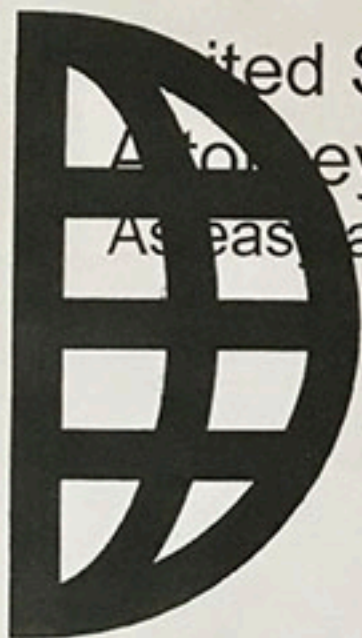


BAKER & MCKENZIE



United States

Attorney-Client Privilege

As to issues 1, 2, 3

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Baker & McKenzie Zurich is a member of Baker & McKenzie International, a Swiss Verein.

2004 American Bar Association survey of US lawyers

- 87% of lawyers responded that the attorney-client privilege had been challenged in the last year
- 25% of the challenges came from federal prosecutors (up +200% post Patriot Act), 15% by federal agencies, 6% by state prosecutors and state agencies, rest from opposing litigants
- 96% of lawyers responded that privilege "was crucial in representing companies"
- 95% of lawyers responded that the break-down of the privilege post Patriot Act has chilled frank discussion of legal issues

Why grant the privilege?

- Clients should be encouraged to be completely truthful with their attorneys
- Clients would be reluctant to seek legal advice if they feared communication would be revealed
- Encouraging communication with lawyers promotes voluntary compliance with the law

What is a privilege?

- Black's Law Dictionary defines "privilege" as "a special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty." Black's Law Dictionary 1215 (7th ed. 1999).
- More plainly, a "privilege" is a right to withhold information from any legal proceeding without suffering the legal consequences (contempt of court, etc.)

Where does the privilege come from?

- Initially recognized in English common law first in the 16th century
- Federal Rules of Evidence, Section 954, enacted in 1975 (codified the common law) – governs what goes into the official record
- Federal Rules of Civil Procedure 26(c) protects against discovery of privileged communication in litigation or other controversy – governs what has to be exchanged between litigants
- IRC Section 7525, enacted in 1998, accountants *quasi* privilege

Three prong test

1. Confidential communication
2. Between Attorney and Client
3. For the purpose of obtaining legal advice

Key here – not all communication between Attorney and Client privileged

When does the privilege attach?

- Preliminary communications – yes!
- Even if no fees are paid – yes!
- Even if Attorney does not get hired – yes!

Capacity Rules

- Must be acting "in capacity" of an Attorney
- Agents of Attorneys covered – yes
- Attorney unlicensed in the place where communication occurred – yes
- Jailhouse lawyers –no!
- Important – communication must not be intended for third parties (legal opinions to banks, etc.)

Example #1

- Dr. Strangelove walks into Swiss bank and discusses with his “Private Banker” his intention to report his undeclared funds:

Privileged?

Example #2

- Dr. Strangelove and Private Banker teleconference Attorney into their meeting at the bank to discuss the undeclared funds:

Privileged?

Example #3

- Client and Private Banker come to Attorney's office and have meeting with Attorney?

Privileged?

Example #4

- Client, two of Client's Attorneys, a paralegal, and two assistants all have a meeting to discuss reporting of the undeclared funds?

Privileged?

YES! Because:

1. Confidential communication
2. Between Client and Attorney
(and attorney's agents)
3. For the purpose of seeking legal advice

Key here – no communication to 3rd parties

Same meeting, but

- CPA, accountant, or other tax preparer has meeting with Client to discuss the reporting of undeclared funds...privileged? (no, or extremely limited)
- The limited privilege for accountants may only be asserted in non-criminal tax matters and only before IRS or in tax litigation;
- Cannot be claimed with regard to other federal agencies, in state court, or in criminal matters – when it really counts!
- Also a carve-out for written communication between accountants and Client regarding a “tax shelter”

Conclusion: not really privileged!!

Sharing with accountants

- Clients often do not realize that once they give a “privileged communication” to their accountants, or auditors of a company, they have waived the privilege
- Use the Kovel letter to make sure accountants are working for the lawyer if you want the communication to be privileged communication

Example #5

- Client and Attorney go into elevator, elevator operator closes door, and Client asks Attorney for legal advice

Privileged?

Example #6

- Client and Attorney have dinner at crowded Overpriced Restaurant where Client asks Attorney for legal advice

Privileged?

Rule

RULE: if Client knew or should have known the communication was not private, i.e. not confidential, then #1 is not satisfied and the communication is not privileged

Is there a malpractice claim lurking here?

Where do we see the privilege issue arise?

- Government or opposing lawyers attempt to submit communication to a civil or criminal court or request the defendant disclose the communication with regard to some investigation
- Client brings *Motion to Quash* to exclude documents, oral testimony, or other evidence requested during discovery or a *Motion in Limine* if evidence already in the hands of prosecutors/litigants
- Judge then decides during hearing whether privileged or not:
 - ...how does the judge know?
 - ...*in camera* review of communication?

Laying the Foundation

- Generally, once the client raises an objection based on a privilege the presumption is that the communication is privileged;
- Burden of proof is on the government or proponent of the evidence to show it is not privileged
- During hearing on the motion, the client may be called to testify as to the facts supporting the privilege – but not as to the content

Panic!

- What if the communication is stolen or otherwise improperly lands in the government's or opposing party's hands?
- Exclusionary Rule: Weeks v. United States (1914) established common law rule
- The Rule: illegally obtained evidence is generally inadmissible as a matter of public policy
- Burden is on Client to show illegally obtained, THEN BURDEN SHIFTS to proponent of evidence to show not privileged

Difficult examples

- **In-house counsel?**

- During meeting to discuss opening new branch operation...privileged?
- During meeting to discuss financial performance...privileged?
- What about meeting to discuss new insurance contract? Price? Terms?

Difficult examples

- **Client is the company/corporation?**
 - Discussion with officers of the company? (sometimes)
 - What about regular employees? (no)
 - What about shareholders? (no)
 - Are there conflict of interests lurking here?

Difficult examples

- **Trustee relationship?**
 - Privilege between Trustee and Beneficiary? (no)
 - Privilege between Attorney for Trustee and Trustee? (yes, if 1, 2, 3)
 - Can Beneficiary assert the Trustee's privilege? (no)

Attorney-Client Work-product doctrine

- Extension of attorney client privilege to written materials potentially not seen by Client
- Technically, no #1 because information not always "communicated" – e.g. memo for the file
- But, if document was prepared in furtherance of litigation or other legal advice it will be protected

Final thoughts

- Always think, 1, 2, and 3
- If you want communication to be privileged, it must be confidential, which means absolutely private
- Do not include 3rd parties!
- Accountant communication with the Client is not privileged, except in very limited circumstances
- Private bankers do not enjoy the attorney-client privilege and thus may be forced to testify or may be served with a *subpoena duces tecum* if subject to United States jurisdiction