

LEGISLATIVE CONFIDENTIALITY: How Not to Learn it the Hard Way

LEGISLATIVE STAFF ACADEMY 2022


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PRIVILEGE

priv·i·lege

/ˈprɪv(ə)lɪj/ 

noun

1. a special right, advantage, or immunity granted or available only to a particular person or group of people.

"education is a right, not a privilege"

synonyms: [advantage](#), [benefit](#); [More](#)

PRIVILEGES WE MAY ENCOUNTER

ATTORNEY/CLIENT

- **PROTECTS CONFIDENTIAL COMMUNICATION BETWEEN ATTORNEYS AND CLIENTS, WHICH ARE MADE FOR THE PURPOSE OF GIVING LEGAL ADVICE**
- **DOES NOT INCLUDE ALL COMMUNICATIONS BETWEEN THOSE PARTIES**
- **SUBJECT TO BEING WAIVED**

WORK PRODUCT

- **“QUALIFIED” PRIVILEGE TO PROTECT MATERIALS PREPARED IN ANTICIPATION OF LITIGATION**
- **SHELTERS THE MENTAL PROCESS OF THE ATTORNEY**
- **PREVENTS THE OPPONENT FROM USING COUNSEL’S OWN PREPARATION**
 - **SUBJECT TO WAIVER**

LEGISLATIVE PRIVILEGE

- **HAS NOT YET BEEN RECOGNIZED BY THE WASHINGTON SUPREME COURT**
- **IN THEORY, DERIVES FROM THE CONSTITUTIONAL SPEECH AND DEBATE CLAUSE**
- **PROTECTS INTERNAL LEGISLATIVE DELIBERATIONS**
 - **SUBJECT TO WAIVER**

WHO HAS THE PRIVILEGE

ATTORNEY/CLIENT

- BELONGS TO THE CLIENT, NOT THE ATTORNEY
 - BUT THERE MUST BE AN ATTORNEY/CLIENT RELATIONSHIP TO ARISE
- PRACTICE OF LAW BOARD ONCE CONCLUDED THAT LEGISLATIVE ATTORNEYS DO NOT PRACTICE LAW*

WORK PRODUCT

- MATERIALS ARE OFTEN CREATED BY THE ATTORNEY AND SOMETIMES SHARED WITH THE CLIENT

LEGISLATIVE PRIVILEGE

- INDIVIDUAL SENATORS AND REPRESENTATIVES
- COMMUNICATIONS AMONG STAFF CAN BE COVERED (WE THINK) BUT THE PRIVILEGE BELONGS TO MEMBERS

WHAT HAS TO BE PUT INTO WRITING?

ATTORNEY/CLIENT

WORK PRODUCT

LEGISLATIVE PRIVILEGE

CAN I DELETE DRAFTS?

- **YES, WHEN A PRODUCT IS FINALIZED**
- **NOTE THAT THE DELIBERATIVE PROCESS EXEMPTION FROM THE PUBLIC RECORDS ACT ENDS WHEN A FINAL DECISION IS REACHED**

ARE PUBLIC RECORDS REQUESTS THE SAME AS DISCOVERY

- **NO (SEE HANDOUT)**
- **PRR'S ARE GOVERNED BY THE PUBLIC RECORDS ACT, AND DISCOVERY BY COURT RULES**
- **NO OBJECTIONS TO PRR'S**
- **EXEMPTIONS ARE NOT ALWAYS THE SAME**
- **IF RECORDS ARE NOT AVAILABLE IN DISCOVERY, THEY ARE NOT AVAILABLE ON A PRR**
- **BUT PRA EXEMPTION MIGHT NOT PROTECT FROM DISCOVERY**

WAIVER

A PRIVILEGE GOES *POOF*

WAIVER HAPPENS WHEN ...

VOLUNTARY DISCLOSURE TO A THIRD PARTY

- **EXPRESS WAIVER**
- **TYPICALLY DONE WITHIN THE FULL CONTROL OF THE PARTY HOLDING THE PRIVILEGE**
- **FOR WORK PRODUCT, MAY REQUIRE DISCLOSURE TO THE OPPONENT, NOT JUST ANY THIRD PARTY**

SUBJECT MATTER WAIVER

- **VOLUNTARY DISCLOSURE OF THE CONTENT OF PRIVILEGED COMMUNICATIONS CONSTITUTES WAIVER AS TO ALL OTHER COMMUNICATIONS ON THE SAME SUBJECT**
- **SCOPE IS DEBATABLE**

