

A client's relationship with a lawyer is unique. Lawyers and clients must be able to communicate freely for clients to receive the help they need, and the attorney–client privilege and the work-product doctrine make this possible. The attorney–client privilege protects confidential information learned by an attorney during client representation. The work-product doctrine protects the thoughts and materials prepared, and communications made, when lawyers and clients think litigation is possible. This pamphlet explains the basics of both protections, and seeks to teach clients how to avoid common pitfalls.

Attorney–Client Privilege

The attorney–client privilege is found at Texas Rule of Evidence 503, and its application in federal courts is governed by Federal Rule of Evidence 501. The purpose of the attorney–client privilege is to encourage free discussion between a lawyer and client. If lawyers and clients cannot talk to each other, the lawyer will not be fully informed and the client cannot get the full benefit of the legal system. The privilege also helps clients feel comfortable seeking early legal assistance.

The privilege protects not only information exchanged between a lawyer and client, but also includes persons authorized to act on their behalf (called “agents”). Communicating confidential information to a lawyer's legal assistant, for example, is likely still privileged. Also, a formal attorney–client relationship is not always required. The protection extends to potential clients who consult a lawyer to potentially hire that lawyer for legal work, even if the lawyer is not ultimately hired.

For the privilege to apply, the communication must be made for the purpose of helping a lawyer provide legal services to the client. Communicating with a lawyer for any other purpose—such as asking for public relations

advice for example—may not be privileged. Finally, a communication must be confidential, meaning it is not intended to be disclosed to others beyond the lawyer and client. If someone other than the lawyer and the client are present when the communication is made—even to family members, friends, etc.—the client risks waiving the privilege.

In criminal cases, the privilege applies to more than just communications. It applies more broadly to any other fact the lawyer or the lawyer's representative learns because of the attorney–client relationship. Also, in certain, limited circumstances an attorney *must* disclose confidential client information to prevent a crime or fraudulent act where the result is likely death or substantial bodily harm to another person. When death or substantial bodily harm is not likely, the lawyer *may* (but is not required to) reveal confidential information to prevent the client from committing the criminal or fraudulent act. The lawyer also *may* reveal confidential information if necessary to fix the consequences of a client's prior criminal or fraudulent act if the lawyer's services were used in committing that act.

The privilege belongs to the client. Unless an exception applies, the client may refuse to disclose the information in a court proceeding and may prevent the lawyer from doing so. Exceptions include communications relating to the death of a client or disputes between the lawyer and client, among others. Clients should be very hesitant to reveal privileged information and should almost always consult an attorney before doing so.

The Work-Product Doctrine

The work-product doctrine protects the ideas and strategic decisions made concerning a case by guarding information revealing the thought process of an attorney, a client, or their agent. This can include notes, memoranda,

letters, e-mails—not just communications. Protecting work product helps the litigation process by safeguarding an attorney's work in preparing for trial and requiring an opposing party to prepare its own case. The work-product doctrine is found at Texas Rule of Civil Procedure 192.5 in Texas cases and Federal Rule of Civil Procedure 26(b)(3) in federal cases.

Work product includes material prepared, mental impressions developed, or communications made “in anticipation of litigation” or for trial. “In anticipation of litigation” can be a difficult concept, as it can be difficult to figure out when parties think litigation is a possibility. Texas courts use a two-part test to answer this question. First, they ask whether a reasonable person would have anticipated litigation under the circumstances. Second, they ask whether the client trying to keep information confidential believed in good faith that there was a substantial chance that litigation could happen and made the notes, communications, etc. to prepare for that possibility.

There is a rarely used exception to the work-product doctrine. Materials made when preparing for litigation that do not necessarily reflect an attorney's thoughts (called “non-core” work product) may be turned over, but only if: (1) the opposing party can show it has a substantial need for the information to prepare its case, and (2) the party is unable to obtain that information by other means without undue hardship. Said simply, the information must be very important and difficult, if not impossible, to obtain otherwise. “Core” work product, which actually reflects an attorney's thoughts, is absolutely protected.

