

THE ATTORNEY-CLIENT PRIVILEGE

A GCR client can feel secure from the potential risk of having sensitive information fall into the wrong hands because of an extremely complex and competitive legal climate saturated by consultants, technical advisors and outside experts. By its very nature, the attorney-client relationship affords a distinct, invaluable right to have communications protected from compelled disclosure to any third party, including self-interested business associates and competitors as well as government agencies.

The attorney-client privilege is one of the oldest Anglo-American jurisprudence privileges. Its use was firmly established in English law axiom and grounded in the concept of honor and the privilege worked to bar any testimony by the attorney against the client.

As the privilege has evolved, countless policy justifications have played a role in its development. At its most basic, the privilege ensures “that one who seeks advice or aid from a lawyer should be completely free of any fear that his personal secrets will be uncovered.” Thus, the principle of the endowed is to provide for “sound legal advice [and] advocacy.” With the security of the privilege, the client may speak frankly and openly to legal counsel, disclosing all relevant information to the attorney and creating a “zone of privacy.” So, if what we say is shielded by privilege, the client may be more willing to communicate to counsel those things that might otherwise be hidden from fact. So such candor and honesty will assist the attorney in providing more accurate, well-reasoned professional advice, and the client can feel more secure in the knowledge that his statements to his lawyer will not be taken as an adverse admission or used against his interest.

So, armed with full knowledge, counselors at law are better equipped to satisfy all of their professional responsibilities, uphold their duties of good faith and loyalty to the client, and [contribute] to the efficient administration of justice.

For all of its policy considerations and justifications, the attorney-client privilege has a very real practical consequence: the attorney may neither be compelled to nor may he or she voluntarily disclose matters conveyed in confidence to him or her by the client for the purpose of seeking legal counsel. Likewise, the client may not be compelled to testify regarding matters communicated to the lawyer for the purpose of seeking legal counsel. So, what is the privilege and when does it apply?

Although there is no single authority on the attorney-client privilege, it has been defined as:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications

relating to that purpose made in confidence by the client, at his [or her] instance permanently protected from disclosure by [the client or by the legal adviser, except the protection be waived.

In principal the privilege applies only if:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made
 - (a) is a member of the bar of a court, or his subordinate and
 - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
 - (a) by his client
 - (b) without the presence of strangers
 - (c) for the purpose of securing primarily either
 - (i) an opinion on law or
 - (ii) legal services or
 - (iii) assistance in some legal proceeding, and not
 - (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been
 - (a) claimed and
 - (b) not waived by the "client."

No matter how the attorney-client privilege is articulated, there are four basic elements necessary to establish its existence:

(1) a communication made between privileged persons in confidence; or for the purpose of seeking, obtaining or providing legal assistance to the client.

(2) before the privilege exists, there must be an attorney-client relationship. As elementary as this concept seems, many clients may assume the relationship exists and mistakenly rely upon the protection of the privilege, but the privilege does not exist until the relationship is firmly established. So, the attorney-client privilege does not take hold until the parties have agreed on the representation of the client.

(3) in the majority of cases, the determination the attorney-client relationship exists is not an in depth study, the attorney has expressly acknowledged representation of the client. Such an express acknowledgment may be demonstrated by an engagement letter, a fee contract, or even an oral agreement as to the scope of the representation. An attorney-client relationship may also be expressly acknowledged by the "appearance" of the attorney on behalf of the client, including filing pleadings in court for the client, drafting documents on behalf of the client, or appearing in court as the representative of a litigant. However, it is not always so clear when an attorney-client relationship exists. So an express contract is not necessary to form an attorney-client relationship; the relationship may be implied from the conduct of the parties. However, the relationship cannot exist unilaterally in the mind of the potential client absent a "reasonable belief" that the attorney-client relationship exists. The implied relationship or agency may be evidenced by several factors, including, but not limited to, the circumstances of the conversation, the payment of fees to an attorney, the degree of sophistication of the would-be client, the request for and receipt of legal advice, and the

history of legal representation between the alleged client and the practitioner. While this list of factors is illustrative, none of these factors, standing alone, will affirmatively establish the existence of an attorney-client relationship. So without more, a confidential relationship likely does not exist unless there is some history of former representation. If the conversation continued, and any legal advice, might have a reasonable belief if that the relationship exists. This reasonable belief would be strengthened by evidence that a potential course of action, and other details regarding the future handling of the matter could result a determinable result.

