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REAL SOLUTIONS

Attorney-Client Privilege

What It Is And How To Protect It

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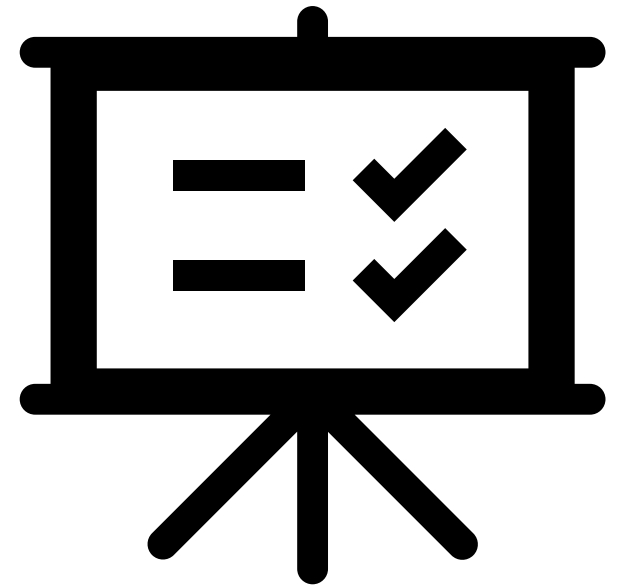
Disclaimer

- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to specific questions of attorney-client privilege.
- Please contact an attorney if you need assistance related to a specific legal issue.



Goals

- ✓ Understand *what is* and *what is not* attorney-client privilege and protected attorney work-product.
- ✓ Learn how to recognize and protect documents covered under the attorney-client privilege and work-product doctrine
- ✓ Learn tips to avoid pitfalls that impact maintaining protection of attorney-client privilege and attorney work product
- ✓ Answer Your Questions!!



What is Attorney Client Privilege?

- Opinions, conclusions, and recommendations based on facts are protected by attorney-client privilege when they are confidentially disclosed to or prepared by an attorney for the purpose of providing a client legal advice.
- This privilege is intended to encourage “full and frank communication between attorneys and their clients.”





What does this mean?

Practically, this means that, except when permitted, an attorney shall not knowingly:

- Reveal a confidence or secret of a client;
- Use a confidence or secret of a client to the disadvantage of the client; or
- Use a confidence or secret of a client for the advantage of the attorney or of a third person unless the client consents after full disclosure.



How Does Attorney-Client Privilege and the Attorney Work-Product Doctrine Apply to Townships?

Attorney-client privilege applies to Townships. In fact, Attorney-client privilege is so highly regarded that Michigan's Freedom of Information Act specifically exempts "[i]nformation or records subject to the attorney-client privilege" from disclosure. MCL 15.243(1)(g).

Thus, not only should Townships maintain privileged communications, but such communications, along with attorney-work product, are exempt from FOIA and are not records subject to disclosure.

PRIVILEGE TIP: public records subject to attorney-client privilege include communications from a public official, employee, or agent in the context of requesting legal advice. It may not always be a communication from the attorney, which can make spotting privilege tricky in certain situations.



Are all communications with
an attorney privileged?

No



Example Scenario:

Q: Let's say a township official asks a question to the Township attorney, about enacting an Ordinance. They discuss the legal implications of such an ordinance, the Township's risk in enacting the ordinance, and what a potential lawsuit would look like.

Is this conversation privileged?

A: Likely yes.

In this case (1) the attorney is acting as a legal advisor; **and** (2) the client is reaching out for the purpose of obtaining legal advice.

Thus, the communication is privileged.



What about legal conversations with co-workers?

- This becomes a gray area (as few areas of the law are black and white)!
- Generally, communications that discuss legal matters but that are **not** between the Township attorney and the Township officials are not protected by attorney-client privilege.
- **PRIVILEGE TIP:** Note that communicating about a legal issue with a party or other official that is not with the Township attorney may not be privileged. This would include various forms of communications, including emails, voicemails, and phone texts.

NOPE

- [nəʊp], *adv (inf) ne(e)*
(*dial*), no.



The Privilege Checklist

Is the communication with your attorney?

If Yes, then...

Is it about a legal matter?

If Yes, then...

Are you asking for or receiving legal advice?

If Yes, then...

Privileged!

There are always exceptions!!

There are also exceptions to attorney-client privilege. An attorney may reveal:

- Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
- Confidences or secrets when permitted or required by the Michigan Rules of Professional Conduct, or when required by law or by court order;
- Confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the attorney's services have been used;
- The intention of a client to commit a crime and the information necessary to prevent the crime; and
- Confidences or secrets necessary to establish or collect a fee, or to defend the attorney or the attorney's employees or associates against an accusation of wrongful conduct.
- MRPC 1.5(c).



