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Clients' Guide to Attorney-Client Privilege

Most are aware that communications between an individual and his attorney are “privileged”, but few know when and to what the privilege applies, or how it can be lost. Given how important the privilege is, and how damaging the implications of its loss can be, a client with only a little knowledge of attorney client privilege can be a dangerous thing.

In order to provide some understanding of these issues, this article will explain what this privilege is, how it can be lost, and finally some principles a client should keep in mind about attorney-client privilege when interacting with its attorney.

What is the privilege?

Attorney client privilege is one of the oldest, and most important, privileges in law. The privilege is established in all fifty states and in the “common law” of the United States. In fact, a California court has held that “the privilege of confidential communication between client and attorney should not only be liberally construed, but must be regarded as sacred”.¹ The United States Supreme Court has explained that the privilege is essential to permit the “full and frank” disclosure of information by a client to its attorney, without which an attorney cannot provide considered and accurate advice to the client.

The client– and only the client – holds the privilege and the client alone may decide whether the privileged communications may be disclosed. Importantly, no matter how compelling the public interest is in the information, a court cannot order the disclosure of the privileged communications. In fact, the privilege even survives the death of the client.

The privilege is broad and is not subject to any weighing of interests once it attaches. Given the breadth and scope of the privilege, however, certain conditions must be present when the communications are made in order for the privilege to attach. First, the “privilege holder” must be either a client of the attorney, or must have made the disclosures when seeking representation of the attorney. Absent such a relationship, the communications are not privileged.

Second, the person to whom the communication is made must be an attorney, who is acting as an attorney at the time of the communication.

¹ *People v. Flores* (1977) 71 Cal. App. 3d 559, 565.

While this seems straightforward, the application of the privilege is not always clear. For example, the fact that a person is a licensed attorney may not by itself satisfy this condition if the person is acting in another role, for example as a corporate officer. Similarly, in some countries in Europe “in-house counsel” are not considered attorneys for the purpose of privilege, so even communications to corporate counsel may not be privileged.

Finally, the purpose of the communication must be to seek legal advice. While most applications of this condition are clear, a client must understand that communications are not necessarily privileged if they are not part of seeking legal advice, such as recounting basic facts that were not otherwise confidential, scheduling matters, etc. Further, if the communication would not otherwise be privileged, the client and attorney cannot make it privileged simply by communicating the information to each other.

How is the privilege lost?

Once the privilege exists, the client and his counsel must make certain not to waive the privilege and invalidate it. The easiest way for the client to lose the privilege is by disclosing it to someone other than the attorney or persons working on the attorney’s behalf – such as other attorneys, paralegals, etc.

While the most obvious ways of making such a disclosure is clear (speaking about it in public, providing the information to a third party, posting it on Facebook), other waivers are not so obvious. For example, some clients will communicate with counsel through texts or emails from their employer’s company account, even if the subject of the representation does not relate to their employer. As most companies expressly regard employees’ company emails and texts as company property, such communication will not be regarded as a private, confidential communication and, therefore, will not meet the standard for attorney client privilege.

Similarly, clients should not forward or discuss communications with other parties, such as friends or trusted advisors, who are not attorneys, because doing so would undermine any privilege claim. Even within a business organization, clients should make certain that any disclosure of privileged information is limited to only those individuals who are essential to the representation itself in order to avoid any inadvertent disclosures of the information that could limit the privilege.

Finally, the privilege does not apply if the purpose of the representation is to commit a crime or defraud another person.

What should a client keep in mind?

Attorney client privilege is an essential part of the client’s relationship with its attorney. While the actual application differs between jurisdictions, and is much more

complicated than the basic outlines here, the client should bear in mind some basic principles when communicating with its attorneys.

First, the privilege covers consultation even for potential representation. Therefore, if a client meets with a potential attorney, but does not retain the attorney, the communications still are privileged.

Second, the client should make certain to limit any disclosures only to the attorneys. Importantly, not only should a client not include individuals, who are not essential to the representation in any communications, but the client must also be careful about the form of the communication, including what email account, mobile device, etc. that is used. If the client does not have an expectation that the communications are private, the privilege will not attach.

Finally, and most importantly, the purpose of the privilege is to provide “full and frank” disclosure between client and attorney. As such, the client should not hide things from its attorney as the privilege will cover even harmful communications if provided in this context.

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