

# *The Attorney-Client Privilege*



Office of General Counsel  
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## **THE ATTORNEY-CLIENT PRIVILEGE**

### **I. INTRODUCTION**

From time to time CSU campus clients need to know about the scope and application of the attorney-client privilege, which can be confusing. This manual provides general information about the privilege, and also discusses some of the common misperceptions about it. This manual is intended to be a campus resource when particular questions about the privilege arise. University Counsel are always available to help respond to questions in a specific context.

### **II. THE PURPOSE FOR THE PRIVILEGE**

The attorney-client privilege is one of the oldest and most respected privileges. It was originally designed to prevent a lawyer from being compelled to testify against his/her client. Today, it still protects confidential communications between clients and their lawyers. It applies equally to in-house counsel and to outside or retained counsel.<sup>1</sup> Sometimes greater scrutiny is applied to determine whether the advice of in-house counsel is truly legal in nature, or more akin to general business advice that might come from any high ranking person in the organization. Only where the advice is predominantly legal does the privilege apply.<sup>2</sup> The modern public purpose underlying this privilege is to encourage full disclosure without fear that the information will be revealed to others, so that clients receive the best and most competent legal advice and representation<sup>3</sup>. The privilege extends to agents of either the client or the lawyer who facilitate the communication (e.g., paralegals or secretaries).

### **III. WHAT IS PROTECTED**

The privilege protects communications that are intended by the client to be confidential as part of an overall relationship between that client and his/her attorney. The privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened.<sup>4</sup> It protects both the communications from the client, and any advice or other response given by the attorney, the primary purpose of which is legal. Where the privilege

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<sup>1</sup> *Upjohn Co. v. United States* (1981) 449 U.S. 383, 389.

<sup>2</sup> *North Pacifica, LLC v. City of Pacifica* (N.D. Cal. 2003) 274 F.Supp.2d 1118, 1127;  
*Handguards, Inc. v. Johnson & Johnson* (N.D. Cal. 1975) 69 F.R.D. 451, 453

<sup>3</sup> *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, 380

<sup>4</sup> *Roberts, supra* at 370.

attaches to a confidential communication, it attaches to the entire communication, and any unprivileged material contained within it is also barred from disclosure.<sup>5</sup> This includes factual statements from potential witnesses to a disputed issue. A party is not barred from gathering the unprivileged information elsewhere, but cannot do so from a privileged source. The intention of the client with respect to confidentiality determines the applicability of the privilege. The intent of any other recipient, including the lawyer, is irrelevant.

#### **IV. WAIVER OF THE PRIVILEGE**

The attorney-client privilege is fragile, and may be subject to waiver when the content of a confidential communication is disclosed to a third person with no legitimate need to know the information, even in some instances where the disclosure is inadvertent. A waiver can also occur where the communication takes place in public, or in some less than secure environment.

When there is more than one defendant in a lawsuit, the parties may agree to a joint defense, which permits them to share confidences on matters of common interest without waiving the privilege. The parties can agree to a joint defense even where they are represented by separate counsel.

#### **V. WHEN THE GOVERNMENT IS THE CLIENT**

The privilege applies to communications between business and governmental entities and their lawyers much the same as it does to individual clients.<sup>6</sup> Because of the nature of the entity client, which is not personified in any one individual, the application of the privilege is a bit more complex. Early decisions sought to define the scope of persons included within an entity's privilege by describing them as the "control group" required to deal with the particular issue. A later Supreme Court opinion, expanded this concept and established a "subject matter" test, which included any persons required to provide information to form the basis of legal advice, irrespective of where they fell in the entity's hierarchy.<sup>7</sup>

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<sup>5</sup> *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 732-733; *Roberts, supra* at 370.

<sup>6</sup> Cal. Evid. Code section 954.

<sup>7</sup> *Upjohn Co., supra*.

