THE ATTORNEY-CLIENT PRIVILEGE

MAY 25, 2011
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# TABLE OF CONTENTS

I. THE PURPOSE FOR THE PRIVILEGE ............................................. 3

II. WHAT IS PROTECTED .......................................................... 3

III. WAIVER OF THE PRIVILEGE ............................................... 3

IV. WHEN A CORPORATION IS THE CLIENT .................................. 4

V. SITUATIONS TO WHICH THE PRIVILEGE APPLIES OR NOT ........... 5-6
   A. The Fact of a Consultation ............................................... 5
   B. Lawyer In the Room ...................................................... 5
   C. Underlying Facts Shared With an Attorney .......................... 5
   D. Documents Provided to an Attorney ................................. 5-6
   E. Correspondence With Copies to an Attorney ....................... 6
   F. Communication in the Presence of a Third Party ................... 6

VI. STATEMENTS MADE TO INSURANCE CARRIER .......................... 6
I. 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.\(^1\) 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.\(^2\) 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. The privilege extends to agents of either the client or the lawyer who facilitate the communication (e.g., paralegals or secretaries).

II. 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. 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 attaches to a confidential communication, it attaches to the entire communication, and any unprivileged material contained within it is also barred from disclosure.\(^3\) 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

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waiving the privilege. The parties can agree to a joint defense even where they are represented by separate counsel.

V. WHEN A CORPORATION 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.\(^4\) 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.\(^5\)

In California, the Supreme Court has laid out a number of "basic principles" to determine who is the client within an entity for purposes of the privilege.\(^6\) 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 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.\(^7\) See also: *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 735.

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\(^4\) California Evidence Code section 954.

\(^5\) *Upjohn Co., supra.*

\(^6\) *D. I. Chadbourne, Inc. v. Superior Court,* 60 Cal. 2d 723 (1964).

VI. SITUATIONS TO WHICH THE PRIVILEGE DOES OR 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.

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.\(^8\) Where a lawyer is called upon to play a role other than as counsel (e.g., investigator), the privilege does not apply.

C. Protects Factual and Legal Information
The privilege protects the content of communications between the client and the attorney. Neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between ‘factual’ and ‘legal’ information.” See In re Jordan (1974) 12 Cal.3d 575, 580 [finding the attorney-client privilege attached to copies of cases and law review articles transmitted by an attorney to the attorney’s client].) Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725, 734 [attorney opinion letter written to its corporate counsel by outside counsel who investigated classifications of certain managers is absolutely privileged and there is no authority allowing it to be reviewed in camera by court].

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

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\(^8\) North Pacifica, supra, 274 F.Supp.2d at 1128-29.
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. “It is also established that a communication which was not privileged to begin with may not be made so by subsequent delivery to the attorney.” (Alpha Beta Co. v. Superior Court (1984) 157 Cal.App.3d 818, 825). Doe 2 v. Superior Court (2005) 132 Cal.App.4th 1504, 1522. Documents that are not originally protected do not become so merely by being provided to or transmitted by an attorney. Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal.App.4th 1453, 1458.

As we explained in Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 397: “Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney. [Citation.] Obviously, a client may be examined on deposition or at trial as to the facts of the case, whether or not he has communicated them to his attorney. [Citation.] While the privilege fully covers communications as such, it does not extend to subject matter otherwise unprivileged merely because that subject matter has been communicated to the attorney.’” Thus, “a litigant may not silence a witness by having him reveal his knowledge to the litigant's attorney…” Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725, 735.

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 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. Those ‘who are present to further the interest of the client in the consultation’ include a spouse, parent, business associate, joint client or any other person ‘who may meet with the client and his attorney in regard to a matter of joint concern.’ Doe 2 v. Superior Court (2005) 132 Cal.App.4th 1504, 1521.

VI. STATEMENTS MADE TO INSURANCE CARRIER

Passenger of car involved in automobile accident brought action against driver of second vehicle, vehicle's owner, and others for damages. Passenger sought discovery of statements made by owner and driver to insurer of second vehicle and they resisted. The Superior Court, San Francisco County, entered order requiring disclosure. Driver and owner
petitioned for peremptory writ of mandate. The Court of Appeal held that statements given to insurer were protected by attorney-client privilege. 

_Soltani-Rastegar v. Superior Court_ (1989) 208 Cal.App.3d 424. Statements given to insurance carrier after the accident here, “for the sole purpose of defending” against claims, are protected by the attorney-client privilege. The fact that litigation was only a threat on the horizon and that attorneys had not yet been selected to try to avert or meet that threat does not convert the purpose of the transmission. To hold otherwise might merely encourage insurance companies to bring in their attorneys at early stages in the claims handling and might discourage early settlement of claims. _Soltani-Rastegar v. Superior Court_ (1989) 208 Cal.App.3d 424, 428.