

THE ATTORNEY-CLIENT PRIVILEGE

WORKING TOGETHER TO PRESERVE CONFIDENTIAL LEGAL COMMUNICATIONS

Most people are familiar with the phrase, “attorney-client privilege,” yet there are a number of misconceptions about the concept. In this article, we will explore the parameters of this doctrine so that district administrators and employees who are involved in legal proceedings will have a better understanding of how to protect confidential communications.

It is important for school and community college districts and county offices of education to be able to seek legal advice and representation in confidence, and for attorneys to be able to obtain enough information from staff to be able to give sound advice. Armed with as much information as possible about the facts of a case, the attorney can properly sift through those facts in light of applicable law, evaluate the strengths and weaknesses of the case, assess the district's options, and provide advice on possible impacts and outcomes.

The attorney-client privilege has existed in one form or another since the time of Queen Elizabeth I. Misuse of the privilege is common and often litigated in the courts, from local courts to the United States Supreme Court.¹ In the education setting, many district employees may not even realize they have a role in the creation and preservation of the privilege. Mis-steps can and do result in the loss of the right to protect the communication. That can mean that sensitive information concerning legal liability or strategies will be released and can be used against the district.

This article will give you a basic understanding of the concepts and some tips that will help us to work together to preserve the confidentiality of the district's communications with counsel.

I. WHAT IS THE ATTORNEY-CLIENT PRIVILEGE?

The attorney-client privilege is a legal rule of evidence that under the proper circumstances protects lawyer-client communications. The privilege allows a client to refuse to disclose and to prevent others from disclosing confidential lawyer-client communications.² The attorney has a

¹ See, *Berd v. Lovelace* (1577) 21 Eng. Rep. 33 (Ch.); *Hunt v. Blackburn* (1888) 128 U.S. 464 [“The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences.”]

² California Evidence Code section 954.

duty to assert the privilege in any setting where the attorney becomes aware that someone is seeking disclosure of privileged information.³

The privilege protects communications in confidence between a client and attorney for the purpose of obtaining or providing legal advice. Many questions arise as to each element of the privilege—whether the communication was reasonably made in confidence; who is the client; who is the attorney (and which of the attorney's agents can communicate on the attorney's behalf); whether the communication was really for business purposes or to obtain legal advice, etc. To qualify as a confidential lawyer-client communication, the information exchanged between the lawyer and client must be transmitted by a means which, so far as the client is aware, does not disclose the information to third parties, with limited exceptions. Those who are present or included in the communication to further the client's interest in the consultation, and those to whom disclosure is reasonably necessary to transmit the information or to accomplish purpose of the consultation are included within the zone of confidentiality.⁴

The rule protects individuals, but it also applies to corporations and public entities that consult attorneys through authorized representatives to obtain legal advice.⁵

II. WHY IS THE PRIVILEGE IMPORTANT?

Districts deal with an ever-growing set of scenarios that may result in legal liability or potential action by regulatory bodies. To be able to evaluate these situations and take appropriate action, district officials need access to qualified legal counsel with whom they can discuss the strengths and potential shortcomings of a particular situation in confidence and receive advice on potential liability and important next steps. Equally important is the need for counsel to be able to speak with district officials and employees to discover the relevant facts. The first step in resolving a legal problem is to find out the facts and analyze them with an eye towards what matters from a legal perspective. The attorney can then advise district decision makers on potential courses of actions and the risks and benefits of each.

The privilege shelters communications with counsel from discovery by those who would seek to benefit from the attorney's work to the detriment of the district.

³ Even outside the attorney-client privilege, attorneys have a duty under state law to guard the secrets of their clients. *See*, Business & Professions Code section 6068.

⁴ Evidence Code section 952.

⁵ Evidence Code sections 951, 954 and 175; *Sacramento Newspaper Guild v. Sacramento County Bd. Of Supervisors* (1968) 264 Cal.App.2d 41.

III. WHICH DISTRICT EMPLOYEES ARE TYPICALLY INVOLVED IN PRIVILEGED COMMUNICATIONS?

Employees at all levels of the district can potentially be involved in privileged communications, depending on their roles in the district. The Board of Trustees will often be involved at the highest level, in authorizing counsel to initiate a lawsuit or defense, providing direction or approving a settlement agreement. The open meeting laws (Ralph M. Brown Act) specifically allow the Board to discuss pending and anticipated litigation in closed session.⁶ Superintendents will almost always be involved in such discussions. Other district office administrators may also be included if the legal matter is within their area of authority or requires their expertise.

Typically, however, administrators and Board members will not have the detailed information on what actually took place. The attorney or an appropriate agent of the attorney such as an investigator will need to meet with employees who have the relevant knowledge to interview them as to what occurred.