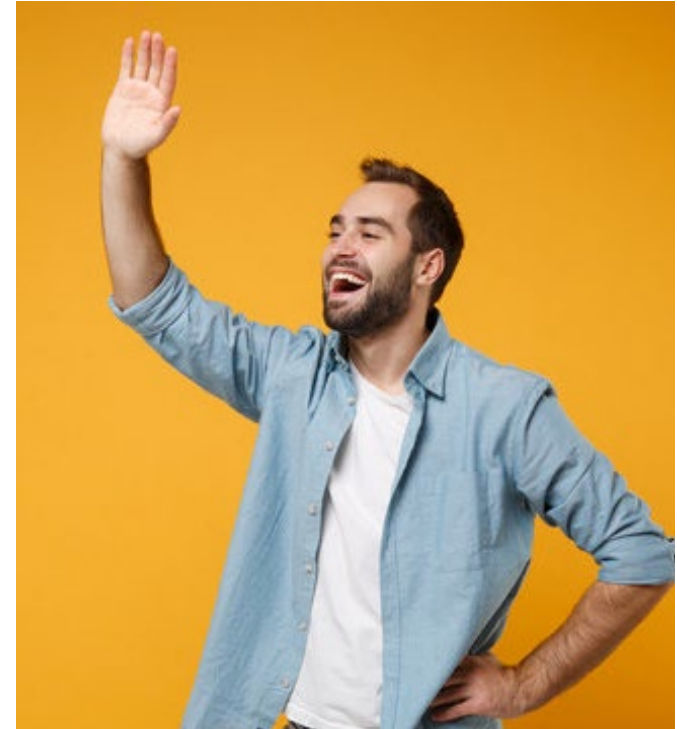
Example Scenario:

- A Township Board member receives a privileged opinion from the Township attorney. In giving the opinion, the attorney is acting as a legal advisor and is legal advice.
- Both required elements are present—the opinion is privileged.
- However, the Board then asks the Township attorney to reveal some information contained in that privileged opinion to a third party.
- In this scenario, the attorney is allowed to reveal the requested information because she is revealing a confidence or secret at the request and consent of the client.
- This is an example of when an exception to attorney-client privilege would apply.



How to waive Attorney Client Privilege

- Attorney-client privilege is personal to the Township, and only the Township can waive it. Typically, waiving privilege requires “an intentional, voluntary act and cannot arise by implication.”





Example Scenario:

Q: Let's say there is a communication between an attorney and a client where the client is asking about the legal ramifications of enacting a certain ordinance.

The client's query is soliciting legal advice, and that email (as well as the attorney's subsequent response analyzing that question) thus meets the first and second element for classifying privilege.

The client then forwards that privileged communication to a public member on accident in responding to questions on the topic. Was privileged waived?

A: Likely, no. Even if the email is accidentally forwarded to a third party, the privilege is likely not waived because the disclosure was not voluntary or intentional.

PRIVILEGE TIP: A Township can have its attorney prepare a legal opinion and subsequently approve its availability to the public. Or, even have its Township attorney prepare a public version that is intended for release.



What about Voluntary Disclosure?



- But be careful!
- A client's voluntary disclosure of confidential communication to a third party waives attorney-client privilege.
- One of the most common ways to voluntarily waive privilege is to have a third party present at the time of the communication.



Example Scenario:

Q: Let's take that ordinance conversation again. An attorney and a client and a township client are discussing the legal ramifications of enacting a certain ordinance. The communication is privileged. This time, the township official purposely cc's a third party and asks for their input.

Is privilege broken?

A: Likely, yes. Here, the disclosure (cc'ing a third party) is intentional and voluntary.

Even though the Township did solicit legal advice from its attorney, the act of cc'ing the communication to a third party on that email chain may prevent any privilege from applying.



- Often, when public employees are attempting to discern what documents are attorney-client privileged, questions arise regarding memorandum and/or redlines that the Township attorney may have prepared for the Township.
- These documents aren't necessarily "communications" in the technical sense. No one is asking the attorney a question nor is the Township attorney providing a response.
- Do they have to be disclosed? Likely, no. They are likely still protected by a concept known as the **"work product" doctrine.**

Work Product Doctrine



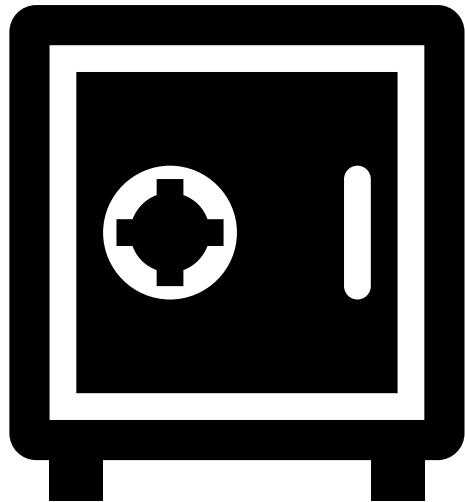


So, what is work product?

- “Work product” consists of certain items that an attorney prepares, i.e., interviews, statements, memoranda, correspondence, briefs, and mental impressions, should not be disclosed to opposing parties.
- This doctrine shelters the mental processes of the attorney, providing a privileged area within which the attorney can analyze and prepare their client’s case.



Tips for Maintaining Attorney-Client Privilege



- ✓ Ensure that an attorney-client relationship is in place.
- ✓ Consult with the Township attorney on how to best maintain privilege.
- ✓ Limit the number of individuals on emails to the Township attorney.
- ✓ Include the Township attorney on communications regarding legal questions.
- ✓ Keep privileged documents separate from other files.





Questions

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