(4) the potential client is now a business entity. And in the corporate context, the attorney-client privilege exists between outside counsel and the corporation. Necessarily, the invocation of this right by a corporation is more complex than when an individual is involved, as a corporation is an artificial “person” created by law and is only able to act through a representative, including officers, directors and employees.

In 2011 the courts faced the task of determining when the attorney-client privilege applies when a corporation is the client. For years, courts employed one of two tests: the subject matter test and the control group test. Now do we encompass the corporate duties and responsibilities of the employee? If so if our hypothetical is called not on her own behalf, but on behalf of a corporation, they are the president or chief financial officer, and discusses with a attorney, the tax exposure or potential liability of their company, they are the president of the corporation, the privilege clearly extends to these communications. So, based upon the current trend of the courts, conversations with the attorney are privileged so long as the issues she discusses with the attorney are directly related to their responsibilities within the company.

The courts will extend the attorney-client privilege to corporate officers, even as an individual, as long as there is clear evidence that the corporate officer communicated with counsel in the officer’s individual capacity concerning personal matters such as potential individual liability. Not surprisingly, the showing required of the corporate employee in this regard is a more stringent one. Moreover, even if the requisite showing is made, certain information might create a conflict of interest for the corporate attorney. In that case, the corporate attorney must end the conversation and advise the corporate employee to seek separate counsel.

Another consideration arises in the context of in-house counsel. A communication relating to corporate legal matters between a corporation’s in-house counsel and the corporation’s outside counsel is normally subject to the privilege. However, when the communication is between a representative of the corporation and the in-house counsel, the distinction is less clear. Because in-house counsel often wears several hats, courts have struggled with the application of the privilege. The privilege would extend to any legal advice rendered, but it does not protect communications which are strictly business-related. Problems arise when the communication contains both legal and business advice, and the courts take different approaches in determining whether or not to apply the privilege. At the very least, it appears that the court will first attempt to determine what role in-house counsel plays within the company — that of a lawyer or

that of a corporate executive. From there, many courts will examine the content of the communication, and this examination will yield varying results. So, the in-house lawyer should be careful to separate his legal advice from his business opinions.

Assuming the attorney-client agency is well-established, is every communication protected?

It depends. The basic attorney-client privilege protects client communications with the attorney, also extends to responsive communications from the lawyer to the client. However, the communication need not be overt so as an oral or written action. The slightest action or inaction, such as an affirmative nod or complete silence, may constitute a communication. Suppose a client is speaking with their attorney, about a matter involving a recent sale of stock that is under investigation by the SEC. The client asks another whether they've received any confidential, nonpublic information prior to the sale of her stock, and they silently nod their head in the affirmative. Although no words were exchanged, this communication is clearly protected by the privilege.

So, a client cannot protect facts from disclosure simply by communicating them to a lawyer. If information may be gathered from another source besides the privileged communication, then the underlying information itself is not privileged. Stated differently, the attorney-client privilege "protects communications made to obtain legal advice; it does not protect the information communicated." Clients and attorneys alike must bear this important fact in mind: merely conveying something to an attorney will not prevent the underlying facts from compelled disclosure, if they can be discovered from a non-privileged source.

But since the client, and not the attorney, holds the privilege, the client holds the ultimate authority to assert or waive it. When the client is a corporation, the privilege is commonly viewed as a matter of corporate control. So, corporate management or the "control group," including the officers and directors, decide whether to assert or waive the privilege. If and when there is a change in the control of the corporation, ownership of the privilege is a spoil that passes to the successors; it does not remain with the former corporate management.

The issue of waiver arises most commonly when a communication is witnessed by a third party or where the client does not intend the communication to be confidential. The mere presence of a third party will likely prevent the creation of the attorney-client privilege. Suppose that a client and their stockbroker meet to discuss the suspect sale of stock. The attorney represents the client, but not the stockbroker. During the course of the meeting, the seller discloses sensitive information. Under this scenario, the privilege is likely waived and the information conveyed does not enjoy protection from disclosure. But what if the communication is disclosed to a third party after a privileged exchange between attorney and client? Has the privilege been waived? Unlike a client's constitutional rights, which can only be intentionally and knowingly waived, the attorney-client privilege may be waived by a careless, unintentional or inadvertent disclosure.

