



Confidentiality, Attorney-Client Privilege and the Public Records Act

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Legal Foundation



Confidentiality

Idaho Rules of Professional Conduct Rule 1.6

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent...

cmt [3] ... applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

Attorney-Client Privilege

Idaho Rules of Evidence Rule 502

Provides a privilege for “confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made ... between the client or the client's representative and the client's lawyer ...”

Idaho Code § 9-203(2)

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

More Attorney-Client Privilege

- ▶ *Upjohn* - Privilege can cover confidential legal communications between attorneys and a corporation's employees at all levels.
- ▶ Any employee entitled to the privilege can waive the privilege.
- ▶ Merely including an attorney on a communication does not make it privileged.

Work Product Doctrine

Idaho Rules of Civil Procedure Rule 26(b)(3)

The work product doctrine exempts from disclosure in discovery “documents and tangible things ... prepared in anticipation of litigation” unless “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”

More Word Product Doctrine

- ▶ First defined in *Hickman v. Taylor*, 329 US 495 (1947)
- ▶ Does not just apply to attorney work product - does not need to be legal advice.
- ▶ Question is, “under the totality of the circumstances, it can be fairly said that the draft were created because litigation was anticipated - *i.e.*, whether the drafts would not have been created in substantially similar form but for the need for legal advice or the prospect of litigation.” *DeWitt v. Walgreen Co.* 2012 WL 3837764.
- ▶ Hard to waive
 - ▶ Can share with third parties so long as their interests are aligned with the client
 - ▶ Waiver if shared with an adversary or disclosure substantially increases the chance the work product will make it to an adversary.

Idaho Public Records Act

Title 74, Chapter 1

- ▶ Presumption that all records are open for inspection unless an express exemption is provided by statute.
- ▶ Grant or deny a person's request within three working days of the date of the receipt of the request.
- ▶ Can take an extension if:
 - ▶ Notify requester in writing; and
 - ▶ Provide records within ten working days of the request; or
 - ▶ A time mutually agreed upon between the agency and the requester.
- ▶ If no response within ten working days deemed denied.
- ▶ If denying or partially denying the request, attorney must review, provide statutory authority for denial, and right to appeal the denial.

Interplay



The Idaho Press Club, Inc. v. Ada County

- ▶ Fourth District, Judge Bail
- ▶ Ada County made partial denials based on:
 - ▶ Attorney-client privilege
 - ▶ Personnel information
 - ▶ Privacy
 - ▶ Deliberative process privilege
 - ▶ Personal contact information
- ▶ Decision
 - ▶ No deliberative process privilege, that's only federal
 - ▶ A-C privilege and work product privilege narrowly construed in the context of public agencies
 - ▶ Attaches “only when the attorney acts in that capacity, not some other role.”

Sources of Privilege Exemption

- ▶ Idaho Press Club - No specific statutory exclusion but they are long standing privileges in Idaho law.
 - ▶ IC § 74-105(18) - The following records of the state public defense commission:
 - (a) Records containing information protected or exempted from disclosure under the rules adopted by the Idaho supreme court, attorney work product, attorney-client privileged communication ...
 - ▶ IC § 74-107(11) - Records of any risk retention or self-insurance program ... Provided however, nothing in this subsection is intended to limit the attorney-client privilege or attorney work product privilege otherwise available to any public agency or independent public body corporate and politic.
 - ▶ “Which seems to imply that the attorney-client privilege and work product privilege do protect public records that fall within their proper focus.”
- ▶ IC § 74-104(1) - Any public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation.

Best Practices

- ▶ Documentation
 - ▶ Label anything that meets the test
 - ▶ Be sure the document indicates you are providing legal advice
- ▶ Assume all communications are business/policy related unless expressly called out otherwise.
- ▶ Educate your client:
 - ▶ Copying an attorney does not make the document privileged
 - ▶ Sharing any information outside of the agency will waive the privilege
 - ▶ The more people included on an email the less likely its privileged
 - ▶ State in emails they are requesting legal advice, include lawyer in “to” field
- ▶ Know that your meeting notes are likely not privileged



Questions?