A. Who Does Counsel Represent?

Normally, district counsel represents the district itself, so the attorney-client privilege runs between the attorney and the district. As a practical matter, the district is represented by its Board of Trustees, which is normally considered the holder of the privilege.⁷ While the district's attorneys must often obtain information from employees, they typically do not represent individual employees – not even the Superintendent.

B. Whose Communications are Protected?

Even though the legal representation is provided to the district as an entity, many communications between counsel and district employees will be protected by the privilege in instances where they can be considered to be speaking for the district. On the attorney side, this will include not only communications directly from the attorney, but also from others to whom disclosure is reasonably necessary to transmit the information or accomplish the purpose of the communication. This can include communications from legal secretaries, translators, paralegals, and agents necessary for the purpose of the legal consultation such as investigators.⁸ Communications from or with other consultants such as accountants and others may be privileged

⁶ Ralph M. Brown Act, Government Code section 54956.9.

⁷ See, *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.

⁸ See, Evidence Code section 952 and Law Revision Commission Comment.

if necessary for the effective consultation between lawyer and client. The privilege may not apply if the attorney's ability to represent the client is merely improved by the involvement of a consultant or rendered more convenient.⁹

With respect to district representatives, communication with certain employees who are in a decision-making capacity with respect to the lawsuit, or who normally deal with legal counsel, will be protected. But even beyond this "control group," communication with lower level employees can be protected as well.¹⁰

As noted above, a proper evaluation of the facts cannot take place without access to information held by employees. Accordingly, communications with district employees who have information about the legal issue and whose job duties make them responsible for such information will be considered to be communicating on behalf of the district even if they are not decision makers with respect to the lawsuit.¹¹ The same is true where the employer requires that employees make a confidential report of incidents for transmission to the attorney. To be considered confidential, it is important that employees understand the information gathering is part of the legal consultation and representation and is intended to be maintained as confidential. Communications between such employees and their family members, friends or other third parties will be outside the privilege. The same is true of communications with other employees who do not have a need to know the information.

While communications with employees outside the control group may be protected by the privilege, the privilege is controlled by district decision makers and not the individual employee. Counsel will typically inform employees of the fact that they represent the district and not the individual. Thus, information the employee shares with counsel may be disclosed to district decision makers for purposes of evaluating and acting on the legal advice.

As an example, in the course of investigating allegations of employee misconduct, employees may in confidence provide important evidence to the district's attorneys that the misconduct did in fact occur. That information will be revealed to district management, who may need to use that

⁹ See, *United States v. Chevron Texaco Corp.* (N.D. Cal. 2002) 241 F.Supp.2d 1065 [Privilege does not "extend ... beyond the situation in which an accountant was interpreting the client's otherwise privileged communications or data in order to enable the attorney to understand those communications or that client data."]

¹⁰ *Upjohn Co. v. United States* (1981) 449 U.S. 383; *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485 [Attorney-client privilege extends to communication of lower level employees who reasonably need to know of the communication to act for the organization.]

¹¹ See, *Chadbourne v. Superior Court*, *supra*, 60 Cal.2d 723, the rationale of which was extended to the public entity setting in *People v. Glen Arms Estate* (1964) 230 Cal.App.2d 841]. Employees who may have witnessed something relating to the claim but for whom it has no connection to their job duties could be outside the privilege as "independent witnesses." *Chadbourne*, *supra*, 60 Cal.2d 723.

information to make decisions to protect the district. As another example, in the course of investigating a parent's claims in a special education matter, improper practices on the part of district staff may come to light which need to be revealed to responsible administrators. While these communications to counsel are protected, the individual employees do not control how the information is used or whether the district later elects to waive the privilege.

Keep in mind that the privilege does not protect the underlying facts themselves from disclosure, but only the communication of those facts between attorney and client.

IV. WHAT KINDS OF DOCUMENTS AND OTHER COMMUNICATIONS TYPICALLY MERIT PROTECTION?

Typically, the types of communications for which protection is claimed include requests by the district for legal advice from its attorneys, communication from district personnel providing factual information to the attorney (which could include interviews, documents, spreadsheets, reports, memoranda or even video), communications from the attorney seeking information from the district to evaluate the situation, and legal advice provided to the district.

A. Verbal Communications.

Any confidential verbal communications with counsel relating the client's request for legal service or advice should be protected. This could also include conversations between employees if relating to the legal representation. This means it is important to be mindful of who is present at meetings or teleconferences to discuss legal issues. On the district side, those without a need to know should not be present for such discussions. Making reference to advice given by the district's attorneys in conversations with third parties may entitle an adversary to inquire into the advice sought and received and what counsel did to develop it.

