

Can your client's helper join the meeting?

Protecting attorney-client privilege when third parties are involved in discussions with you

By Clifton Smoot

Your client asks you, "Is it okay if my family member sits in on our discussion?" If your client is a person who is disabled, elderly, a minor, or otherwise needs a trusted person to help them navigate the world, then your answer should probably be "Yes." Having the client's helper on hand is useful, and carries minimal risk of waiving the attorney-client privilege. But a few caveats apply.

Evidence Code section 952 codifies the attorney-client privilege. The privilege generally applies to information confidentially transmitted between a client and their lawyer in the course of representation. As with any privileged communication, it is waived if voluntarily made in the presence of a third party. (Cal. Evid. Code § 912, subd. (a); *Jones v. Sup. Ct.* (1981) 119 Cal.App.3d 534, 547; see also *Cohen v. Trump*, 2015 WL 3617124, at *13 (S.D. Cal. Jun. 9, 2015) (citing *In re Grand Jury Proceedings October 12, 1995*, 78 F.3d 251, 254 (6th Cir.1996.).)

However, section 952 includes a carveout for people who are "present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (See also *First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co.* (N.D.Cal.1995) 163 F.R.D. 574, 581 ["…the privilege can continue to attach to communications that are disclosed in confidence to third persons when that disclosure is reasonably necessary to achieve the ends for which the lawyer is being consulted."]; *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 688.)

Now consider a classic scenario: the interpreter. Your client is limited in his English proficiency, and has no experience with the U.S. legal system. You don't speak his language, so an interpreter is needed. His boyfriend is willing (and able) to take on the

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interpreting role during your meetings, and can also translate your written correspondence.

Can you allow the boyfriend to assist you and the client via meetings, phone calls, and emails, without waiving attorney-client privilege? Yes. In this scenario, you can welcome the boyfriend to help interpret; the privilege will not be waived. If the client needs a helper in order to reap the normal benefit of representation, then those communications in the helper's presence will be protected by the privilege. Note that the statutory language of section 952 is broad, allowing the third party's presence to preserve the privilege so long as he is reasonably necessary to:

- "further the interest of the client," or,
- transmit the communication, or
- accomplish the representation.

Be sure to have a good argument that one or more of these conditions is met. If push comes to shove, you will have the burden of proving that the third party is indispensable to the client to secure his "subjective freedom of consultation." (*Himmelfarb v. United States* (1949) 175 F.2d 924, 939 (quoting 8 Wigmore on Evidence (3rd Ed.), § 2311, 602).) Normally, you need only make a prima facie showing to shift the burden of proof, triggering a presumption of privilege. (*Costco Wholesale Corp. v. Sup. Ct.* (2009) 47 Cal.4th 725.) But when "a third party is present, no presumption of confidentiality obtains, and the usual allocation of burden of proof, resting with the proponent of the privilege, applies in determining whether confidentiality was preserved under § 952." (*Sony Computer Entertainment America, Inc. v. Great American Ins. Co.* (N.D.Cal.2005) 229 F.R.D. 632, 634.) As the party bearing the burden of proving the privilege applies, you may have to provide the Court with "a general sense [of] the communication's content." (*OXY Resources California LLC v. Sup. Ct.* (2004) 115 Cal.App.4th 874, 895.)

In the above scenario, the boyfriend/interpreter clearly meets the second condition, and perhaps all three. His translation work "transmits" the attorney's communication. That's all that's needed to preserve the privilege. There is no risk that the boyfriend will later be forced to divulge the communications he was privy to while helping interpret. (See e.g., *U.S. v. Kovel* (1961) 296 F.2d 918; *City & County of San Francisco v. Sup. Ct.* (1951) 37 Cal.2d 227; see also Evid. Code § 754.5 [preserving privilege in presence of interpreter for people who are deaf or hard of hearing].)

