



Attorney-Client Privilege

©2009 eNotes.com, Inc. or its Licensors. Please see [copyright information](#) at the end of this document.

- [Background](#)
- [The Elements, Scope, and Application of the Attorney-Client Privilege](#)
- [State Rules Governing Attorney-Client Privilege](#)
- [Additional Resources](#)
- [Organizations](#)

Background

The [ATTORNEY-CLIENT PRIVILEGE](#) is an evidentiary rule that protects both attorneys and their clients from being compelled to disclose confidential communications between them made for the purpose of furnishing or obtaining legal advice or assistance. The privilege is designed to foster frank, open, and uninhibited discourse between attorney and client so that the client's legal needs are competently addressed by a fully prepared attorney who is cognizant of all the relevant information the client can provide. The attorney-client privilege may be raised during any type of legal proceeding, civil, criminal, or administrative, and at any time during those proceedings, pre-trial, during trial, or post-trial.

The privilege dates back to ancient Rome, where governors were forbidden from calling their advocates as witnesses out of concern that the governors would lose confidence in their own defenders. In 1577 the first evidentiary privilege recognized by the English [COMMON LAW](#) was the attorney-client privilege. The English common law protected the confidential nature of attorney-client communications, regardless of whether those communications took place in public or in private. The American colonies adopted this approach to the attorney-client privilege, and Delaware codified the privilege in its first constitution in 1776.

The Elements, Scope, and Application of the Attorney-Client Privilege

Elements of the Attorney-Client Privilege

Because the attorney-client privilege often prevents disclosure of information that would be relevant to a legal proceeding, courts are cautious when examining objections grounded in the privilege. Most courts generally require that certain elements be demonstrated before finding that the privilege applies. Although the elements vary from [JURISDICTION](#)

to jurisdiction, one often cited recitation of the elements was articulated in *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357 (D.Mass. 1950), where the court enumerated the following five-part test: (1) the person asserting the privilege must be a client or someone attempting to establish a relationship as a client; (2) the person with whom the client communicated must be an attorney and acting in the capacity as an attorney at the time of the communication;

(3) the communication must be between the attorney and client exclusively; (4) the communication must be for the purpose of securing a legal opinion, legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or [FRAUD](#); and (5) the privilege may be claimed or waived by the client only.

Scope and Application of the Attorney-Client Privilege

The five-part test is typically the starting point in a court's analysis of a claim for privilege. Each element appears straight-forward on its face but can be tricky to apply, especially when the client is a corporation and not a natural person. CORPORATE clients raise questions as to who may speak for the corporation and assert the attorney-client privilege on behalf of the entity as a whole. Some courts have ruled that the attorney-client privilege may only be asserted by the upper management of a corporation. A vast majority of courts, however, have ruled that the privilege may be asserted not only by a corporation's officers, directors, and board members, but also by any employee who has communicated with an attorney at the request of a corporate superior for the purpose of obtaining legal advice. *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, (U.S. 1981).

Whether the client is a natural person or a corporation, the attorney-client privilege belongs only to the client and not to the attorney. As a result, clients can prevent attorneys from divulging their secrets, but attorneys have no power to prevent their clients from choosing to waive the privilege and testifying in court, talking to the police, or otherwise sharing confidential attorney-client information with third parties not privy to the confidential discussions. Clients may waive attorney-client privilege expressly by their words or implicitly by their conduct, but a court will only find that the privilege has been waived if there is a clear indication that the client did not take steps to keep the communications confidential. An attorney's or a client's inadvertent disclosure of confidential information to a third party will not normally suffice to constitute [WAIVER](#). If a client decides against waiving the privilege, the attorney may then assert the privilege on behalf of the client to shield both the client and the attorney from having to divulge confidential information shared during their relationship.

