

I have been warned not to waive my attorney-client privilege during my civil lawsuit, what does that mean?

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To understand the importance of the attorney-client privilege, initially, one must understand what information a party is generally entitled to during a lawsuit/litigation. Generally, the other party is entitled to what you say to others about the facts of the lawsuit. This needs to sink in because people are used to the world where another person cannot get information about communications they have with another unless someone tells them. This is better known as the secret. Well, in litigation, a party has the right to compel (that means require them with the force of law) to divulge the communications under what is called "Discovery" in a lawsuit. In Discovery, parties have to share information, whether they like it or not, that is sought and reasonably calculated to lead to the discovery of admissible evidence. Mass. R. Civ. P. 26(b)(1). (This means, in general, there are no secrets and this is one reason why lawsuits are sometimes not filed.) So, if you blab to your best friend about the lawsuit, generally, the other party gets to know what you said. This can be quite damaging to a party's interests in a lawsuit and there are an infinite amount of scenarios one can imagine where disclosure can be damaging.

Now let's turn to what the privilege is and what its purpose is. The attorney-client privilege is a legal right to withhold the content of communications between people, in this case communications between an attorney and a client, which would otherwise be discoverable. The privilege only exists when there is: 1) a communication; 2) made between privileged persons; 3) in confidence; 4) for the purpose of seeking, obtaining, or providing legal assistance to the client. On the federal level a similar formula for the attorney-client privilege has been cited: 1) where legal advice of any kind is sought 2) from a professional legal advisor in his capacity as such; 3) the communications relating to that purpose; 4) made in confidence; 5) by the client; 6) are at his instance permanently protected; 7) from disclosure by himself or by the legal advisor; 8) except the protection be waived. US v. Mass. Inst. of Tech., 129 F3d 681, 684 (1st Cir. 1997).

The purpose of the attorney-client privilege is simple, "it encourages disclosures by client to lawyer that better enable the client to conform his conduct to the requirements of the law and to present legitimate claims or defenses when litigation arises. Id. See Upjohn Co. v. US, 449 U.S. 383, 389-90 (1981). In layman terms, it allows a person to speak to their attorney and obtain legal advice without the worry what is said will be used against them.

The focus of this post is on waiver, which generally is the intentional relinquishment of a right, and in the context of the attorney-client privilege is doing something to give up the protection or not doing something to ensure it exists (which should be referred to as forfeiture, but to conform to slippage in legal parlance we will continue to refer to it as waiver). One way you can waive the privilege is simply to blab what you said to your

attorney or what he said to you, which is simple enough to understand. XYZ Corp. v. US (In re Keeper of Records), 348 F.3d 16, 22 (1st Cir. 2003). So, don't talk about a lawsuit when you are involved in one at the cocktail party, at the gym, or at the water cooler at work.

Another way one can possibly waive their attorney-client privilege is to bring a third party into a meeting with your attorney. It is common for a person to bring a third party to a meeting with an attorney without realizing or having any thought that there could be a danger in doing so. It should be understood, that the presence of the third party generally defeats the attorney-client privilege. That means, having a meeting with your lawyer with a third party present, the communications are not protected. (This does not include agents of the lawyer, like a paralegal of the law office.) There can be exceptions found where the attorney-client privilege continues even when a third party is in the meeting. US v. Mass. Inst. of Tech., 129 F3d 681, 684 (1st Cir. 1997) (noting and citing to other decisions ruling that information shared with "secretaries, interpreters, counsel for a cooperating co-defendant, a parent present when a child consults with a lawyer" were still privileged despite the presence of the third party); Deloury v. Deloury, 22 Mass. App. Ct. 611, 613 fn.1 (1986) (noting presence of grown daughter for "moral support" in contemplation of filing a divorce proceeding did not waive attorney-client privilege).

The legal question appears to center around the client's intent that the communication was to be confidential, but that subjective intent alone may not be found to be "sufficient." US v. Mass. Inst. of Tech., 129 F3d 681, 684 (1st Cir. 1997). It appears to the author from the case law that the question of whether the attorney-client privilege is waived by the presence of a third party in a meeting with an attorney is almost decided on a case-by-case basis because who "closely related persons" are and whose presence is "vital" or "appropriate" to a consultation can be debatable. Id.

Needless to say, the case law on the subject is mixed and it is not always legally clear whether the presence of a third party will waive the privilege. This means, instead of creating an issue the other side can argue in its favor and taking the risk that a court many months from a meeting with your attorney determines that the attorney-client privilege does not exist because there was a third party in the room, the safer move is to never enter a meeting with an attorney with any third party present.

In the event that you are involved in a lawsuit/litigation or are facing one and have concerns over the attorney-client privilege or other concerns, feel free to give this office a call.

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