B. Written Communications.

Written communications are also entitled to protection. These can include, for example, confidential advice letters, draft responses, certain investigative reports, draft charging documents in employee discipline matters, research memoranda, draft responses to "due process complaints" in special education matters. On the attorney side, these documents may be originated or transmitted by the attorney, legal secretaries, paralegals, and agents necessary for the purpose of the legal consultation such as investigators. While communications from attorneys should be labeled as privileged and confidential, the label is not required to assert the privilege.

C. Special Problems with Electronic Communications.

Today the majority of information is created or stored electronically. Given the great ease with which electronic communications can be circulated, it is especially important to pay attention to who is copied on e-mails. Just as with the decision on who to invite to a meeting, a “more the merrier” approach is not appropriate for electronic legal communications. Care should be taken to include only those with a need to know, and to correct any inadvertent inclusion of those who do not.

Attorney-client communications can be contained in word processing documents, e-mail, text messages, voice-mail, deleted e-mail that can be restored, back up and deleted files, and even information stored in peripheral devices such as printers, external hard-drives, and fax machines. This creates potential problems when electronic records are requested in court proceedings. Attorneys may be required to search through enormous volumes of electronic records seeking to pull out privileged documents to avoid disclosure. Most major employment disputes will be subject to requests to discover electronic information. Even rather dated information indicates that a single e-mail can reproduce itself an estimated 27,000 to 28,000 times on a computer system during a year, which can make efforts to locate and protect privileged electronic communications overwhelming.¹² If attorneys do not locate and exclude all of the privileged documents, courts may declare the privilege to have been waived and its protection lost.

Districts can help by establishing protocols to label such electronic communication so that key word searches can locate them as privileged communications. Storage of electronic communication in files or systems not accessible to those without a need to know is also important to prevent access by those without a need to know. If employees having no connection to legal matters can access privileged communications, the privilege may be lost.

V. WHO CAN WAIVE THE PRIVILEGE?

Certain events can trigger a waiver of the privilege, in which case the district may lose the power to claim its protection. This occurs when a significant part of the communication is disclosed to a third party, or when consent to disclosure is given, under circumstances where coercion is not a factor.¹³ For that reason, every effort should be made to preserve the privilege in terms of taking care to carefully determine who can be privy to the communications, to

¹² Bruno, Anthony Francis, *New York Law School Law Review*, “Preserving Attorney-Client Privilege in the Age of Electronic Discovery”, Vol. 54 2009/10. In one cited case, the plaintiff produced 133 CDs with single-page image files totalling nearly 800,000 printed pages, which included four CDs containing more than 500 inadvertently produced e-mails with privileged information.

¹³ Evidence Code section 912.

establish practices so that privileged materials are disseminated only within the zone of confidentiality, and to properly label and maintain the confidential communications.

While an intentional waiver is likely to cause loss of the privilege, in some jurisdictions including California, an inadvertent, accidental disclosure may not trigger a waiver. This will depend on the circumstances surrounding the disclosure.

Examples of potential waiver scenarios in the education setting include copying an entire department on an e-mail from legal counsel; discussing confidential advice from counsel with the media or at a social function; circulating a draft investigative report to a district consultant not necessary to the furnishing of the advice; copying and pasting confidential advice of counsel into a letter to a third party; sharing advice of counsel with parents of a student receiving special education services; or forwarding the attorney's advice regarding a charter school matter to representatives of the charter.

The case law is not absolutely clear on what triggers waiver in the context of a public entity. If an employee, even a member of the management team, discloses a privileged communication, the district would assert that only the Board of Trustees has the power to waive the privilege, and must do so in a board meeting and by majority vote.¹⁴ However, given the lack of clear guidance on this point in the case law and the potential consequences, taking every effort to preserve the privilege is highly recommended.

VI. TIPS FOR PRESERVING THE PRIVILEGE.

Employees who are routinely involved in communication with the district's legal counsel and others who become involved in a particular situation should be educated about the privilege and the need to maintain confidentiality of lawyer-client communications. The attached checklist may be helpful.

Employees should know not to discuss or share information on legal matters with other employees who have not been authorized as having a need to know or with third parties. Even within the control group (senior management), care should be taken to tailor access to necessity and job function. Special care should be taken with e-mail and electronic documents to limit the distribution list.

Attorney-client communications or transmission of confidential documents, should be labeled as privileged and stored so that unauthorized persons do not have access. Ideally, district

¹⁴ *See, Vela v. Superior Court* (1989) 208 Cal.App.3d 141 [Criminal case later questioned on other grounds; court declined to uphold waiver of the privilege where LAPD officer testified about interview by an investigation team because City and not officer was holder of the privilege.]

communications should spell out the request for legal advice in writing and refer to it subsequently.