How the Attorney–Client Privilege and Work-Product Doctrine are Different

The two protections are different. First, they serve different purposes. Unlike the

attorney–client privilege, the work-product doctrine is not concerned with protecting client's confidential information. Its purpose is to protect the mental processes of the attorney, client, and their representatives, resulting in a safe area to analyze and prepare a case.

The work-product doctrine is also broader. It protects more than just attorney–client communications, extending to notes and other materials prepared for litigation. Unlike the attorney–client privilege, work product can be disclosed to an ally or person with common interest without waiving the protection (though consult with a lawyer before doing so).

Finally, even if the attorney–client privilege is waived (by disclosing the communication to a third person, for example), the work-product doctrine could still be used to protect the information. And while waivers of the work-product privilege are possible, they are determined on a document-by-document basis. Waivers of the attorney–client privilege can be broader, extending to the entire subject matter discussed in the revealed communication.

Common Pitfalls

Clients need to know about certain hiccups that often arise related to these protections. Common mishaps occur, for example, when a client is unaware that only legal advice is protected by the privilege. Thus, asking an attorney whether he or she thinks the purchase of a piece of property is a good deal is likely not protected because the attorney would be giving business advice, and not legal advice.

Other issues arise when clients do not think carefully about forwarding e-mails, or copying recipients. Suppose an attorney represents an individual employee at a company, and asks the employee through e-mail for some information. When that employee forwards the attorney's e-mail to another in the company (not repre-

sented by the attorney), the attorney's initial e-mail is no longer confidential and the privilege is waived. Who is copied on an e-mail is also important. For example, writing a detailed factual e-mail to twenty non-lawyers, while copying only one lawyer, could make it difficult to later claim the e-mail was sent for the purpose of getting legal advice, as opposed to some other purpose. If a client is truly seeking legal advice, he or she should make that clear in the communication and send it only to the attorney and those necessary to secure the advice sought.

The most challenging issues arise when clients do not clearly understand who the lawyer they are speaking with represents. That is why two of the most important questions a client can ask are "Who do you represent?" and "Do you represent me?"

Business transactions—especially the creation of new entities—are often a source of confusion because clients may not have a clear understanding of who a lawyer is representing. Suppose two friends decide to start a business and contact an attorney. The attorney meets with both friends and begins to draw up documents to create *the new company*. Who does the attorney represent and what communications are confidential? Most likely, the attorney will represent the new company and not either friend individually. If a conflict arises between the two friends, the attorney may be required to disclose any conversations with the individuals and, in many circumstances, will advise them both to seek individual counsel.

Organizational representations can also be troublesome. If an organization is sued along with its directors, officers, or other employees, differing circumstances may lead an attorney to represent the just the organization, the organization and one or more individuals, or just some individuals. If a company that an

individual works for is sued and that individual is involved in any way, the individual should confirm who the attorney he or she is speaking with is representing before disclosing confidential information.

Representations involving family law, such as divorce, child custody issues, etc., may also create privilege issues. Suppose a husband and wife approach an attorney seeking an uncontested divorce. Attorneys cannot represent both parties in litigation, including divorce, and attorneys should remind parties that they only represent one spouse or the other. As a consequence, a husband's conversation with his wife's counsel will not be privileged, even if the divorce is agreeable and the husband originally intended the conversation to be confidential.

Finally, representations involving children can often confuse parents. Suppose parents are paying the legal fees for their child who was involved in a traffic accident. Parents often assume that because they are paying legal fees, they can sit in on conversations between a child and his or her attorney. But the attorney represents the child—not the parents—and the parents' presence at those conversations could prevent the attorney-client privilege from applying.

Conclusion

The attorney-client privilege and the work-product doctrine are important tools necessary for attorneys to effectively represent their clients. But both attorneys and clients should be mindful of how these protections apply, and whether their communications are confidential and protected. Above all, clients should think clearly before sending a communication intended to be protected and have a clear understanding of who the lawyer they are speaking with represents before divulging confidential information.

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