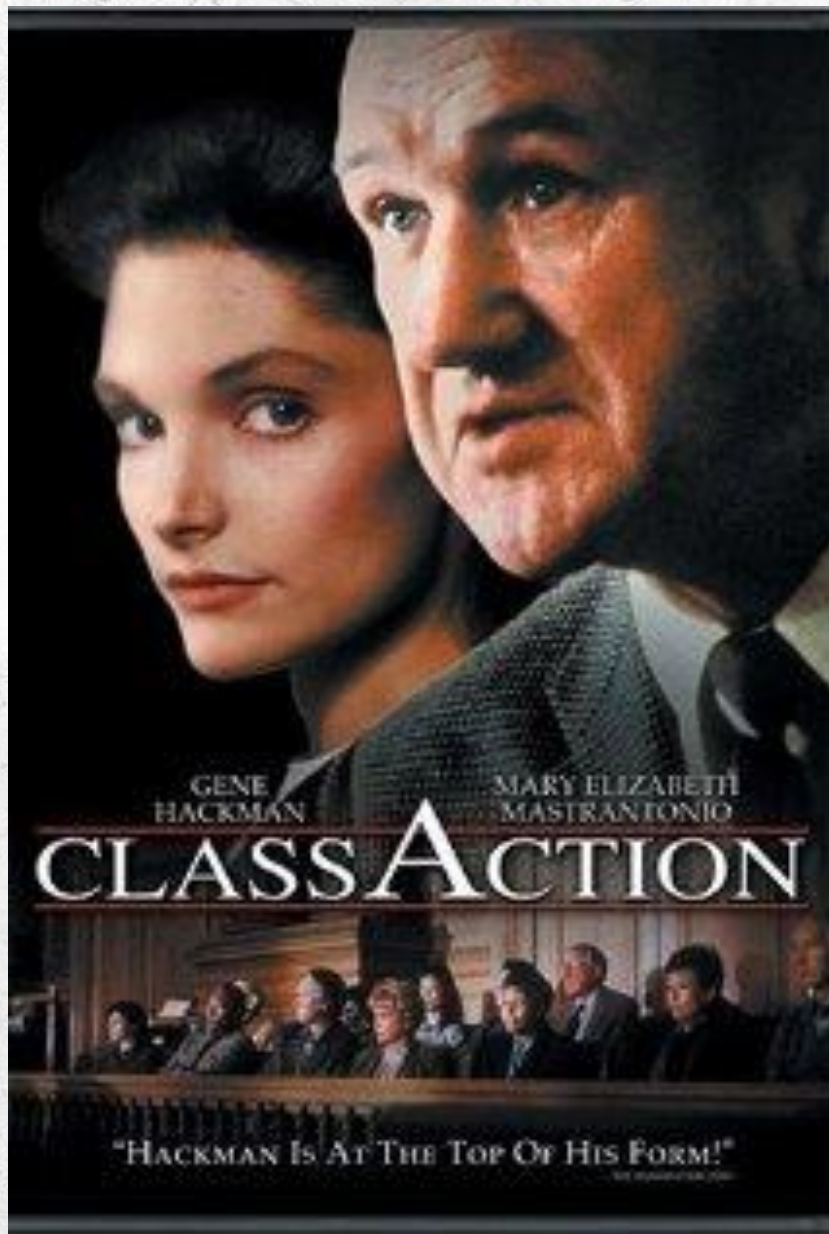
Lawyer For An Organization

- A lawyer who represents an organization, such as a Corporation, a labor union, or a public-interest organization, represents the organization, not its officers.
- At times, the interests of the organization and its officers may converge.
- Under such circumstances, a lawyer may represent both the organization and its officers, but the lawyer must withdraw if the interests of the organization and the officers diverge.
MR 1.13.



