

## In what circumstances can the Attorney-Client Privilege be invoked?

Thursday, December 29, 2022.

Courtroom proceedings would not be the same without the attorney-client privilege. Lawyers and their clients can confidently discuss the details of a legal case without fear of repercussions with attorney-client privileges. To provide legal services effectively, it is essential to understand the full scope of these privileges.

As a district court judge wrote in 1975, the attorney-client privilege is based on the principle that one should not be afraid of their secrets being revealed if he seeks advice or assistance from a lawyer. The following quote explains the attorney-client privilege, which can be invoked:

- Communication with a lawyer that a client has hired should be private
- Communication between a lawyer and a client regarding legal advice or an ongoing matter
- There is a client-attorney relationship

A client's statement to an attorney is more likely, to be honest, and open when they know it cannot be used as evidence, and the attorney-client privilege exists to promote better legal advice. As a result of full transparency, attorneys have a complete picture of a case, which is beneficial to them.

There is no restriction on the area of law when this privilege applies since it applies wherever an attorney-client relationship exists. Whether a client is involved in a personal injury, administrative, or criminal case, the attorney-client privilege applies to them at any stage, whether before, during, or after trial.

### **How Does an Attorney-Client Relationship Work?**

An attorney-client relationship may seem obvious at first glance, but it's easy to presume it exists when it doesn't. The presumption does not automatically elicit attorney-client privileges.

In order to qualify for these privileges, both parties must have agreed that the attorney will represent the client. This agreement can include:

- Fee contract submission
- Oral agreement that is explicit
- An engagement letter
- Filing court documents on behalf of a client by an attorney



In courtrooms, there is a strong emphasis on debate, which extends to the existence of an attorney-client relationship. In order to avoid unnecessary case complications, it is important to establish a clear relationship between the attorney and client before exchanging private information.

### **The Attorney-Client Privilege Doesn't Apply**

Attorney-client privilege may not apply in some circumstances. These include:

- If a client has committed a crime and is facing criminal charges, their communications with an attorney are privileged. However, if the client plans a future crime, the attorney-client privilege is lost.
- Clients are ultimately the arbiters of attorney-client privilege, which means they may waive it at their discretion. The same applies to corporate cases, too, such as when a company is taken over by a new leadership team. In this case, the attorney-client privilege could be handed down to the new management team.
- The attorney-client privilege may be lost when a client dies, especially in cases involving estate disputes.
- Third-party involvement: Adding third parties to the mix can lead to violations of attorney-client privilege. This is a serious concern when it comes to email chains. If a client cc's an individual who is not involved in the attorney-client relationship, they could end up nullifying privacy privileges. Certain exceptions do exist, though; if the third party is assisting you or your lawyer in some way, such as with a paralegal or legal ally, then the privileged status of the conversation will be retained.
- Shareholder interests can act as an exception to attorney-client privileges in cases involving shareholders.

### **Is the Attorney-Client Privilege applicable to corporations?**

The attorney-client privilege has historically applied only to high-level corporate employees seeking legal advice or counsel. Several key legal decisions indicate, however, that the "subject matter test" will be applied more readily in modern cases. This precedent is referred to as the "control group" test.

According to the "subject matter test," any member of a corporation may claim attorney-client privilege if:

- Legal advice was sought by them
- Legal advice was requested by their superior
- An employee was carrying out orders from a superior
- Employees were acting within the scope of their corporate responsibilities
- Beyond those seeking legal advice, the conversation was disseminated

In addition to determining which members of a corporation receive legal privileges, corporations often hire lawyers for a variety of reasons. These reasons can be divided into two categories, economic advice and legal advice. Notably, attorney-client privileges typically do not cover communications involving economic advice.

Communication between attorneys and corporations, however, often contains both legal advice and economic advice. In this case, the court usually examines the corporation's intent to obtain legal advice. Was the corporation initially seeking advice regarding a merger? Or was it about upcoming legal representation? Corporations cannot just send all of their sensitive information to an attorney and expect it to be protected.

