

## Attorney-Client Privilege - California

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**State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.**

Generally, California treats communications between an attorney and client privileged when relating to matters discussed or disclosed in confidence. Cal. Evid. Code, § 950 et seq. The California Evidence Code provides that a client can refuse to share and prevent another from divulging confidential communication between the client and lawyer unless an exception applies. *Id.* Further, the privilege applies to all communications made in pursuit of seeking legal advice or made in anticipation of litigation. Cal. Evid. Code, § 952. In California, the privilege encompasses any means of sharing information, not just verbal or written communications. *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 457.

The attorney-client privilege ("ACP") requires there to be a communication, made between privileged persons, in confidence, for the purpose of obtaining or providing legal assistance for a client. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.

The party claiming a privilege must provide enough factual information to support the claimed privilege, including a privilege log, if necessary. Cal. Civ. Proc. Code, § 2031.240. The party opposing the privilege is burdened with showing that a particular communication is not privileged or that an exception exists. *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 989.

**Does the jurisdiction recognize/preserve the attorney-privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants' communications qualify?**

Joint defense or common interest privileges are not codified in California statutes. *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206. However, a couple of cases out of the California Court of Appeal seem to recognize an exception through the common interest doctrine. See *Raytheon Co. v. Superior Court* (1989) 208 Cal App.3d 683, 689; *OXY Res. California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 900–01.

Disclosures between defendants may be protected by ACP through the common interest doctrine, if the disclosure is necessary to accomplish the purpose for which clients consulted an attorney. *OXY Res. California LLC v.*

Superior Court (2004) 115 Cal.App.4th 874, 900–01.

The common interest doctrine, characterized as a non-waiver doctrine in California, falls under standard waiver principles that are applicable to ACP. *Id.* at 889.

According to Cal. Evid. Code, § 912, which governs waiver of privilege “‘A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) ..., when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer ... was consulted, is not a waiver of the privilege.’” *OXY Res. California LLC* 115 Cal.App.4th at 890 quoting Cal. Evid. Code, § 912, subd. (d).

### **Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g. failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.**

There are several ways to lose California’s ACP. Foremost, a privilege is waived if any holder of the privilege acts inconsistent with the duties required to maintain the privilege. Cal. Evid. Code, § 912. This includes disclosing a significant portion of the communication or consenting to a disclosure by failing to object. *Id.*

In addition, California’s Evidence Code outlines several exceptions to the privilege. For instance, when two or more clients enlist the services of a lawyer regarding a matter of common interest, neither client (nor a successor in interest) can claim ACP when communicated information is offered later during a civil proceeding against one of the said clients or successor in interest. Cal. Evid. Code, § 962.

Also, there is no ACP if a lawyer’s services were used in the furtherance of an illegality (exception applies for cannabis laws), or when a lawyer reasonably believes disclosure is necessary to prevent a criminal act that is likely to result in a person’s death or serious bodily harm. See Cal. Evid. Code, § 956 et seq. Other exceptions to ACP apply to a decedent’s disposition of property, a client’s intention or competence in certain circumstances, and communications related to the breach of the attorney-client relationship. See Cal. Evid. Code, § 957 et seq.

### **Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.**

ACP may be implicated through the new systematization of California’s Rules of Professional Conduct, which changed to track the numbering format of ABA’s Model Rules of Professional Conduct.

The former Cal. Rules of Professional Conduct, rule 3-210, Advising or Assisting the Violation of Law, held a lawyer could not advise the violation of any law unless the lawyer believed in good faith the law’s invalidity. However, the new rule recognizes that a lawyer may counsel or assist a client to determine the application of a law. Cal. Rules of Professional Conduct, rule 1.2.1.

Communications between a lawyer and a client regarding state and local laws that conflict with federal laws (e.g. immigration issues or cannabis businesses), is not deemed wrongful under the new California Rules of Professional Conduct. Arguably, the new rule broadens the scope of ACP in the context of California’s Rules of Professional Conduct.

Further, issues continue to arise in the legal malpractice realm when certain cases are dismissed due to a lawyer’s inability to defend the merits of a claim because of ACP. *Reilly v. Greenwald & Hoffman, LLP* (2011) 196 Cal.App.4th 891, 904.