

## Attorney-Client Privilege Waiver by Pro Bono Disclosure

Is the attorney-client privilege waived if one discloses to opposing counsel that one is defending one's client pro bono? Any other traps?

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Payment has no bearing on whether there is an attorney-client relationship for privileged communications. The only way fees could be potentially relevant is if fees were in dispute as part of the litigation.

Look at Comment 5 to Rule 1.6:

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/comment\\_on\\_rule\\_1\\_6/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6/)

There are times where it would further your client's interest and "facilitate a satisfactory conclusion to a matter." Example: Your indigent client is being sued and you tell the other side they are wasting their time with the suit.

Although, there might be times where disclosure could be harmful to your client.

You might find this helpful in regards to waiver:

<https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2017/how-to-lose-attorney-client-privilege/>

Bottom Line: I don't know all the facts in your case. But I'm struggling to think of any situation/scenario where disclosing pro bono representation would then amount to blanket waiver of the A-C privilege.

Ryan Young, Virginia

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I agree. And keep in mind that the privilege belongs to the client and not the attorney, so even if the attorney inadvertently discloses privileged information, the privilege generally still applies. It's only the client who can unequivocally waive A/C privilege.

Kevin Grierson, Virginia

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Kevin raises an excellent point (and practice pointer). Example: You send a privileged email to your client. Your client then takes that email and forwards it to family/friends and asks "What should I do here?" That communication is no longer privileged. Clients should be cautioned in this regard.

Ryan Young

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The question is whether attorney-client privilege is waived if one discloses to opposing counsel that one is defending one's client pro bono?

In general, we consider both privilege and confidentiality with respect to your question. Normally, the crime-fraud exception applies to overcome privilege. Otherwise, counsel cannot waive privilege for the client. The client must do so (disclosure to third party, for example) or it has to occur by operation of law.

Chapter 7 bankruptcy requires disclosure of the attorney's fee. In fact, there's a standard form for that. This is an example aligned with Rule 1.6, which provides an exception to the confidentiality rule (informed consent and/or implied by representation). If it would help in a debt settlement, revealing that information is arguably in the best interest of the client and could be implied.

I would get informed consent, even in writing to be extra cautious, from the client if the situation is not absolutely clear. You are not getting a disclaimer of liability, but only permission to disclose confidential information to aid the client reaching their strategic goal.

Alex Salmu, Michigan

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Privilege and confidentiality are the same whether an attorney is being paid or not generally. Disclosure may be required as to pro bono representation in discovery typically.

Sometimes disclosure may be a tactical decision. For example, a defendant being represented pro bono because the individual or entity is not capable of paying attorney's fees may be disclosed under the "you cannot get blood from a turnip theory." Public interest law firms disclose for a different reason, when they do so, frequently because they have funding to take on a claim and the cause may be disproportionate to the financial considerations.

Darrell G. Stewart, Texas