Even in the example of the "friendly interpreter," some caution is due. Only your communications with the client will be protected by the privilege. If the boyfriend is a witness to case facts (e.g., the injury-causing incident, the client's damages, etc.), his memories and discussions with the client are not privileged. Similarly, any separate discussions you have with him about those facts will not be protected by attorney-client privilege. (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 143; *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 734 ["a litigant may not silence a witness by having him reveal his knowledge to the litigant's attorney"].) You will want to review these boundaries with your client and his boyfriend-interpreter, memorialize the same in writing, and document everything in your file. This brings us to the question of whether you "should" allow a friendly case witness to serve as an interpreter during private meetings. You may decide that your client's case is better served by a neutral interpreter who has no interest in the outcome of the case. Leaving the boyfriend out of the loop may also be beneficial because it leaves him untainted by your confidential discussions with the client, and reduces the risk that the boyfriend would inadvertently disclose confidential communications.

The cognitively impaired client

Here's another scenario. Your client suffers from a severe brain injury. Doctors have diagnosed her with cognitive deficits and impaired memory. Though she generally cares for herself, she no longer works or drives. She relies on her son to coordinate her schedule, travel, and medical care. During meetings with you, she gets confused and frustrated, especially when discussions last longer than ten minutes. She finds it hard to learn legal terms and understand expert issues. She has a hard time recalling your prior discussions. She is not "good at email."

In this scenario, your client is best served by having her son join your meetings, and by having him take the lead when communicating with you. She trusts him, and he knows how to communicate with her. Your client benefits greatly from his help, and having him present is the only way she can use your legal services. Your representation would suffer greatly without the son's help, as would the attorney-client relationship. Under the plain language of section 952, your client's son would likely meet all three of the above conditions – though he only need fulfill one. With the son joining attorney-client communications, he will help the client process and retain the information you share, and repeating and paraphrasing your discussions, all of which helps the client navigate litigation.

Emotional support person

Consider a third scenario. Your client wants to bring in a loved one to provide them emotional support during your attorney-client meeting. Unfortunately, that person should wait outside. It's likely a judge would find that person was providing a mere convenience, not a professional or indispensable service. "[T]he 'necessity' element means more than just useful and convenient." (*Cavallaro v. United States* (2002) 284 F.3d 236, 249; see also *Himmelfarb, supra,* 175 F.2d at 939.)

Here's another common scenario. Your client's spouse – who is not a client himself – wants to join your meetings and participate in case discussions. Your client is pursuing a case based on a spinal injury; she has no cognitive issues that inhibit her

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communications with you. Here, the spouse should wait outside the meeting, and stay in his "lane" during the life of the case. No attorney-client privilege is likely to attach if he's in the room, as he is only adding a "convenience" or "support" for the client, not an indispensable service. As with the prior example of the boyfriend-interpreter, the spouse is likely to be a fact witness, too. He could be questioned about these attorney-client communications, as well as any other communications with the client. Do not expect the spousal privilege to apply here, either! That privilege is riddled with exceptions, including for instance where one spouse is a plaintiff pursuing damages. (Evid. Code § 973, subd. (b); see also "Love and Marriage," Plaintiff Magazine, Anthony Label, Jan. 2012.)

The minor client and his parents

Finally, an important scenario: your client is a minor, and their parents want to sit in on all meetings, and correspond with you about the representation. Here, only the minor's guardian ad litem (GAL) is assured to be protected by attorney-client privilege. (*De Los Santos v. Sup. Ct.* (1980) 27 Cal.3d 677.) Assuming one of the parents is the GAL, you can only safely include that person in confidential communications. But not the other parent. Of note here, a GAL's communications with the minor client, if obtained for the purpose of the guardian ad litem's communications with you, are also protected by the privilege. (*Ibid.*) This means that virtually *all* of the minor plaintiff's private conversations with the GAL regarding the case and the underlying incident will remain privileged, even for those discussions when you are not present. (*Ibid.*; see also *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588 [widely extending privilege to "family members…on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interests of the litigant."].)

The helper must be indispensable

In short, the law of attorney-client privilege in California allows you to welcome your client's helper to join your confidential meeting so long as the helper is needed for the client to receive your legal advice. Caution is due. Be sure that the helper's work is "indispensable," not just "convenient." Remind the helper of the boundaries of the privilege. Consider imposing limits on the helper, or hiring a neutral service. Following these tips, your client can receive the complete benefits of your legal service without risk of waiving the privilege. So, bring in the helper!



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