In most situations, courts can easily determine whether the person with whom a given conversation took place was in fact an attorney. However, in a few cases courts are asked to decide whether the privilege should apply to a communication with an unlicensed or disbarred attorney. In such instances, courts will frequently find that the privilege applies if the client reasonably believes that he or she was communicating with a licensed attorney. *State v. Berberich*, 267 Kan. 215, 978 P.2d 902 (Kan. 1999). But courts in some jurisdictions have relaxed this standard, holding that the privilege applies to communications between clients and unlicensed lay persons who represent them in administrative proceedings. *Woods on Behalf of T.W. v. New Jersey Dept. of Educ.*, 858 F.Supp. 51 (D.N.J. 1993).

Although many courts emphasize that the attorney-client privilege should be strictly applied to communications between attorney and client, the attorney-client privilege does extend beyond the immediate attorney-client relationship to include an attorney's partners, associates, and office staff members (e.g., secretaries, file clerks, telephone operators, messengers, law clerks) who work with the attorney in the ordinary course of their normal duties. However, the presence of a third party who is not a member of the attorney's firm will sometimes defeat a claim for privilege, even if that third person is a member of the client's family.

Thus, one court ruled that in the absence of any suggestion that a criminal defendant's father was a confidential agent of the [DEFENDANT](#) or that the father's presence was reasonably necessary to aid or protect the defendant's interests, the presence of the defendant's father at a [PRETRIAL CONFERENCE](#) between the defendant and his attorney invalidated the attorney-client privilege with respect to the conference. *State v. Fingers*, 564 S.W.2d 579 (Mo.App. 1978). In the corporate setting, the presence of a client's sister defeated a claim for attorney-client privilege that involved a conversation between a client-company's president and the company's attorney, since the sister was neither an officer nor director of the company and did not possess an ownership interest in the company. *Cherryvale Grain Co. v. First State Bank of Edna*, 25 Kan.App.2d 825, 971 P.2d 1204 (Kan.App. 1999).

Encyclopedia of Everyday Law: Attorney-Client Privilege

Many courts have described attorney-client confidences as "inviolable." *Wesp v. Everson*, — P.3d —, 2001 WL 1218767 (Colo. 2001). However, this description is misleading. The attorney-client privilege is subject to several exceptions. Federal Rule of EVIDENCE 501 states that "the recognition of a privilege based on a confidential relationship... should be determined on a case-by-case basis." In examining claims for privilege against objections that an exception should be made in a particular case, courts will balance the benefits to be gained by protecting the sanctity of attorney-client confidences against the probable harms caused by denying the opposing party access to potentially valuable information.

The crime-fraud exception is one of the oldest exceptions to the attorney-client privilege. The attorney-client privilege does not extend to communications made in connection with a client seeking advice on how to commit a criminal or [FRAUDULENT](#)

act. Nor will a client's statement of intent to commit a crime be deemed privileged, even if the client was not seeking advice about how to commit it. The attorney-client privilege is ultimately designed to serve the interests of justice by insulating attorney-client communications made in furtherance of adversarial proceedings. But the interests of justice are not served by forcing attorneys to withhold information that might help prevent criminal or fraudulent acts. Consequently, in nearly all jurisdictions attorneys can be compelled to disclose such information to a court or other investigating authorities.

A party seeking [DISCOVERY](#) of privileged communications based upon the crime-fraud exception must make a threshold showing that the legal advice was obtained in furtherance of the fraudulent activity and was closely related to it. The party seeking disclosure does not satisfy this burden merely by alleging that a crime or fraud has occurred and then asserting that disclosure of privileged communications might help prove the crime or fraud. There must be a specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud.

The fact that an attorney-client relationship exists between two persons is itself not typically privileged. *U.S. v. Leventhal*, 961 F.2d 936 (11th Cir. 1992). However, if disclosure of an attorney-client relationship could prove incriminating to the client, some courts will enforce the privilege. *In re Michaelson*, 511 F.2d 882 (9th Cir. 1975). Names of clients and the amounts paid in fees to their attorneys are not normally privileged. Nor will clients usually be successful in asserting the privilege against attorneys who are seeking to introduce confidential information in a lawsuit brought by a client accusing the attorney of wrongdoing. In such instances courts will not allow clients to use the attorney-client privilege as a weapon to silence the attorneys who have represented them. Courts will allow both parties to have their say in [MALPRACTICE](#) suits brought by clients against their former attorneys.

