

## Attorney-Client Privilege “Basics”

### **I. Introduction**

The attorney-client privilege is the oldest privilege known to the law allowing confidential communications. The purpose of the privilege, of course, is to enhance the attorney-client relationship by promoting the free flow of information between an attorney and the attorney’s client. The privilege accomplishes this by protecting from involuntary disclosure communications between such parties that are intended to be confidential, thereby encouraging the client to communicate openly with the attorney and the attorney to communicate candidly with the client.

### **II. How the Privilege is Established**

In its simplest form, the privilege is relatively easy to understand. However, in the world of “corporate” or institutional clients (including universities), some complexities emerge. It is generally understood that the privilege belongs to the *client*. But who, in the corporate or institutional setting, is the client? Under one theory, only communications between an attorney and the organization’s upper level administrative group, or “control group,” are covered by the privilege. The United States Supreme Court rejected this theory, however, and now the privilege is generally applicable to communications with a broader category of employees. *See Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). As long as the attorney is acting at the direction of upper level employees of the corporation or institution for the purpose of giving legal advice to the entity, the privilege generally will apply to communications between the attorney and lower level employees. *See Ex parte Alfa Mut. Ins. Co.*, 631 So.2d 858 (Ala. 1993)(citing *Jay v. Sears Roebuck & Co.*, 340 So.2d 456 (Ala.Civ.App. 1976)).

It is also true that the privilege applies only to communicative exchanges between the lawyer and his/her client and only to communications that relate to the seeking or giving of legal advice from or by the attorney. With respect to the second qualification, only communications made while an attorney is fulfilling a legal role are protected. The attorney’s participation in a conversation relating to business or administrative matters, or the attorney’s presence at a meeting at which such matters are discussed, is not within the privilege. It is obviously important, therefore, that all parties understand in what capacity (“legal” or “non-legal”) an institutional attorney is functioning in the context of a particular conversation or meeting. With respect to the first qualification, merely adding the attorney’s name to the distribution list of a document does not automatically attach the attorney-client privilege to that document. However, the privilege will attach if the document is part of a communication between a lawyer and his client and the document is part of the process whereby the lawyer is providing legal advice. Finally, in Alabama the privilege attaches both to statements made by an attorney to the client and statements made by the client to the attorney, as long as the other requirements are met.

The privilege may apply not just to the attorney but also to those working on behalf of the attorney. Communications from a client to an attorney’s agents or subordinates, such as an administrative assistant, secretary, or law clerk working under the attorney’s supervision and

control, are privileged. See *Richards v. Lennox Industries, Inc.*, 574 So.2d 736 (Ala. 1990). The privilege has also been held applicable to a non-attorney university employee interviewing fellow university employees at the direction of the university attorney in a sexual harassment investigation. *Carter v. Cornell Univ.*, 173 F.R.D. 92 (S.D.N.Y. 1997).

### III. How the Privilege May be Lost

There are several ways that the attorney-client privilege may be lost, all of them having “waiver” as the common denominator. First, the privilege is not automatic; it does not arise unless it is properly asserted. Thus, it may be lost by a simple failure to assert the privilege at the appropriate time, such as by failing to object to privileged testimony that is solicited at a trial or administrative hearing.

Secondly, the privilege may be lost by a voluntary, intentional disclosure. If the material is disclosed to a third party, the privilege may be lost, even if the third party has agreed to keep the material confidential. Thus, for example, if a significant part of information previously communicated between a senior University official and a University attorney within the scope of the privilege is shared by the official with a party outside the University, the privilege will likely be lost as to the original attorney-official communication. Even sharing a significant part of the information with *another University official* is ill-advised -- the argument may later be made that such disclosure amounts to a waiver of the entire attorney-official communication on that subject matter (see discussion below). Of course, conversations between non-lawyer University officials are not in any way privileged and are thus subject to subsequent mandatory disclosure.