The following is a sample privilege label:

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

This label should not be used routinely on all communications between lawyer and client; it should be used in a deliberate manner to flag communications relating to a legal consultation.¹⁵

Copies of such documents should be segregated and stored in separate files in a location not generally accessible to other employees. The same goes for electronic records.

To sum up, the district and its counsel should take all reasonable steps to preserve confidentiality and to shore up any holes in their procedures.

VII. WHAT IS ATTORNEY WORK PRODUCT?

From time to time, you may see documents generated by attorneys which are marked “Confidential Attorney-Work Product.” The work product doctrine is distinct from the attorney-client privilege. This rule is designed to provide sufficient privacy for attorneys to investigate and prepare cases for trial. It protects any writing that reflects an attorney's impressions, conclusions, opinion or legal research or theories.¹⁶ The rule protects documents prepared in anticipation of litigation and otherwise in the role of counselor.¹⁷

VII. CONCLUSION

The attorney-client privilege is an important tool protecting the ability of districts to air their legal concerns in privacy with their attorneys and prevent the disclosure of information exchanged for this purpose. Whether they realize it or not, many district employees may be involved in the creation of the privilege and can unknowingly cause the district to lose its protection. Districts and their counsel can work together to educate those involved and implement proper practices to preserve the privilege. If you have questions about this topic, please contact our office.

¹⁵ Documents which were not originally created with an expectation of confidentiality for purposes of legal consultation do not necessarily become privileged simply to later transmitting them to an attorney. Similarly, the act of copying the attorney on routine correspondence will not necessarily trigger the privilege.

¹⁶ The work product rule has been codified in California. See, Code of Civil Procedure section 2018.010 and following.

¹⁷ 70 Opinions of the California Attorney General 28 (1987)

CHECKLIST FOR PRESERVING THE ATTORNEY-CLIENT PRIVILEGE

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| ✓ | CONVERSATIONS |
| | Do not discuss legal issues in public. Do not discuss legal issues with employees who do not have a need to know or who are not involved by virtue of their job duties. Do not reference attorney-client communications in discussions with anyone outside the “need to know” group [example: “Our attorneys advised us . . . “]. Employees who are not top-level administrators assigned to the legal matter should not discuss it with other employees. |
| ✓ | COPIES |
| | Do not provide or circulate documents reflecting discussions with legal counsel or documents received from legal counsel to anyone without authorization of the Superintendent. If you become aware that communications are being circulated outside the circle of those with a need to know, take steps to correct that. Beware wireless Internet connections! Do not copy attorneys on communications solely to assert privilege where it is not part of an effort to obtain legal advice. |
| ✓ | DON'T SHARE |
| | Do not relate the information contained in a privileged email or show the email to third parties. Showing may have the same effect as handing it over. |
| ✓ | E-MAIL |
| | First ask yourself whether the e-mail communication is necessary (once sent, it lives forever). Attempts at humor may be misconstrued. Take special care not to copy (directly or via blind copy) “third parties” on confidential e-mail communications. If you believe an employee does not need to know about the legal communication, do not copy them without the Superintendent's consent (Superintendents in doubt, consult legal counsel). Confirm the accuracy of the list of recipients before using “Reply All.” |
| ✓ | MEETINGS |
| | Do not include outsiders in otherwise privileged meetings. Do not include insiders who do not have a need to know the information or are not necessary for the transmission of information to counsel. |
| ✓ | SEPARATE |
| | Privileged communications should be kept in a separate legal file marked “CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS” or at least “CONFIDENTIAL AND PRIVILEGED.” |



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CHECKLIST FOR PRESERVING THE ATTORNEY-CLIENT PRIVILEGE

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| ✓ | ACCESS |
| | Restrict access to confidential documents to those with a need for access. This means storing them in a secure location, ideally a locked file cabinet. Confidential electronic documents should be stored in such a way that persons without a need to know and authorization cannot access them. |
| ✓ | LABEL |
| | Label privileged documents as such. This means clearly stating in correspondence that the document is "Privileged and Confidential Attorney-Client Communication." However, be selective in labeling – the privilege should not be asserted for every routine correspondence with counsel. |
| ✓ | DESCRIBE |
| | Confirm in communications with counsel that legal advice is being sought. "Attached is the draft contract document we discussed. I am requesting legal advice on the provisions relating to termination." |
| ✓ | INVESTIGATION |
| | When beginning an internal investigation with counsel, follow a protocol establishing that all key documents are being prepared by or at the direction of counsel. For privilege protection, the investigation must be motivated primarily by (and used for) legal rather than business concerns. |
| ✓ | CONSULT |
| | Before beginning an investigation, consult counsel so they can advise you on what steps to take to maximize protection. |

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