


To: Executive Board
Kathy Collins, General Counsel
From: David Roger, General Counsel 
Date: June 4, 2014
Re: Attorney-Client Privilege

This memo will address whether our Executive Board members are included in the Attorney-Client privilege when acting as investigators and/or agents for attorneys during officer involved shooting investigations.

NRS 49.095 (1) provides, “A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client...and the client’s lawyer or the representative of the client’s lawyer.”

A representative of the lawyer is defined by NRS 49.085 as, “[A] person employed by the lawyer to assist in the rendition of professional legal services.”

While the Nevada Supreme Court has not addressed this statute, other courts have broadly construed similar laws defining who is included in the litigation team. For example, the Second Circuit Court of Appeals held that an accountant retained to assist an attorney in a tax case was protected by the privilege.¹

The court also found no legal distinction in communications between the accountant and client occurring in the presence of the lawyer and conversations outside the attorney’s presence. As the court explained:

“[I]f the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege;

¹ *United States v. Koval*, 296 F.2d 918 (2nd Cir. 1961).

there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.²

Another court held that a public relations consultant, hired by an attorney to assist them in dealing with the media, was included in the attorney-client privilege.³

Our Executive Board members, who respond to assist our attorneys during OIS investigations, provide valuable help and insight to both the subject officer and assigned attorney. The representatives help the attorney with gathering evidence, interpreting radio traffic, explaining police tactics and identifying department policy issues. Additionally, the representatives provide a unique perspective concerning the dynamics an officer experiences moments before and immediately after a critical incident.

The representatives have a calming influence over officers who have been involved in a traumatic event. Because the representatives are able to relate with the officer/client, attorneys are better able to communicate with the officer/client in the brief time the attorney has to consult with them at the scene.

Quite often, representatives gather intelligence for an attorney, which allows them to provide critical advice to officers who are considering whether to waive their rights and speak with investigators. Other times, representatives run interference with detectives, thus giving attorneys additional time to consult with their clients.

² Id. at 922.

³ *In re Grand Jury Subpoenas*, 265 F.Supp2d 321 (DC NY, 2003).

It is common practice for lawyers to retain investigators to assist with trial preparation and client consultation. I cannot think of a single case in which a court has pierced the veil of the attorney-client privilege and ordered an investigator to disclose client communications or reveal work-product privilege material. There is very little chance a court would refuse to include our representatives within the protections of our privilege.