The attorney-client privilege may also be lost by the inadvertent disclosure of privileged material, an event that typically happens as a result of the actions by counsel for a party during a lawsuit (particularly the discovery phase). In order for a disclosure to constitute a waiver of the privilege, it must be voluntary, Ala. R. Evid. 510; and whether an accidental or unintended disclosure is sufficiently “voluntary” to constitute a waiver is said to be “an open question.” *McElroy’s Alabama Evidence*, Vol. II, § 394.01(2)(c). Many courts will look at factors such as whether the party took reasonable steps to prevent disclosure, whether the party acted promptly to rectify the disclosure once discovered, what result will serve the interests of justice, etc. in determining whether the disclosure may be considered voluntary and thus an effective waiver. The Federal Rules of Evidence, Rule 502(b) also focuses, in the context of a federal proceeding, on these considerations, holding that waiver does not occur when reasonable preventive steps and prompt rectifying action were taken by the disclosing party. The Federal Rules of Civil Procedure (Rule 26(b)(5)(B)) provides for the return of privileged materials that were inadvertently disclosed by a party, once that fact is made known by the other, disclosing party.

A related question has to do with the scope of the waiver. Does disclosure of one part of a privileged matter result in waiver of the entire matter? For example, if a University official voluntarily disclosed an attorney-client document relating to a liability issue, would that have the effect of waiving the privilege as to all other communications between them on the same subject? The rule in Alabama is that the portion revealed must be significant in order for waiver to exist as to the subject matter in general, including other communications on the same subject. See Ala.

R. Evid. 510. The Federal Rules of Evidence, as amended in 2008, now provide that this “subject matter” waiver will extend to undisclosed communications/documents only if the waiver was intentional, the disclosed and undisclosed communications concern the same subject matter, and fairness dictates that the communications be considered together. Fed. R. Evid. 502(a). Inadvertent disclosure does not result in subject matter waiver under this Rule.

These rules are particularly important today due to the tremendous increase in the amount of digital data, often involving huge masses of communications, that are now created and stored by corporate/institutional entities. As the discovery of this electronic data has become prevalent in litigation, the risk of inadvertent disclosure of attorney-client material has grown and remains a concern.

#### **IV. Exceptions to the Privilege**

There are at least two areas where the attorney-client privilege does not arise. The first is the crime/fraud exception. The Eleventh Circuit Court of Appeals has held that, in order for this exception to apply, it must be shown that the client was engaged in the criminal/fraudulent activity at the time legal advice was sought, and the legal advice was obtained in furtherance of the criminal/fraudulent activity. *See, e.g., In re Grand Jury Investigation (Schroder)*, 842 F.2d 1223 (11th Cir. 1987). The second exception involves the representation of two or more clients by the same attorney. In that situation, the attorney-client privilege applies to disclosure sought by all third parties but not to disclosure sought by the represented parties.

#### **V. Open Records Act Issues**

State universities face an additional challenge in maintaining the attorney-client privilege relating to documents because of public disclosure statutes, such as, in Alabama, the Open Records Act. § 36-12-40, *Alabama Code* (1975, as amended). Though not applicable to a state university, the federal Freedom of Information Act helpfully includes a specific exemption for attorney-client and work-product documents. 5 U.S.C. § 552(b)(5). The Alabama Open Records does not contain a similar express exception for attorney-client privileged records. However, the Alabama Supreme Court has long held that records received by the state in *confidence* are not within the scope of the Open Records Act. *See Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981). While there is no Alabama decision positively holding that attorney-client privileged records of a public entity are exempt from the operation of the Open Records Act, a 1991 Court of Civil Appeals case is instructive. *Advertiser Co. v. Auburn University*, 579 So. 2d 645 (Ala. Civ. App. 1991). The trial court in that case held that an attorney report furnished to Auburn University was a public document subject to the Open Records Act and that the non-statutory exceptions recognized in the *Stone* case were not applicable to the document. The court further held that the document was subject to the protection of the attorney-client privilege but that, in this case, the privilege had been waived when Auburn furnished a copy of the document to an affiliated corporation. That holding was not appealed, so the decision does not constitute actual authority on this issue.

Related to the attorney-client privilege is the attorney work-product rule. This topic will be covered in the next issue of *Legal Watch*.