

Attorney Client  
Privilege, Work  
Product &  
Confidentiality

# Welcome

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# Introduction

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- The attorney-client privilege is an evidentiary privilege
  - Comes into play in governmental investigations, administrative proceedings and litigation
  - Prevents forced disclosure or discovery of testimony or documents involving lawyer-client communications

# Introduction (Cont.)

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- The ability to assert the privilege turns on a variety of factors:
  - What privilege law applies
  - The nature of the communication
  - How the communication was:
    - Made
    - Titled, labeled or described
    - Distributed within the agency
    - Filed or stored
    - Used
  - Whether its contents were disclosed within or without the agency.

# Policy

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- By assuring confidentiality, the privilege encourages clients to make "full and frank" disclosures to their attorneys, who are then better able to provide candid advice and effective representation.

Upjohn Co. v. United States, 449 U. S. 383,  
389 (1981)

# Elements of the Privilege

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- Restatement (Third) of the Law Governing Lawyers § 68
  - Communication
  - Made between privileged persons
  - In confidence
  - For the purpose of obtaining or providing legal assistance to the client

# Sources of Privilege Law

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- Federal (common law and F.R.Evid.)
  - *Upjohn v. United States*, 449 U.S. 383 (1981) and progeny
  - Fed.R.Evid. 502(g)(1) (waiver)
- Arizona (statutory and common law)
  - A.R.S. § 12-2234 (civil actions)
  - A.R.S. § 13-4062(2) (criminal proceedings), as construed by *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 862 P.2d 870 (1993)

# Federal Privilege Law

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- *Upjohn v. U.S.*, 449 U.S. 383 (1981):
  - U.S. Supreme Court adopted broad corporate privilege for employee communications with counsel
  - Rejected narrower “control group” test

# Federal Privilege Law (Cont.)

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- *Upjohn* “subject matter” test protects employee communications with counsel that are made
  - At the direction of corporate superiors
  - In confidence
  - For the purpose of securing legal advice for the corporation
  - Concerning matters within the scope of the employee’s duties

# Federal Privilege Law (Cont.)

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- *Upjohn* rejected “control group” test
  - Privilege may be invoked only by those employees who
    - Communicate with counsel and
    - Who are in a position to control, or take a substantial role in the determination of, the course of action a corporation may take based on the legal advice received.

# Arizona's Privilege Law

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- **1993:** *Samaritan Foundation v. Superior Court*, 176 Ariz. 497, 862 P.2d 870 (1993), narrowly construes *Upjohn*.
- **1994:** Legislature rejects *Samaritan* by amending civil attorney-client privilege statute (A.R.S. § 12-2234), but not criminal statute (A.R.S. § 13-4062); broad application of *Upjohn*.
- **2003:** Court of Appeals rules in *Roman Catholic Diocese v. Superior Court*, 62 P.3d 970, 204 Ariz. 225 (App. 2003) that *Samaritan* applies in criminal cases.

# Arizona Privilege Law (Cont.)

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- A.R.S. § 12-2234 (civil actions)
  - Protects employee communications with counsel
  - Regarding acts or omissions of, or information obtained from, the employee
  - For the purpose of providing legal advice to the agency or the employee

# Arizona Privilege Law (Cont.)

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- A.R.S. § 13-4062, as interpreted by *Samaritan* (criminal actions)
  - All employee-initiated communications (in confidence, seeking legal advice) are privileged
  - When agency law department initiates communications, privilege applies if employee's conduct at issue
    - Not to employees who are fact witnesses

# Which Law Applies?

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- Federal investigation, administrative proceeding, federal court litigation based on “federal question” jurisdiction
  - *Upjohn* and federal common law
- State court litigation, state administrative proceedings, federal court litigation based on “diversity” jurisdiction (assuming Arizona law applies)
  - A.R.S. § 12-2234 and state common law (largely based on federal common law)
- State criminal investigation or prosecution
  - A.R.S. 4062(2) (criminal proceedings), as construed by *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 862 P.2d 870 (1993)