There are no hard and fast rules regarding what constitutes privileged information in a corporate context, so the outcome of a privilege decision can depend on the judge overseeing the case. Thus, attorneys should be rigorous and intentional when communicating with their corporate clients. The more it is apparent that your communications constitute legal advice, the better.

### **Best Practices for Attorney-Client Privilege**

In order to protect attorney-client communications, the American Bar Association (ABA) recommends the following best practices:

- Separate business and legal discussions
- Establish a clear attorney-client relationship
- Communicate in writing with caution
- Third parties should only be included in legal discussions when necessary
- Ensure clients understand what constitutes a waiver of attorney-client privilege

Whenever you use email to communicate with clients, be careful. Lawyers should not send emails to clients' businesses (provided the client is not an entity), and they should check that the client is not using a shared email account. Be careful when responding to email chains, as you may not know who's included. Above all, whenever you send an email, ask yourself, "Will sending this email to jeopardize attorney-client privileges?"

### **Attorney-client privileges and modern communications**

It is important to maintain confidentiality during attorney-client communications beyond email. As a result of texting, video conferences, and phone calls, all of these communication methods present distinct security risks, even if they are often beneficial.

#### **Communication via text**

Many Americans use their mobile phones as their primary phone. Others may use an iPhone or another digital device that employs end-to-end encryption. According to IBM, this privacy measure prevents third parties from accessing text communications.

It is possible to reduce the risk of accidental loss of attorney-client privileges by barring third-party access to text software that uses end-to-end encryption. For end-to-end encryption to work, both you and your client must be using the same text software.

Among other tips for secure text communications, here are a few:

- It is always a good idea to discuss text messaging policies with clients in advance
- When a client asks a complicated question, schedule an in-person meeting
- Avoid texting clients' privileged information as it creates a permanent record

#### **Video calls**

During the pandemic, supply chain problems and inflation were the most significant issues. In addition to shelter-in-place orders, remote work tools also became more prevalent. Today, it is easier than ever to make a video call to discuss a case with a client. But are these video calls secure?

Currently, Zoom uses the same end-to-end encryption technology as iMessage, which provides protection from third parties. At face value, your communications will be secure if you use Zoom.

- Password-protected video meetings: Without passwords, a third party could gain access to your meeting. Similarly, most commercially available video call software allows you to bar those you are speaking with from adding additional people to the call – make use of it to further safeguard your conversation.
- You should be cautious when recording and saving calls. According to Zoom's terms of service, “by using the Services [recording tools], you consent to Zoom storing recordings of any or all Zoom meetings or webinars you participate.” Attorney-client confidentiality can be threatened by storing client conversations on a third-party server.
- You never know who might be eavesdropping on a conversation, so make sure you use headphones and tell your client to do the same.

### **Inadvertent Disclosures and Attorney-Client Privileges**

A great deal of legal documents used to be physical contained in endless boxes of files, images, and statements. Nowadays, much of it is digital, or electronically stored information (ESI). Although ESI has many benefits, it makes it easier to accidentally share privileged information during discovery with the opposing legal team.

Inadvertent disclosures are protected by law

Subsections (b) and (d) of the Federal Rule of Evidence 502 govern inadvertent disclosures. Subsection (b) provides that inadvertent disclosures cannot be used as evidence in the following circumstances:

- Upon discovering the error, the holder promptly rectified it, including (if applicable) following Federal Rule of Civil Procedure 26 I(b)(5)(B).
- Inadvertent disclosure
- It was reasonable for the holder of the privilege or protection to prevent disclosure

It is up to the relevant court to decide whether an inadvertent disclosure results in a privilege waiver.

A federal rule generally protects against inadvertent disclosures that can wreck a case. If the party receiving the inadvertent disclosure attempts to take advantage of the error, they can issue penalties. However, there have been instances where inadvertent disclosures have caused problems for those who slipped up.