In California, the Supreme Court has laid out a number of "basic principles" to determine the identity of the client within an entity for purposes of the privilege.<sup>8</sup> This decision, while complicated, is not very different from the United States Supreme Court "subject matter" test. The California Court found that the "client" for purposes of the privilege will normally be the logical person or persons required to speak on behalf of the entity based on the facts presented in the particular situation. The "client" will not always be a high ranking officer, but high ranking officers will almost always be clients. Persons who are witnesses to events, even if asked or directed to provide statements regarding those events, are not generally entity "clients," unless they would be "clients" by virtue of their relationship to the situation, irrespective of having been a witness to the events.

California Evidence Code section 952 provides that the privilege covers information transmitted to persons to those to whom disclosure is reasonably necessary for "the accomplishment of the purpose for which the lawyer is consulted." While involvement of an unnecessary third person in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves the confidentiality of the communication. A California case takes note of the fact that, in the corporate or governmental setting, it is often lower-level employees who are called upon to put the lawyer's advice into effect, even where that advice was given directly to a high-level employee. As such, to implement the lawyer's advice, the advice must necessarily be communicated to others within the corporation or government entity, as it would be nonsensical to require each employee with a legitimate need to know to meet with the lawyer personally and/or see verbatim excerpts of the legal advice given.<sup>9</sup>

## **VI. SITUATIONS TO WHICH THE PRIVILEGE DOES NOT APPLY**

### **A. The Fact of a Consultation**

The privilege does not extend to the fact that a consultation between attorney and client occurred, nor to the general subject matter of the consultation. It protects only the content of the communications in that consultation.

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<sup>8</sup> *D. I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal 2d 723.

<sup>9</sup> *Zurich American Insurance Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

**B. Lawyer In the Room**

Sometimes a lawyer is called upon to participate in activities that do not necessarily call for specific legal representation or advice. In those contexts, the privilege does not apply. All conversation in a general meeting, for example, is not protected just because a *lawyer* is in the room. Rather, only the portion of the meeting where legal advice is solicited and/or given will be protected, while the rest of the meeting content is subject to disclosure.<sup>10</sup> Where a lawyer is called upon to play a role other than as counsel (e.g., investigator, negotiator, business agent), the privilege does not apply.<sup>11</sup>

**C. Underlying Facts Shared With an Attorney**

The privilege protects the content of communications between the client and the attorney. It does not extend to underlying factual information that may come out during the course of the communication, unless that information is contained within a privileged communication.

**D. Documents Provided to an Attorney**

Documents do not automatically become privileged simply because they are transmitted to, or reviewed by, an attorney. What is privileged is the fact that a particular document has been provided to the attorney, for purposes of soliciting legal advice – not the document itself or the information it contains, unless the document was prepared specifically for the purpose of soliciting the attorney’s advice. Correspondence that is forwarded to an attorney for some purpose other than obtaining legal advice is not privileged.

**E. Correspondence With Copies to an Attorney**

Correspondence is not automatically privileged just because an attorney is listed among those receiving a carbon or “blind” copy. The test will be whether the

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<sup>10</sup> *North Pacifica, LLC v. City of Pacifica* (N.D. Cal. 2003) 274 F.Supp.2d 1118, 1128-29.

<sup>11</sup> *Montebello Rose Co. v. Agricultural Labor Relations Board* (1981) 119 Cal.App.3d 1, 32; *Watts Industries, Inc. v. Superior Court* (1981) 115 Cal.App.3d 802, 804-805.

content of the correspondence is part of an overall attorney-client communication. If the writer is attempting to convey to others in the organization with a legitimate need to know, the content of an attorney's advice, the correspondence may be privileged.

**F. Communication in the Presence of a Third Party**

The privilege only extends to communications the client intends to be confidential. Communications made in non-private settings, or in the presence of third persons unnecessary to accomplish the purpose for which the attorney was consulted, are not confidential, and therefore are not protected by the privilege.

**VII. MAKING THE CALL**

Determining when the attorney-client privilege applies, and when it does not, within the context of the CSU can be complicated. University Counsel are available to consult on how to handle a particular situation at any time.