ILLUSTRATING WAIVER



ALEXA: WAIVE THE PRIVILEGE

- **ATTORNEY AND CLIENT MEET TO DISCUSS A CASE**
- **CLIENT LEAVES, TAKING AN UBER**
- **WHILE IN THE UBER, CLIENT HAS AN ADDITIONAL THOUGHT**
- **“ALEXA, CALL MY LAWYER.”**
- **DISCUSSES CASE WITH LAWYER (1) IN FRONT OF THE UBER DRIVER, AND (2) POTENTIALLY BEING RECORDED BY AMAZON**

FIVE YEARS LITIGATING A FOOTNOTE

- ***UNITED STATES V. SANMINA CORP*, 968 F.3D 1107 (2020)**
- **CORPORATION CLAIMED A TAX DEDUCTION, AND TO SUPPORT IT SUBMITTED A REPORT FROM ITS ACCOUNTANT**
- **ACCOUNTANT'S REPORT, IN A FOOTNOTE, CITED THREE INTERNAL MEMOES WRITTEN BY IN-HOUSE COUNSEL**
- **IRS SUPPEONAED THE MEMOS**
- **9TH CIR HELD THAT CITING THE MEMOS IN A REPORT GIVEN TO THE IRS WAIVED THE PRIVILEGE**

BEFORE I LEAVE ON VACATION . . .

- **TRUE STORY**
- **EMAIL THREAD BACK AND FORTH BETWEEN CLIENT AND ATTORNEYS**
- **ALL CLEARLY WITHIN ATTORNEY/CLIENT PRIVILEGE**
- **CLIENT FORWARDS TO A KING COUNTY DEPUTY PROSECUTOR, “BEFORE I LEAVE ON VACATION, I HAVE TO SHARE THIS WITH YOU”**
- **CLIENT CALLED AS A WITNESS, GRILLED ABOUT CONTENTS OF THE EMAIL**

WHO SEES THAT EMAIL YOU'RE SENDING?

TO: SENATOR X

FROM SENATOR Y

CC: SOMEBODY AT THE GOVERNOR'S OFFICE

SUBJECT: SB 5555

DEAR SENATOR, I REALLY HATE YOUR BILL.

WHO SEES YOUR EMAIL NOW?

TO: A BUNCH OF LOBBYISTS

FROM SENATOR X

SUBJECT: FW: SB 5555

SEE THE EMAIL THREAD BELOW. SENATOR Y REALLY HATES MY BILL

CONSTITUENT SENT ME THIS...

- **WHAT DO YOU ACTUALLY NEED TO RETAIN?**
- **I SHOULD FORWARD IT TO 3 PEOPLE AND THEN ANOTHER TO SEE IF I NEED TO KEEP IT...**
- **STOP FORWARDING!**

IS THIS EXEMPT?

TO: SENATOR X

FROM CONSTITUENT

SUBJECT: HEALTHCARE BILL

BELOW ARE MY THOUGHTS... I HAVE ALSO ATTACHED MANY OF MY MEDICAL RECORDS.

IS THIS EXEMPT?

TO: SENATOR X

FROM CONSTITUENT

SUBJECT: THOUGHTS ON ROAD FUNDS

BELOW ARE MY THOUGHTS... [HERE IS MY DRIVER'S LICENSE AND PHOTOS OF 3 POTHOLES AND REGISTRATION FOR MY CAR.](#)

I DO NOT NEED THIS, BUT YOU HAVE SENT IT TO ME...

- **BANK ACCOUNT NUMBER**
- **BIRTH CERTIFICATE**
- **SOCIAL SECURITY NUMBER**

I DO NOT NEED THIS, BUT YOU HAVE SENT IT TO ME...

- PRESCRIPTION DRUG HISTORY**
- MEDICAL DIAGNOSES**
- DARK FAMILY SECRETS**
- INAPPROPRIATE/OFFENSIVE STATEMENTS/COMMENTS**

BUT IT IS PRIVATE – IT IS PERSONAL

- **THERE IS NO GENERAL “PRIVACY” EXEMPTION IN THE PRA**
- **IF PRIVACY IS AN EXPRESS ELEMENT OF ANOTHER EXEMPTION, PRIVACY IS INVADDED ONLY IF DISCLOSURE ABOUT THE PERSON WOULD BE:**
 - **“HIGHLY OFFENSIVE TO THE REASONABLE PERSON” AND**
 - **“NOT OF LEGITIMATE CONCERN TO THE PUBLIC”**

BUT IT IS EMBARRASSING...

- **THERE IS NO EMBARRASSMENT EXEMPTION IN THE PRA**
- **THERE IS NO “IT MAKES ME/THE AGENCY/THE LEGISLATURE LOOK BAD”**