

Attorney-Client Privilege

Introduction

The attorney-client privilege permits clients to talk with a lawyer in confidence. It is established by a statute that requires witnesses to “refuse to disclose . . . a confidential communication between client and lawyer.”¹ The purpose of this evidentiary privilege is the preservation of confidentiality between attorney and client. It is all but sacrosanct and is frequently described as being “absolute”. A communication is confidential if the client believes that information will not be disclosed to third persons or will be disclosed to further the client’s interest in the consultation or those to whom disclosure is ‘reasonably necessary’ for transmission of the information or accomplishment of the purpose for which the attorney is consulted.² Some disclosure to third parties is permitted without waiving the privilege.³

Attorney-Client Privilege Is Statutory

Evidence Code § 954 provides in part: “[T]he client . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) The holder of the privilege; (b) A person who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the lawyer at the time of the confidential communication.”

Evidence Code § 952 provides in part: “[C]onfidential communication between client and lawyer’ means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is *reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” (Emphasis added).

Evidence Code § 912 provides in part: “[T]he right of any person to claim . . . (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.”

The Purpose of the Attorney-Client Privilege

“[T]he fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client [citation], and the primary harm in the discovery of privileged material is the disruption of that relationship.”⁴ Confidentiality of communications between attorney and client is fundamental to our legal system.⁵ “[I]t has long

¹ Evid. Code § 954.

² *Fireman’s Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1274 (*Front Gate*).

³ Evid. Code § 952.

⁴ *Front Gate, supra*, 196 Cal. App. 4th at 1272.

⁵ See, *Duty of Confidentiality* at DutytoDefend.com.

been understood that ‘[t]he privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.’⁶ And because the privilege protects a transmission irrespective of its content, there should be no need to examine the content in order to rule on a claim of privilege.’⁷

The Attorney-Client Privilege Is Absolute

The attorney client “privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.”⁸ “[T]he attorney-client privilege deserves a particularly high degree of protection in this regard since it is a legislatively created privilege protecting important public policy interests, particularly the confidential relationship of attorney and client and their freedom to discuss matters in confidence.”⁹

The Attorney-Client Privilege Applies to Confidential Communications

A confidential communication is information “which, so far as the client is aware” will not be disclosed to third persons. However, evidence code § 952 expressly recognizes three exceptions so that disclosure is permitted to “third persons . . . [1] who are present to further the interest of the client . . . or [2] those to whom disclosure is reasonably necessary for the transmission of the information or [3] the accomplishment of the purpose for which the lawyer is consulted.”¹⁰ “[A]most any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such.”¹¹

Revisions to the evidence code “will preclude a possible construction of this section that would leave the attorney’s uncommunicated legal opinion - which includes his impressions and conclusions - unprotected by the privilege. Such a construction would virtually destroy the privilege.”¹² Thus, legal opinions formed by counsel during representation of the client are protected ‘confidential communication[s],’ even if the opinions have not been transmitted to the

⁶ *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600 (*Mitchell*).

⁷ See, *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 227, 235 (*City & County of San Francisco*); *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739 (*Costco*); *Cornish v. Superior Court* (1989) 209 Cal. App. 3d 467, 480.

⁸ *Costco, supra*, 47 Cal.4th at 732; see, *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.

⁹ *Raytheon Co. v. Superior Court (Renault & Handley Employees Invest. Co.)* (1989) 208 Cal.App.3d 683, 686 (*Raytheon*).

¹⁰ See, *Front Gate, supra*, 196 Cal.App.4th at 1274 (numbering added).

¹¹ *City & County of San Francisco, supra*, 37 Cal.2d at 235-236; see also *Mitchell, supra*, 37 Cal.3d at 600; *Benge v. Superior Court (Mac Machines)* (1982) 131 Cal.App.3d 336, 345 (*Benge*).

¹² *Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 99.

client.”¹³

The Scope of the Attorney-Client Privilege

The privilege attaches upon the initial client consultation and continues beyond the end of the attorney-client relationship for so long as a “holder” is in existence.¹⁴ “[T]he privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened.”¹⁵ A client is a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal services or advice in the lawyer’s professional capacity.¹⁶ An insurer that pays attorney fees is not a holder of the attorney-client privilege.¹⁷ Protected communications include the attorney’s legal opinion formed and advice given in the course of the attorney-client professional relationship.¹⁸ Inquiry into the lawyer’s uncommunicated impressions and conclusions concerning the case is prohibited. To hold otherwise “would virtually destroy the privilege.”¹⁹

The Client Has the Burden of Proof

The person asserting the privilege has the burden of proof to establish the existence of the privilege.²⁰

Waiver of the Attorney-Client Privilege

The attorney-client privilege may be waived by disclosure of “a significant part of the communication or has consented to disclosure made by anyone.”²¹ “[A] disclosure in confidence of a privileged communication is not a waiver of the privilege ‘when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was

¹³ *Front Gate, supra*, 196 Cal.App.4th at 1273.

¹⁴ Evid. Code § 954; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891 [duty to protect confidential information continues even after formal attorney-client relationship ends.]

¹⁵ *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371; *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 714-716.