# Which Law Applies (Cont.)

	Actor	Witness
Federal Civil	Yes	Yes
Federal Criminal	Yes	Yes
State Civil	Yes	Yes
State Criminal	Yes	No (unless witness initiates)

# *Upjohn* Warnings

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- Make clear that agency's lawyer does not represent the individual employee;
- Anything said by the employee to the lawyers will be protected by the agency's attorney-client privilege and will be waived, if at all, at the agency's sole discretion; and
- The employee may wish to consult with his or her own attorney if he or she has any concerns about potential personal exposure.

# “In Confidence”

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- Information not deemed confidential (or as not conveying legal advice):
  - Facts told to, or in the presence of, an attorney
  - Non-privileged documents sent to an attorney
  - Drafts of documents sent to third parties
  - Drafts of documents meant to be disclosed to third parties

# “In Confidence”

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- Privilege may be lost if information not conveyed in confidence
  - Communicate only with “privileged persons” in locations/by means that are private
    - Presence of someone who is not “privileged person” will destroy privilege
  - Give oral admonitions in meetings
  - Clearly label written communications as privileged
  - Limit distribution of written communications to those with need to know
  - Segregate privileged from non-privileged communications
    - Instruct agency clients to do same

# “Giving Legal Assistance”

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- Legal, not business or policy, advice is protected
- Internal communications with agency counsel subject to court scrutiny to determine if privilege applies.
- Protected if:
  - Communication is legal in nature
  - If communication has dual purpose, privilege will apply if
    - Primary or predominate purpose to convey legal advice
    - Lawyer acting in legal, rather than business or policy, role

# “Giving Legal Assistance”

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- Best practices
  - Separate legal issues from policy issues to extent practicable
  - Convey legal advice in a document or e-mail that is separate from a policy document
  - Limit written communications

# Work Product Doctrine

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- *Hickman v. Taylor*, 329 U.S. 495 (1947)
  - Information as to facts and witnesses' statements obtained by the adverse party's attorney are not within the common law privilege of attorney and client.
  - The broader policy against invasion of the lawyers' files does not make them absolutely immune from discovery.
  - Party asking for disclosure of information must show special circumstances in order to obtain it.
  - When the proponent of discovery can obtain the desired information elsewhere, it has not met the burden of showing such special circumstances.
- Ariz. R. Civ. P 26(b)(3)

# Work Product Doctrine

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- The work product doctrine protects from disclosure to third parties materials that are both:
  - Prepared by or for a party or its representative.
  - In anticipation of litigation.
- The document's "primary purpose" must relate to litigation.
- Any client "representative" can create protected work product (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)
- Although not strictly necessary, a lawyer's participation helps.

# ER 1.6 - Confidentiality

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- “A lawyer shall not knowingly reveal information relating to the representation of a client” unless:
  - Client gives informed consent
  - Disclosure is impliedly authorized to carry out the representation
  - Disclosure is otherwise permitted by the rules (e.g., client’s intent to commit a crime; mitigate effects of crime; securing legal advice re compliance with ERs; claim/defense re dispute with client; compliance with court order.)

# Information “Relating to Representation”

RELATING TO  
REPRESENTATION

CONFIDENTIAL  
INFORMATION

Attorney-Client Privilege

Work Product

Embarrassing / Detrimental to  
Client

Client Requests Kept  
Confidential

# Client-Lawyer Confidentiality

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Attorney Client  
Privilege/  
Work Product  
Doctrine

- Judicial and other proceedings when lawyer may be called as a witness or otherwise required to produce evidence

Ethical Rule of  
Confidentiality

- Situations other than those where evidence is sought from the lawyer through compulsion of law.

# Common Interest Doctrine

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# Common Interest Doctrine

## What is it?

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An exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to third parties.

Multiple parties sharing a common interest may be able to assert privilege despite disclosure.

