

The Attorney-Client Privilege



Office of the General Counsel

SAINT JOSEPH'S UNIVERSITY

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THE ATTORNEY-CLIENT PRIVILEGE

I. INTRODUCTION

From time to time Saint Joseph's University campus clients need to know about the scope and application of the attorney-client privilege, which can be confusing. This short summary 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. Saint Joseph's Office of the General Counsel is 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. 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).

III. WHAT IS PROTECTED

The privilege protects communications which are intended by the client to be confidential in the relationship between that client and his/her attorney. It protects both communications from the client and any advice or other response given by the attorney. 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 Privilege belongs to the University, not the individual asserting or waiving it.*

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 does permit 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 UNIVERSITY IS THE CLIENT

The privilege applies, in concept, to communications between business and institutional entities and their lawyers much the same as it does to individual clients. Because of the nature of the entity client (the University), 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, Upjohn Co. v. United States 449 U.S. 383 (1981), 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.

Various state laws have laid out a number of "basic principles" to determine who is the client within an entity for purposes of the privilege. For example, in D. I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 36 Cal. Rptr. 468 (1964), the court's 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.

In instances, when there is no conflict of interest presented, the entity "client" can be a particular member(s) of the University faculty or staff who have the need to receive or seek legal advice in connection with their scope of employment at the University. Therefore, the "client" does not always have to be a high ranking officer. However, high ranking officers will almost always be clients, by virtue of their administrative status and role within the University. 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, regardless of having been a witness to the events.

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.
- B. Lawyer In the Room:** Sometimes a lawyer is called upon to participate in activities which 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. Moreover, where the lawyer is called upon to play a different role (e.g. investigator) and is not acting as a lawyer, the privilege may not apply.
- 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 the client shared with the attorney during the course of the communication.
- D. Documents Provided to an Attorney:** Documents do not automatically become privileged simply because they are transmitted to, or reviewed by, an attorney. Correspondence which is forwarded to an attorney for some purpose other than obtaining legal advice review, or input is also not privileged. Therefore, it is important to identify documents that are prepared at the request of or for review by counsel versus business or other documents that are just given to counsel. This means that a document that was prepared as a business record or personal note regardless of its internal sensitivity or confidentiality, generally, does not become, after-the-fact, a privileged document simply because it is given to counsel.
- E. Correspondence With Copies to an Attorney:** General correspondence does not become privileged just because an attorney is listed among those receiving a carbon or "blind" copy. If the writer is attempting to convey to others in the College 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 Saint Joseph's can be complicated. Saint Joseph's Office of the General Counsel is available to consult on how to handle a particular situation at any time.