State Rules Governing Attorney-Client Privilege

The body of law governing the attorney-client privilege is comprised of federal and state legislation, court rules, and [CASE LAW](#). Below is a sampling of state court decisions decided at least in part based on their own state's court rules, case law, or legislation.

ARKANSAS: Attempts by both an attorney and his secretary to communicate with the client regarding his pending criminal case were protected by the attorney-client privilege. Rules of Evid., Rule 502(b). *Byrd v. State*, 326 Ark. 10, 929 S.W.2d 151 (Ark. 1996).

ALABAMA: Where a defendant asserted that his guilty pleas to robbery charges were the product of his defense counsel's [COERCION](#), the absence of the defense counsel's [TESTIMONY](#) to rebut the defendant's testimony could not be excused by any assertion of the attorney-client privilege. *Walker v. State*, 2001 WL

Encyclopedia of Everyday Law: Attorney-Client Privilege

729190 (Ala.Crim.App., 2001).

ARIZONA: By asserting that its personnel understood the law on stacking coverage for under insured and uninsured motorist claims, the insurer affirmatively injected legal knowledge of its claims managers into the insureds' [BAD FAITH](#) action and thus effectively waived the attorney-client privilege as to any communications between the insurer and its [COUNSEL](#) regarding the propriety of the insurer's policy of denying coverage. *State Farm Mut. Auto. Inc. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (Ariz. 2000).

CALIFORNIA: The attorney-client privilege is not limited to litigation-related communications, since the applicable provisions of the state Evidence Code do not use the terms "litigation" or "legal communications" in their description of privileged disclosures but instead specifically refer to "the accomplishment of the purpose" for which the lawyer was consulted. West's Ann.Cal.Evid.Code §§ 912, 952. *STI Outdoor v. Superior Court*, 91 Cal.App.4th 334, 109 Cal.Rptr.2d 865 (Cal.App. 2 Dist. 2001).

ILLINOIS: To prevail on an attorney-client privilege claim in a corporate context, a claimant must first show that a statement was made by someone in the corporate control group, meaning that group of employees whose advisory role to top management in a particular area is such that a decision would not normally be made without their advice or opinion and whose opinion, in fact, forms the basis of any final decision by those with actual authority. *Hayes v. Burlington Northern and Santa Fe Ry. Co.*, 323 Ill.App.3d 474, 752 N.E.2d 470, 256 Ill.Dec. 590 (Ill.App. 1 Dist. 2001).

MAINE: Counsel's inadvertent disclosure of a memorandum to opposing counsel, which summarized a telephone conference between counsel and his client, did not constitute a waiver of the attorney-client privilege, where the document was mistakenly placed in boxes of unprivileged documents that were available to opposing counsel to photocopy and the memorandum in question was labeled "confidential and legally privileged." *Corey v. Norman, Hanson & DeTroy*, 742 A.2d 933, 1999 ME 196 (Me. 1999).

MASSACHUSETTS: Hospital personnel were neither the defendant's nor his attorney's agents when they conducted a blood-alcohol test on the defendant at the attorney's request for sole purpose of gathering potentially exculpatory evidence, and thus the state's GRAND JURY SUBPOENA of the test results did not violate the attorney-client privilege. *Commonwealth v. Senior*, 433 Mass. 453, 744 N.E.2d 614 (Mass. 2001).

MICHIGAN: A Court of Appeals reviews de novo a decision regarding whether the attorney-client privilege may be asserted. *Koster v. June's Trucking, Inc.*, 244 Mich.App. 162, 625 N.W.2d 82 (Mich.App. 2000).

MINNESOTA: The presence of the defendant's wife at a joint meeting in which the defendant, his attorney, and his wife discussed financial aspects of a possible [DIVORCE](#) prevented the attorney-client privilege from attaching. *State v. Rhodes*, 627 N.W.2d 74 (Minn. 2001).