# Establishing CID

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- Burden (as with all evidentiary privileges) rests on the party attempting to assert the privilege.
- Basic Elements:
  - Underlying privilege (e.g. A-C) exists;
  - Parties shared the communication at a time they shared a common interest;
  - The communication or disclosure occurred in furtherance of that common interest, and
  - The parties have not otherwise waived the privilege.

# Arizona Case Law on CID

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- *Ariz. Indep. Redist. Comm'n v. Fields*, 206 Ariz. 130 (2003):
  - Exchanged communications must be (1) privileged and (2) related to the common legal interest (§ 37);
  - CID “protects only those communications made to facilitate the rendition of legal services to *each* of the clients involved in the conference.” In other words, “exchanging communications and work product must further the legal interests of each client.” (§ 39)
- *Lund v. Donahoe*, 227 Ariz. 572 (2011)
  - CID protected strategic decisions and discussions among parties’ attorneys.

# Written Agreement

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- While a written agreement is not a requirement, use one to document:
  - Inception
  - Duration
  - Scope,
  - Boundaries
  - Termination

# Final Thoughts

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- Neither agreement standing alone, nor a client's beliefs can transform otherwise unprivileged conversations into privileged.
- Privilege must independently pre-exist. So communications solely among parties (i.e. no attorney) do not fall within CID.
- Duty of confidentiality on participants.

Attorney-Client  
Privilege  

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Waiver

# Express Waiver

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- A client may expressly waive the privilege by intentionally sharing a privileged communication.
- Decision to waive must be made by someone with the authority to waive the privilege.
- Who has authority to waive for a government agency? Agency director? Governing Board?

# Organization as Client

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- “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” E.R. 1.13 (a)
- If the lawyer knows of a legal violation that is likely to result in substantial injury to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. E.R. 1.13(b)

# Who is the Client?

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- An agency?
- Officials or employees of an agency?
- A branch of state government?
- The state government, as a whole?

# Implied Waiver

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- An implied waiver occurs if:
  1. assertion of the privilege was a result of some affirmative act, such as filing suit [or raising an affirmative defense], by the asserting party;
  2. through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
  3. application of the privilege would have denied the opposing party access to information vital to his defense.

*State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 56 ¶ 10, 13 P.3d 1169, 1173 (2000) (endorsing the *Hearn* test).

# Advice of Counsel Defense

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- Express reliance on an advice-of-counsel defense may be an implied waiver of the attorney-client privilege.
- Rationale: “[R]eliance on a privilege unfair when used as both a sword and a shield.”

*State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 58 -60 ¶ 17-21, 13 P.3d 1169, 1175-77 (2000)

# Using Documents to Refresh Recollection/Prepare to Testify

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- Reviewing privileged documents to refresh recollection before testimony may waive privilege as to those documents.
- *See* Ariz. R. Evid. 612

# Scope of Waiver

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- General Rule:

A waiver of the attorney-client privilege results in the waiver of privilege “as to all related privileged matters on the same subject.”

- C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2016.6 at 405 (2010)
- *See also Ulibarri v. Superior Court*, 184 Ariz. 382, 385-86, 909 P.2d 449, 452-53 (App. 1995) (waiver limited to “communications concerning the specific condition . . . Petitioner . . . placed at issue”)

# Rule of Evidence 502(a) Waiver Rule

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- A waiver extends to an undisclosed communication if:
  - Waiver is intentional;
  - The disclosed and undisclosed communications or information concern the same subject; and
  - They ought in fairness to be considered together.

# Inadvertent Disclosures

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- Disclosure does not waive the privilege if:
  - (1) disclosure is inadvertent;
  - (2) holder of the privilege took “reasonable steps to prevent disclosure;”
  - (3) holder of the privilege “took reasonable steps to rectify the error, including following Arizona Rule of Civil Procedure 26.1(f)(2).

Ariz. R. Evid. 502(b)

# Actions Following Inadvertent Disclosure

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- Party claiming to have inadvertently produced a privileged document may notify the party receiving the information.
- After receiving this notice, the party must “promptly return, sequester or destroy” the information.
- Receiving party may seek judicial resolution of claim of privilege.

