

## **Can I tell you a secret?**

I am often asked by my clients during our meetings “you will keep this between us right?” As I tell them, not only will I keep their information confidential because I have an ethical obligation as a lawyer to do so but I’ll also do it because I most likely have to.

There is something in the law that you may have heard of called the attorney-client privilege. This month, I would like to give you a brief overview of what that concept is and how it protects what you tell me. While I will not go into every nuance of the privilege here in this article (for which I am sure you will thank me), I thought that it might be useful to for you to have an understanding of the basics.

### **What is the attorney-client privilege?**

At its most basic level, the attorney-client privilege is a legal concept that protects communications between a client and his or her attorney and keeps those communications confidential. It is one of the oldest and most respected privileges and was originally designed to prevent a lawyer from being compelled to testify against his or her client. As such, it encourages open and honest communication between clients and attorneys without fear that the information will be revealed to others, so that clients receive the best and most competent legal advice and representation.

While there are some variations in certain states, the general requirements under United States law for a valid assertion of the attorney-client privilege are as follows:

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

While this definition is fairly self-explanatory, there are some areas that need a little more explanation:

The privilege belongs to the client (or someone seeking to become a client) and generally speaking, it is better than any confidentiality agreement that you can ask a lawyer to sign (which I know happens). It applies to corporate clients, multi-party clients as well as individuals. The privilege applies to conversations and correspondence as well as among counsel when the client is represented by more than one attorney.

The attorney to whom you share the confidential communication must be acting as an attorney (and not in a non-legal capacity) at the time the communication is made and the client must be seeking legal services from the attorney. That means that just having a lawyer in the room is not enough for the privilege to apply. Conversation in a general meeting, for example, is not protected just because a lawyer is in the room.

The privilege protects communications that are intended by the client to be confidential as part of the overall relationship between the client and his or her attorney. It protects both the information given from the client to the attorney and from the attorney to the client. However, the important thing to remember here is that the privilege can be lost (or waived) if the content of that confidential communication is disclosed to a third person with no legitimate need to know the information, even if the disclosure is inadvertent. Parties can agree to joint representation by the attorney however, without waiving the privilege.

### **When doesn't the privilege apply?**

While the attorney-client privilege is considered one of the strongest privileges available under law, there are situations to which the privilege does not apply:

The privilege does not protect the disclosure that a consultation between an attorney and client occurred nor does it protect disclosure of the general subject matter of the consultation. It does however protect the content of the communication in that consultation. Remember too, the privilege would not protect underlying factual information that may come out during the course of any communication with your counsel.

As I mentioned earlier, it is not enough just to include a lawyer in an activity such as a meeting that does not call for specific legal representation or legal advice. In such a context, the privilege would likely not apply (perhaps a portion of the information in the meeting would be protected if legal advice is solicited and/or given would but it may be problematic).

Documents provided to an attorney do not automatically become privileged simply because they are given 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 obtaining legal

advice. Neither the document itself nor the information it contains is privileged unless it was prepared specifically for the purpose of soliciting the attorney's advice. Correspondence that is sent to counsel for other non-legal purposes is not privileged. And no, adding an attorney as a recipient on correspondence does not automatically privilege the document either.

The privilege only extends to communications that are intended to be confidential. That means that communications made in a non-private setting or in the presence of third persons without a need to know (or unnecessary to accomplish the purpose for which the attorney was consulted) are not confidential, and therefore not protected by the privilege.

Certain exceptions to the privilege allow for the disclosure of confidential information by attorneys if the attorney reasonably believes that disclosure is necessary to prevent a crime that will likely result in death or serious injury and the privilege may be rendered moot when communication between an attorney and client are used to further a crime or fraud.

### **So can you tell me a secret?**

The bottom line is that when a client comes in to see an attorney he or she can be assured that his or her information will be kept confidential. We have an ethical and more often than not a legal obligation to do so. So yes, I'll keep your secret...