NEW JERSEY: The person asserting the attorney-client privilege bears the burden to prove it applies to any given communication. *Horon Holding Corp. v. McKenzie*, 341 N.J.Super. 117, 775 A.2d 111 (N.J.Super.A.D. 2001)

NEW YORK: A client's intent to commit a crime is not a protected confidence or secret for the purposes of the attorney-client privilege. N.Y.Ct.Rules, § 1200.19. *People v. DePallo*, 96 N.Y.2d 437, 754 N.E.2d 751, 729 N.Y.S.2d 649 (N.Y. 2001).

NORTH DAKOTA: A communication is confidential, for the purposes of determining the applicability of attorney-client privilege, if it is not intended to be disclosed to persons other than those to whom the disclosure is made during the course of rendering professional legal services or to those reasonably necessary for transmission of the communication during the course of rendering professional legal services. Rules of

Encyclopedia of Everyday Law: Attorney-Client Privilege

Evid., Rule 502(a)(5). *Farm Credit Bank of St. Paul v. Huether*, 454 N.W.2d 710 (N.D. 1990).

OHIO: The attorney-client privilege is not absolute, and thus the mere fact that an attorney-client relationship exists does not raise a presumption of confidentiality of all communications made between the attorney and client. *Radovanic v. Cossler*, 140 Ohio App.3d 208, 746 N.E.2d 1184 (Ohio App. 8 Dist. 2000).

TEXAS: Physicians who were defending against a malpractice action were not entitled to discover, under fraud exception to attorney-client privilege, material relating to a [SETTLEMENT](#) between the plaintiffs and another defendant, although the physicians alleged that disparate distribution of the settlement proceeds was a sham intended to deprive the physicians of settlement credit, since there was no evidence that the plaintiffs made or intended to make hidden distributions. Vernon's Ann.Texas Rules Civ.Proc., Rule 192.5(a); Rules of Evid., Rule 503(d)(1). *IN RE Lux*, 52 S.W.3d 369 (Tex.App. 2001).

WASHINGTON: The federal constitutional foundation for the attorney-client privilege is found in the Fifth Amendment PRIVILEGE AGAINST SELF-INCRIMINATION, the Sixth Amendment right to counsel, and the Due Process Clause of the Fourteenth Amendment, as these rights can be protected only if there is candor and free and open discussion between client and counsel. U.S.C.A. Const.Amends. 5, 6, 14. *In re Recall of Lakewood City Council Members*, 144 Wash.2d 583, 30 P.3d 474 (Wash. 2001).

Additional Resources

American Jurisprudence. West Group, 1998.

http://cyber.lp.findlaw.com/privacy/attorney_client.html FindLaw: CyberSpace Law Center: Privacy: Attorney-Client Privilege.

West's Encyclopedia of American Law. West Group, 1998.

Organizations

American Bar Association

740 15th Street, N.W.
Washington, DC 20005-1019 USA
Phone: (202) 662-1000
Fax: (816) 471-2995
URL: <http://www.abanet.org>
Primary Contact: Robert J. Saltzman, President

National Lawyers Association

P.O. Box 26005 City Center Square
Kansas City, MO 64196 USA
Phone: (800) 471-2994
Fax: (202) 662-1777
URL: <http://www.nla.org>
Primary Contact: Mario Mandina, Chief Executive Officer

National Organization of Bar Counsel

515 Fifth Street, N.W.

Encyclopedia of Everyday Law: Attorney-Client Privilege

Washington, DC 64196 USA

Phone: (202) 638-1501

Fax: (202) 662-1777

URL: <http://www.nobc.org>

Primary Contact: Robert J. Saltzman, President

Copyright Notice

©2009 eNotes.com, Inc.

ALL RIGHTS RESERVED.

No part of this work covered by the copyright hereon may be reproduced or used in any form or by any means graphic, electronic, or mechanical, including photocopying, recording, taping, Web distribution or information storage retrieval systems without the written permission of the publisher.

For complete copyright information, please see the online version of this work:

<http://www.enotes.com/everyday-law-encyclopedia>