¹⁶ Evid. Code § 951; *State Farm Fire & Cas. Co. v. Superior Court (Taylor)* (1997) 54 Cal.App.4th 625, 638; *State Comp. Ins. Fund v. Superior Court (People)* (2001) 91 Cal.App.4th 1080, 1087.

¹⁷ *Wells Fargo Bank, N.A. v. Superior Court (Boltwood)* (2000) 22 Cal.4th 201, 212-213; *Strasbourg Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1404-1405.

¹⁸ Evid. Code § 952; *Front Gate, supra*, 196 Cal.App.4th at 1273.

¹⁹ See, *Benge, supra*, 131 Cal.App.3d at 345.

²⁰ *Brown v. Superior Court* (1963) 218 Cal. App.2d 430; *Raytheon, supra*, 208 Cal.App.3d 683, 688.

²¹ Evid. Code § 912.

consulted.”²²

1. Significant Part

A “significant part” means disclosure of enough substantive information as to reveal the specific content of the alleged confidential communication.²³

Examples of waiver: A mother’s testimony that her ingestion of a drug during pregnancy effectively disclosed a ‘significant part’ of her physician-patient communications.²⁴ A client who testified about the existence of letter to an attorney and went into some detail as to its contents waived a privilege.²⁵

Examples of no waiver:

Disclosures that do not reveal the actual content or substance of the communications do not waive a privilege.²⁶ Admitting the existence of a privileged relationship does not disclose a significant part of protected communications.²⁷ Nor does disclosure of the fact that a privileged communication occurred waive a privilege.²⁸ Disclosure of facts that might have been discussed in confidential conversations with their lawyers “is not equivalent to disclosure of the actual content of these attorney-client conversations.”²⁹ A client does not waive the attorney-client privilege simply by disclosing the lawyer’s conclusions without revealing the content of the communications.³⁰ A party’s verification of a pleading on “information and belief” does not waive the attorney-client privilege.³¹

The scope of a waiver may be limited. Disclosure of a significant part of a privileged

²² *Raytheon, supra*, 208 Cal.App.3d at 687; Evid. Code § 912(d); accord, *Insurance Co. of North America v. Superior Court* (1980) 108 Cal. App.3d 758, 771; See, Article: Attorney Client Privilege Waiver.

²³ *Southern Calif. Gas Co. v. California Pub. Util. Comm’n* (1990) 50 Cal.3d 31, 46 (*Southern Calif. Gas*); *Mitchell, supra*, 37 Cal.3d at 601; *People v. Superior Court* (1991) 231 Cal.App.3d 584, 590-591.

²⁴ *Jones v. Superior Court (Eli Lilly & Co.)* (1981) 119 Cal.App.3d 534, 546.

²⁵ *Julrik Productions, Inc. v. Chester* (1974) 38 Cal.App.3d 807, 811.

²⁶ *Mitchell, supra*, 37 Cal.3d at 602-603; *Littlefield v. Superior Court* (1982) 136 Cal.App.3d 477, 483-484 (*Littlefield*).

²⁷ *Mitchell, supra*, 37 Cal.3d at 602; *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1092-1093 (*San Diego Trolley*).

²⁸ *Mitchell, supra*, 37 Cal.3d at 602; see *Littlefield, supra*, 136 Cal.App.3d at 484.

²⁹ *Maas v. Municipal Court* (1986) 175 Cal.App.3d 601, 606; see also *Southern Calif. Gas, supra*, 50 Cal.3d at 48-49; *Travelers Ins. Cos. v. Superior Court* (1983) 143 Cal.App.3d 436, 444.

³⁰ *Southern Calif. Gas, supra*, 50 Cal.3d at 49.

³¹ *Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818, 831.

communication waives the privilege only with respect to that communication. Other privileged communications in the same relationship are unaffected even if they relate to the same subject matter.³²

2. Coercion

“Evidence of . . . disclosure of privileged information is inadmissible . . . if: . . . (1) A person . . . claimed [the privilege] but nevertheless disclosure erroneously was required to be made; or (2) The presiding officer did not exclude the privileged information. . . . If a person . . . [claimed the privilege], but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion.”³³

3. Cooperation With Co-Parties

Disclosure of a confidential communication through cooperation with coparties in a lawsuit does not necessarily waive the privilege.³⁴ In such event, no waiver occurs by a mutual disclosure of client confidences that is “reasonably necessary” to accomplish that purpose.³⁵ “The Supreme Court has recognized that it is an ‘everyday reality that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information.”³⁶ “Such sharing cannot abrogate the privilege protecting an attorney’s legal opinions.”³⁷

³² See *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1148; *Owens v. Palos Verdes Monaco* (1983) 142 Cal.App.3d 855, 870-871; *San Diego Trolley, supra*, 87 Cal.App.4th at 1090-1092.

³³ Evid. Code § 919.

³⁴ For exceptions to waiver by disclosure, see, *Common Interest Doctrine* at DutytoDefend.com.

³⁵ *Raytheon, supra*, 208 Cal.App.3d 687; *OXY Resources Calif. LLC v. Superior Court (Calpine Natural Gas LP)* (2004) 115 Cal.App.4th 874, 891.

³⁶ *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153-1154.

³⁷ *Front Gate, supra*, 196 Cal. App. 4th at 1274.