Ariz. R. Civ. P. 26.1(f)(2); *see also Lund v. Myers*, 232 Ariz. 309, 305 P.3d 274 (2013).

# Public Records/Privilege Review

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- Train client re attorney-client privilege issues
- Determine with client process for privilege review before public records are produced
  - Does lawyer review entire production for privilege?
  - If not, client needs to know which documents/communications to identify as potentially privileged, subject to attorney review.

# Practice Tips

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# Train Your Clients!

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- Ensure that privileged information is not inadvertently disclosed at a later date
- Correct misconceptions about what constitutes a privileged communication so that the client knows what is and what is not protected

- Attorney–client privileged information does not include information/facts acquired by attorney/attorney’s agents from non-client sources. *Granger v. Wisner*, 134 Ariz. 377, 380, 656 P.2d 1238, 1241 (Ariz. 1982).
- The privilege protects content of communication from compelled disclosure but does not immunize the facts communicated if those facts can be learned from another source other than the privileged communication. *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (Ariz. 1993) (“The privilege does protect disclosure of the communication but does not protect disclosure of the underlying facts by those who communicate with a lawyer.”).
- Client-authored documents drafted for purpose other than seeking legal advice are not protected simply by providing them to the attorney. *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (Ariz. 1993) (“[T]he communication must be made to or by the lawyer for the purpose of securing or giving legal advice, must be made in confidence, and must be treated as confidential.”).
- Attorney-client privilege may not apply to forwarded business documents or keeping attorney apprised of business developments absent any indication that the expectation or intent was that the attorney would render a legal opinion or provide advice. *See* Ariz. Rev. Stat. § 12-2234 (stating requirements for attorney-client privilege as being “[f]or the purpose of providing legal advice” or “[f]or the purpose of obtaining information in order to provide legal advice . . .”)

# Train Your Clients: Public Records

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What is a public record?

“All books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics . . . Made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved . . . as evidence of the organization, functions, policies, decision, procedures, operations or other activities of the government, or because of the informational or historical value of the data contained therein.” A.R.S. § 41-151.18 (state library and archives statute)

# Train Your Clients: Public Records, cont.

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- A record “made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference.”
- A record that is “required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done.”
- Any “written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not . . .”

*Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952).

# Train Your Clients: Public Records, cont.

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- It includes more than physical documents – e-mail and electronic compilations, including embedded metadata, are subject to the law.

*Star Publishing Co. v. Pima County Attorney's Office*, 181 Ariz. 432, 891 P.2d 899 (App.1994);  
*Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (2009).

# Train Your Clients: Public Records, cont.

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Who can have access to public records?

- A.R.S. § 39-121: “. . . any person. . .”
- They do not have to give a reason, only whether or not it is for a commercial purpose.
- But no one group is entitled to greater access than any other (i.e., no special considerations for the press).

# Train Your Clients: Public Records, cont.

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- Attorney-Client or Work Product privileged records are confidentiality exceptions to broad public records access laws.
- Unpublished, but helpful, decision: *Phoenix Law Enforcement Assoc. v. City of Phoenix*, WL 461812 (App. 2012) (evaluating public records issue related to PowerPoint presentation).

# Problem Clients and Confidentiality

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- Confidentiality vs. Duty to Prevent or Rectify a Wrongful Act by an Employee
  - An assistant attorney general represents a governmental organization and owes a duty of confidentiality to it.
  - The public interest must be considered.
- Dealing with Errant Conduct by a Public Officer or Employee
  - Ask the person to reconsider the matter.
  - Consult a supervisor or other attorney in the Office. Tell the client about the consultation.
  - Refer the matter directly to a higher authority such as the agency's director or the Governor.



**KEEP  
CALM  
OUR  
PRESENTATION  
IS OVER  
ANY  
QUESTIONS?**

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