Class Action (1991)

M_ClassAct_04



Spousal Privileges

- Two distinct privileges with separate policy reasons
- **Spousal Testimony Privilege (Immunity)**
- **Reason:**
 - To avoid causing disharmony between married people
- **Rule:**
 - One spouse cannot be forced to testify against his or her spouse
 - Applies even to actions that happened before the marriage
 - Applies to any form of testimony
- **Caveats:**
 - Applies only between **spouses who are currently married**
 - The testifying spouse can waive the rule and testify against the other spouse



Spousal Privileges

- **Marital Communications Privilege**
- **Reason:**
 - To encourage open communication between spouses
- **Rules:**
 - One spouse CANNOT testify as to communications made by the other spouse during the course of the marriage
 - Cannot be waived by the testifying spouse
 - Applies even if they are divorced; as long as the communication was made during the marriage
- **Caveats:**
 - Applies only to communications; not any other facts; such as eyewitness testimony
 - Applies only to **communications made during the course of the marriage**



What's The Difference?

- **Spousal Testimony Privilege**

- Historically, the spousal testimony privilege allowed a spouse in a criminal trial to deny his spouse from testifying against him. But many states, and the U.S. Supreme Court, now hold that the spouse who might act as a witness is the one who holds the power to testify or not.
- **This privilege lasts only as long as the marriage does**, and a divorced spouse may testify about any events that occurred before, during, and after the marriage without disrupting the spousal testimony privilege.

- **Marital Communications Privilege**

- Unlike the spousal testimony privilege, this privilege lasts long after the marriage is over - but it only applies to communications that **occurred *during* the marriage.**
- Using the marital communications privilege makes it possible for either spouse to object to presentation of evidence regarding communications between the two which happened during the marriage.
- It is destroyed when communication is shared or overheard by someone outside the marriage.



Client Confidentiality Summary

- The lawyer-client privilege is a rule of evidence that applies to communications made in confidence to a lawyer by a client for the purpose of seeking or obtaining legal advice.
- The lawyer-client privilege protects communications between clients and their lawyers to encourage open dialogue, while the work product doctrine is broader and precludes lawyers from capitalizing on an adversary's work efforts.
- The ethical duty of confidentiality applies to any information you learn about your client's case, from your client and from anyone else. MR 1.6, Comment 3.
- You cannot use confidential information to your client's disadvantage or to your advantage. MR 1.8(b), 1.9(c)(1).



Client Confidentiality Summary

- Government and corporate lawyers owe a duty of confidentiality to the entity, which is the client, rather than an individual. MR 1.13
- The obligation to preserve your client's confidential information generally survives the end of your lawyer-client relationship with her. MR 1.6, 1.9(c)(2)
- Because the lawyer-client privilege and the ethical duty of confidentiality belong to your client, she is the only one who can waive her right to their protection.
- A client may waive explicitly or implicitly. An express waiver requires that you obtain her informed consent.
- As in other contexts, you must take reasonable care with your client's confidential information when using telephones, emails, and wireless technology. MR 1.6, Comment 17



Client Confidentiality Summary

- You have the discretion to “reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary” to:
 - Prevent reasonably certain death or substantial bodily harm. MR 1.6(b)(1)
 - Secure legal advice. MR 1.6(b)(4)
 - Establish a claim or defense. MR 1.6, Comment 11
 - Comply with other law or a court order.
 - Prevent your client from carrying out a crime or fraud reasonably certain to cause substantial injury to another person’s financial interests or property and which involved your client’s use of your services.
 - Prevent fraud on an entity.



Client Confidentiality Summary

- You must disclose confidential information to prevent client fraud on a tribunal. MR 3.3
- Implicitly authorized disclosure occurs when lawyers in the same firm discuss their cases, even if the client hired only one of the lawyers. ABA Formal Opinion 08-453
- When lawyers for co-parties pool their information, whether these communications are protected depends on the existence of the joint defense privilege, an extension of the lawyer-client privilege.
- When you represent more than one client in the same matter, you must tell each of them about the joint client exception to the lawyer-client privilege. MR 1.7, Comment 30



Quick Quiz



End Of Class Review Quiz

**THE
BIG
QUIZ**



The End

