

## Attorney- Client Privilege

The general rule under the Oregon Public Records Act is that all public records must be disclosed, if requested. Further, with respect to litigation, the general rule is that all information pertinent to a case is discoverable, if requested. The exceptions in both instances are documents that fall under one or more privileges when that privilege has not been waived – meaning the information has been kept confidential.

Attorney-client privilege is an evidentiary rule that protects communications between a client and his or her attorney and keeps those communications confidential. It protects both attorneys and their clients from being compelled to disclose confidential communications between them made for the purpose of furnishing or obtaining legal advice or assistance.

The privilege is designed to foster frank, open, and uninhibited discourse between attorney and client so that the client's legal needs are competently addressed by a fully prepared attorney who is cognizant of all the relevant information the client can provide. The attorney-client privilege is considered as one of the strongest privileges available under law.

## How to avoid Waiving or Losing the Attorney- Client Privilege

The attorney-client privilege is not only important to ensure protection of legal advice from disclosure under Oregon public records law but essential to defending the Department or Commission, or both, in any lawsuit. However, in some cases, the attorney-client privilege can be destroyed, either by design or sometimes by accident.

What is the attorney-client privilege? It protects confidential communications between an attorney and their client(s) that is either (a) legal advice provided a client at their request; or (b) information pertinent to client's request for legal advice that is shared with attorney for that purpose. In the latter example, DOJ generally argues that this includes information shared with attorney for the purpose of making that attorney aware of subject so that the attorney may provide guidance on how to proceed in conformance with all applicable legal requirements. In general, it means confidential communication between a client and her lawyer cannot be used in court. The privilege generally covers legal advice and law-related discussions between a lawyer and a client, whether written or oral.

Therefore, what does not fit under the privilege, or can destroy the privilege altogether? Here are four scenarios to consider:

1. **Non-legal advice** -- The attorney-client privilege generally does not apply when a communication discusses unrelated issues that have nothing to do with the law. Courts generally focus on the "primary purpose" of a communication to

determine if it is privileged. Example: Don't just copy an attorney. Ask the attorney a question, but you may provide the relevant background information so that the attorney may provide his/her advice on how to proceed.

2. **Informed waiver** -- One way to get the attorney-client privilege destroyed is by agreeing to waive the privilege. A waiver is often required to be in writing, and can't be undone. Government entities sometimes agree to waive the privilege to show they have nothing to hide. However, waivers must be intentional, and DOJ advises to approach this decision cautiously as it may waive privilege on related documents concerning same subject matter.
3. **Waiver by communication to a third party** -- One of the most common ways to waive the privilege is to have a third party present at the time of the communication. Waiver also occurs when a client or lawyer later discloses privileged information to a third party.
4. **Failure to object** -- This usually happens during the pretrial discovery phase, when both sides request documents and information. If privileged information is produced, and a party does not object in a timely manner, the privilege may be lost forever.

The attorney-client privilege is not easily destroyed, but it is not uncommon for it to be challenged as a case proceeds. If you are in the midst of litigation, it may be a good idea to ask Erin or Anika precisely what is covered so you do not destroy the privilege by accident. Cardinal Rule: Protect information and advice covered by the attorney client privilege to ensure the Commission maintains its confidentiality.