



June 24, 2014

CLIENT ALERT

PROTECTING THE ATTORNEY-CLIENT PRIVILEGE FROM BEING WAIVED

Mom and Dad, would you step out of the room while I speak with my attorney?

How often has a client or an attorney heard such a statement? Rarely, if ever! Nevertheless, conversations between a client and his or her attorney in the presence of family members, business associates or even another attorney may not be privileged. The presence of a third party (whether it be a lawyer not affiliated with the retained counsel, a parent, a child or a sibling) during a meeting with retained counsel generally acts as a waiver of the attorney-client privilege. While this type of waiver problem can arise in any type of litigation, it often arises in the context of matrimonial matters, where family members or others are often part of a “support group” for the individual involved, or in estate planning or administration cases, where non-client family members may be present during conversations with attorneys.

An exception exists if the third party is serving as an agent for either the client or the attorney in order to facilitate such communication. In such an instance, the privilege *may* not be waived; however, the burden of proof lies with the individual asserting the exception.

For the agency exception to apply, the individual asserting privilege must demonstrate that the client had a reasonable expectation of confidentiality and, most importantly, disclosure to the third party was *necessary* for the client to obtain informed legal advice. The “necessity”

element requires that the third party's involvement be "nearly indispensable or serve some specialized function" in facilitating communications between the client and his or her attorney. Mere conclusory statements that an agency relationship exists between the client and the third party are insufficient to overcome the presumption of a waiver of the privilege. The individual asserting the agency exception must establish with factual evidence that the presence of the third party during such "privileged" conversations was indispensable to the client's communications with his or her counsel.

Practice Tip For Attorneys: If third parties will be present from the onset of representation, establish immediately whether the third party's involvement is "necessary" or merely for emotional support. To avoid confusion or a challenge later on if the agency relationship cannot be clearly established, have the third party retain client's counsel as well, so that all meetings fall within the attorney-client privilege. It's a small price to pay for a significant peace of mind!

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Please contact Eric I. Wrubel, 212-984-7735, ewrubel@wbcsk.com to discuss any potential [matrimonial](#) needs.

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