

**Ethics in Practice CLE Presentation (July 14, 2016):
Maintaining the Protections of the Attorney-Client Privilege as an
Attorney in the Law Department for the City of Philadelphia**

What is the Attorney-Client Privilege?:

It is an evidentiary rule that protects certain communications from a third party's efforts to discover the substance of those communications and precludes its admissibility.

See Thomas E. Spahn, *The Attorney-Client Privilege: A Practitioner's Guide* § 1.3 (2007).

Who holds the Attorney-Client Privilege?:

The attorney-client privilege is owned by the client – not the lawyer. As the client's agent and fiduciary, however, the lawyer has standing and a duty to defend the privilege. In addition, lawyers have important ethical duties to protect the confidential nature of their attorney-client communications.

See Pa. R.P.C. 1.6 ("Confidentiality of Information"), 1.9 ("Duties to Former Clients"), and 1.18 ("Duties to Prospective Clients").

What is protected by the Attorney-Client Privilege?:

When a client consults with an attorney for the purpose of obtaining legal assistance of any kind, their confidential communications are permanently protected by the attorney-client privilege.

See 8 Wigmore, *Evidence* § 2292 at 554 (4th Ed. 1995).

The Attorney-Client Privilege is a two-way street:

"[T]he attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice."

Gillard v. AIG Ins. Co., 15 A.3d 44 (Pa. 2011).

Important policy considerations underlying the Attorney-Client Privilege:

The attorney-client privilege is intended to ensure full and frank disclosure by clients who feel safe confiding in their attorney. The cloak of privilege is critical to enable attorneys to provide effective, informed representation and counsel. Society benefits by protecting these communications because lawyers help guide clients' conduct in lawful directions.

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

The evidentiary protections of the Attorney-Client Privilege are codified in Pennsylvania:

“In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.”

42 Pa. C.S. § 5928.

“In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.”

42 Pa. C.S. § 5916.

Some key questions to determine whether the Attorney-Client Privilege applies:

- (1) Is legal advice or assistance being sought or provided?
- (2) Is the communication confidential?
- (3) Is there an attorney-client relationship (existing or reasonably anticipated) between the participants?
- (4) Has the communication (if written) been marked or designated as privileged and/or confidential?

The Attorney-Client Privilege as it relates to government lawyers:

Rule 1.13 of the Pennsylvania Rules of Professional Conduct, titled “Organization as Client,” provides in pertinent part that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” Pa. R.P.C. 1.13.

Comment 6 to the Rule discusses the unique role of government lawyers:

The duty defined in this Rule applies to governmental organizations. **Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.** See Scope. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. **Moreover, in a matter involving the conduct of**

government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. *See* Scope.

Pa. R.P.C. 1.13, cmt. 6 (emphasis added).

In addition, **Numbered Paragraph 17** of the **Preamble and Scope** to the Pennsylvania Rules of Professional Conduct states as follows:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and their federal counterparts, and the same may be true of other government law officers. **Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.** These Rules do not abrogate any such authority.

Pa. R.P.C., Preamble and Scope, ¶ 17 (emphasis added).

Article IV of the Philadelphia Home Rule Charter:

Article IV, Chapter 4, Section 4-400 of the Philadelphia Home Rule Charter delegates power and authority to the Law Department to “furnish legal advice to the Mayor, to the Council and to all officers, departments, boards and commissions concerning any matter or thing arising in connection with the exercise of their official powers or performance of their official duties”

In addition, the Law Department is the “legal advisor of the Mayor, the Council and all the agencies of the City government.” In addition, the Home Rule Charter directs the Law Department to “handle all City litigation” and civil aspects of law enforcement, to “prepare and

approve for legal sufficiency all City contracts and bonds,” and to “assist the Council, the Mayor and City agencies in the preparation of ordinances for introduction into Council.”

Article VIII of the Philadelphia Home Rule Charter:

Article VIII, Chapter 4, Section 8-410 of the Philadelphia Home Rule Charter (titled “Legal Advice and Services”) requires City officers, departments, boards and commissions to seek legal advice from the Law Department concerning all aspects of their official business and whenever “any legal question or dispute arises or litigation is commenced or to be commenced in which any officer, department, board or commission is officially concerned”

In addition, City officers, departments, boards and commissions are obligated to follow the legal advice they obtain from the Law Department concerning the exercise of their official duties. Resort to other counsel for such legal advice may not be had except with the advance written consent of the City Solicitor (unless the Law Department declines to render legal advice to the Council, or Council requires counsel to assist it in conducting an investigation relating to the executive and administrative branches of City government).

Title 20 of the Philadelphia Code:

Section 20-702 of the Philadelphia Code (titled “Representation by City”) provides that the “City Solicitor shall defend and the City of Philadelphia shall indemnify and hold harmless the officers and employees of the City, whether currently employed by the City or not, against and from any and all personal liabilities, actions, causes of action, and any and all claims made against them whatever for acts performed within the scope of their employment.”

All acts “performed incident to employment for which [a City] officer or employee is hired or appointed and which it is his duty to perform” fall within the scope of their employment for purposes of this indemnification provision Philadelphia Code § 20-701. In addition, City “officers and employees” are defined within the Code to include:

Any person who is elected or appointed to a position in any branch of the government of the City and/or County of Philadelphia or to any elected or appointed position which serves the City and/or County of Philadelphia including, but not limited to, members of agencies, authorities, boards and commissions however elected or appointed; persons serving full-time or intermittently; persons serving with or without compensation.

Id.