



WHAT IS ATTORNEY-CLIENT PRIVILEGE?

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Attorney-client privilege is one of the oldest recognized legal principles in the world and was created to ensure that a client felt secure in sharing sensitive information with their attorney. It also prevents lawyers from testifying about, or being forced to testify about, their client's statements.

This legal principle protects the confidentiality of communication between a client and an attorney. Typically, this privilege applies when:

1. Communication is between a client and an attorney or an agent of their attorney;
2. Communication is made by the client and contains private information;
3. Communication is made without the involvement of a non-privileged third party;
4. Legal advice is being sought by the client; and
5. The client has not waived privilege.

Communication can be oral or written. A client may choose to inform an attorney that they can share private communications with those outside of the legal team; however, an attorney cannot do so without permission from the client.

There are exceptions to this rule – if a client informs their attorney that they are planning to commit a crime, especially those that will result in serious

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injury or death, then the attorney may disclose that information to the appropriate authorities and may be ethically obligated to do so depending on the circumstances.

It is fairly easy to understand when the attorney-client privilege exists between an attorney and a single client. However, this rule becomes more complicated in a corporate setting.

Attorney-Client Privilege for In-House Counsel

Attorneys who work in an in-house counsel capacity for a corporation could work as sole legal representatives or as part of a large legal team. The job may require the completion of a wide range of legal tasks, including:

- Designing and implementing legal policies to manage legal risks;
- Ensuring compliance with all laws and regulations which could impact the specific business;
- Providing legal advice to staff members;
- Drafting and reviewing legal contracts;
- Communicating with outside third parties like auditors;
- Researching and staying up-to-date on new legislation that could impact the company.

Given the number of people who an attorney will interact with on any given day, it can be difficult to determine when attorney-client privilege exists in a



corporate setting. Typically, the court views the “client” as the actual corporation, not the individuals that work for the corporation. Simply having an attorney present does not indicate that attorney-client privilege applies, as many attorneys also work in a business capacity. In general, only communications in which the attorney is specifically providing legal advice related to company practices could such communications be considered privileged.

An easy way to make clear that attorney-client privilege does not apply is when the privilege is waived. That can be accomplished in three ways:

Implied Waiver

Implied waiver occurs when a client places communications “at issue” in litigation. When the communicated information is put forward as a vital part of a case by the client, an implied waiver exists.

Inadvertent Waiver

For example, if an employee forwards a privileged communication to a third-party outside of those involved in the initial communication, that creates an inadvertent waiver.

Express Waiver

This is when the client - in the case of a corporation, typically a senior-level employee such as a CEO or COO - indicates that the information may be shared with a third-party.

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Explaining Attorney-Client Privilege to Internal Clients

Here are a few “tests” or best practices that corporate attorneys can use to educate and guide internal clients when it comes to the attorney-client privilege:

- “Careless Test”: Do not overuse the privilege mark on documents, as this could result in the court reviewing privilege logs.
- “Need To Know Test”: Be strict with creating “need to know” groups for documents that are privileged. Provide clear guidelines about with whom documents may or may not be shared.
- “Press Test”: Consider how each communication would be reviewed by a court, media, or an opposing party prior to sending it.
- “Dummy Test”: Communicate succinctly and correctly. Avoid coming to legal conclusions or making connections to unrelated matters.

If you have any questions regarding attorney-client privilege in a corporate setting, contact Athan Law at (509) 215-4679 to learn more.

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