And the privilege becomes more complex state by state. In California when officers, directors, shareholders, or employees' interests conflict with the organization's interests, the attorney is expected to explain that the attorney is representing the entire

organization, not them as individuals. The lawyer “should not be influenced by the personal desires of any person or organization” because the only client is the “corporate entity actually represented.”

In California the Rule’s Definition of “Client” Does Not Apply to Government Entities
The rule designates “client” as “the organization itself, acting through the highest authorized officer, employee, body, or constituent overseeing the particular engagement.”

In a non-governmental corporation, this “client” is clearly identifiable because there is often a hierarchy of power and a formal procedure for decision making.

However, in the government context, this concept of “highest authorized officer” is ambiguous at best because there are many stakeholders who have “authority” to make decisions for the organization, and it may be difficult to prioritize who is the “highest” in command.

The legislature may allocate funding and regulate the organizational structure while the executive branch appoints the director.

This multi-layered approach to administering a governmental organization makes it unclear who has the ultimate responsibility for the organization. Without that information, the attorney cannot know to whom they owe the duty of confidentiality.

There are also some public policy exceptions to the application of the attorney-client privilege. Some of the most common exceptions to the privilege include:

1. **Death of a Client.** The privilege may be breached upon the death of a testator-client if litigation ensues between the decedent’s heirs, legatees or other parties claiming under the deceased client.
2. **Fiduciary Duty.** A corporation’s right to assert the attorney-client privilege is not absolute. An exception to the privilege has been carved out when the corporation’s shareholders wish to pierce the corporation’s attorney-client privilege.
3. **Crime or Fraud Exception.** If a client seeks advice from an attorney to assist with the furtherance of a crime or fraud or the post-commission concealment of the crime or fraud, then the communication is not privileged. If, however, the client has completed a crime or fraud and then seeks the advice of legal counsel, such communications are privileged unless the client considers covering up the crime or fraud.
4. **Common Interest Exception.** If two parties are represented by the same attorney in a single legal matter, neither client may assert the attorney-client privilege against the other in subsequent litigation if the subsequent litigation pertained to the subject matter of the previous joint representation.

In addition to these more traditional policy exceptions to the application of the privilege, recent events remind us that the privilege is not at all absolute. In the wake of the events of September 11, 2001, for example, Congress enacted, in swift fashion, the USA Patriot Act, allowing for, among other things, increased authority to conduct searches and monitor activity without judicial intervention.

The USA Patriot Act led to a number of new rules and executive orders from the Bush Administration, including the widely criticized Bureau of Prisons Rule. This rule “authorizes the Attorney General to order the [Bureau of Prisons] Director to monitor or review communications between inmates and lawyers for the purpose of deterring future acts that could result in death or serious bodily injury to persons or property.” All that is required before such monitoring can begin is a “reasonable suspicion ... that a particular inmate may use attorney-client communications to facilitate acts of terrorism.” Although the long-term effects of this new rule cannot be known, one is reminded that the privilege itself is not immune from the political climate in which we live.

Not all components of the attorney-client relationship are protected by or encompassed within the attorney-client privilege. For example, the existence of the attorney-client relationship or the length of the relationship are not privileged bits of information.

The general nature of the services performed by the lawyer, including the terms and conditions of the retention, are generally discoverable.

The factual circumstances surrounding the communications between an attorney and a client, such as the date of the communication and the identity of persons copied on correspondence, are likewise not privileged.

Participants in a meeting with an attorney, the length of a consultation and the documents evidencing same (*e.g.* Note and appointment books) are not necessarily protected from compelled disclosure. As for the fee arrangement between an attorney and a client, these documents are typically discoverable, except where such discovery would produce confidential communications with the client.

While the attorney-client privilege is firmly established as a legal doctrine protecting confidential communications between lawyers and their clients, its application is not absolute. The circumstances of the communication, its content and even subsequent actions relating to the privileged communication must be carefully considered to preserve the integrity of the privilege.