



ETHICS AND PROFESSIONAL RESPONSIBILITY

The attorney-client privilege and legal malpractice: Are there exceptions?

by Jill Kruger



Under what is known as the attorney-client privilege, what a client shares with their attorney is forever privileged information that must be kept private, even after the matter is concluded or if the client dies.

But what is the extent of this privilege, can it be waived, and are there exceptions?

The test of whether attorney-client privilege applies to a communication is whether it was for the purpose of obtaining legal advice and was directed to the attorney who is being consulted for that purpose. When the communication is from attorney to client, it must be made for the purpose of giving legal advice or services, all in the course of a professional relationship. If the communication involves both legal and non-legal matters, it will generally be considered privileged, as long as it is primarily of a legal nature.

Losing the Privilege

Privilege can be lost in a number of ways, such as:

- **Informed waiver.** This is the most common way to lose the attorney-client privilege. While the client can decide to waive or forfeit the privilege, the lawyer cannot.
- **Crime-fraud exception.** When a court asks an attorney to break the privilege without the client's consent, because of a suspicion of crime or fraud being committed, lawyers are not required to reveal information about past crimes.

- **Failure to object.** In the event that privileged information is produced during the pretrial discovery phase of litigation and a party doesn't object in a timely manner, the privilege may be lost.

Attorney disclosure of this information to a third party could be considered an ethics violation subject to disciplinary action ranging from a slap on the wrist to disbarment, depending on jurisdiction. However, the attorney-client privilege is treated differently in a legal malpractice setting, and the client-defendant privilege is immediately waived if the client decides to sue their former attorney, putting the communications at issue. ☞

WRITER'S CORNER

Judges take notice of gender neutrality in legal writing

by Nancy A. Del Pizzo

Not too long after I had been referred to as "Mr." two times in an email from a judge serving as a discovery master (he apologized after I brought it to his attention), I had the opportunity to raise the issue of sexism in language in a courtroom, at a Rule 16 conference in California. Having prepared, in part, by reading up on the judge—the



Hon. Andrew J. Guilford, U.S.D.J., Central District of California—I found an article he wrote on writing where he addressed sexism, showing an incredibly thoughtful understanding of the power of language.

He wrote:

Sexist language can hurt both feelings and the flow of thoughts and it can cause other harm. Seek gender neutrality, which usually is achieved by structuring sentences to use plural pronouns like “they,” rather than singular pronouns like “he.” Thus, rather than “A lawyer should simplify his briefs” try “Lawyers should simplify their briefs.”

During the conference, I had the opportunity to tell him I had read his article and thank him for taking the time to address sexism in language. He told the full courtroom a story about how Justice Anton Scalia had not agreed with him, but that he believed it was important, and made it a point to regularly talk to his law clerks about keeping sexism out of legal briefs. It was a moment in time that I will never forget. Someone of importance recognized the *personal* impact of sexist language and made it a point to address it, not just in an article, but on a regular basis—to effect change.

It is nice to know there are people in positions of power who are trying to focus on gender neutrality, at least in the papers that pass from lawyer to lawyer and lawyers to judge. ♪

WHAT I WISH I KNEW

Standing out, while fitting in

A young lawyer's guide to navigating your career

by James V. Lewis

Through your hard work in law school, you already have a proven ability to be successful. But, how does success look as you embark on your new journey as a practicing attorney?

Real success begins with *you*. Consider this ‘the getting to know you’ phase of the rewarding relationship you will have with your career. This is your time to figure out what you value and how you can add value to this profession.

My first mentor told me to play to win. It’s a mantra I think of frequently, even now, entering my 10th year of practice. For me, a win is dedicating myself to the practice of law in an environment where I fit into the team, while also creating opportunities to stand out. So, where can you start?

Know Yourself

Is there a particular area of law you find interesting? Will you enjoy the twists and turns of active litigation

practice? Does the thought of a deep dive into statutory interpretation excite or terrify you? It’s time to take a look in the mirror and conduct the most important interview of your career—a hard-hitting sit-down with yourself. What is it you are hoping to gain from your career? And, perhaps more importantly, what is it you are willing to give?

Create a vision of who and what you want to be. Then develop and redevelop your plan. Once you firmly assess who you are and recognize all you are capable of, you will be prepared to evaluate each professional opportunity that comes your way.



Matchmaker, Make Me a Match

The next step is to set your goals and communicate them to your trusted network. Research positions where employees have accomplished similar goals and there are opportunities for you to become the attorney that you envision. Use your network and goals as a metric to help find your ‘perfect match.’

Ask Questions

The practice of law, much like the phrase suggests, requires a willingness to continuously learn. In fact, the required courses for attorneys are called continuing legal education (CLE). Be selective about these courses because each CLE provides a unique opportunity to expand your knowledge, skill set, and network. Each can be an invaluable asset to your career development.

Another opportunity to learn is in the informal context of bar association gatherings. In order to make the most of these opportunities, you must not shy away from asking questions that will help you hone the details of your career game plan. By asking questions, you will arm yourself with the information to make an educated decision at each step of your career path.