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Scope of the privilege

1. Are communications between an attorney and client protected? Under what circumstances?

So long as communications between attorney and client are made in confidence and for the purpose of seeking, obtaining or providing legal assistance to the client, such communications are protected. The attorney–client privilege is a product of federal and state common law and is not based in the Constitution, so there is no singular definition of its elements, but the underlying principle of the privilege is to provide for "sound legal advice [and] advocacy". Upjohn Co v. United States, 449 U.S. 383, 389 (1981).

2. Does the privilege only protect legal advice? Does it also protect non-legal communications between an attorney and client, such as business advice?

Legal advice is protected by the attorney–client privilege, but communications regarding non-legal topics, including business advice, are not protected. Lawyers, such as in-house counsel, who serve both as legal and business advisers, must be mindful that courts will carefully examine communications that may have a dual purpose. Courts apply two tests. First, courts ask what the primary purpose of a communication is when determining whether the attorney–client privilege protects it. If a communication's primary purpose is to obtain legal advice and the non-legal information conveyed is an integral part of the communication, the privilege will apply. If a communication primarily has a business purpose and any legal advice is incidental, then the privilege may not apply. For example, see Neuder v. Battelle Pac. Nw. Nat'l Lab, 194 F.R.D. 289, 293 (D.D.C. 2000); see also In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014) (privilege will stand as long as "one of the significant purposes" of the communication is to provide legal advice). Second, and typically when weighing whether the work-product doctrine protects a communication with a dual business and legal purpose, courts may use the broader "because of" test, which asks only whether the "communication was made 'because of' the need to give or receive legal advice". In re Grand Jury, 23 F.4th 1088, 1092-94 (9th Cir. Sept. 13, 2021) (declining to "extend the 'because of' test to the attorney-client privilege context").

3. Is a distinction made between legal advice related to litigation and other legal advice?

No, protected communications can involve any potential legal issue and the protection does not turn on whether there is active or potential litigation. The work product doctrine protects materials prepared in anticipation of litigation and, can, in some instances, operate in coordination with the attorney–client privilege. But the two protections are not co-dependent, and a communication can be protected by the attorney–client privilege without qualifying as attorney work product.

4. What kinds of documents are protected by the privilege? Does it cover documents that were prepared in anticipation of an attorney–client communication? Does it cover documents prepared during an attorney-led internal investigation?

The attorney–client privilege protects communications, including those memorialised in written or electronic form by both attorney and client. Documents prepared in anticipation of an attorney–client communication, such as a legal memorandum by counsel or a list of questions by a client, are protected if they were created in order to facilitate the provision of legal advice. However, the fact that a document is transmitted by an attorney or client as part of a communication does not necessarily mean that document is protected. For example, if a client transmits to counsel a copy of a non-privileged email communication, that transmission alone does not alter the non-privileged nature of that email. The attorney–client privilege protects communications between attorneys and corporate personnel made

in the context of an internal investigation so long as the investigation is being conducted to provide legal advice to the company. See Upjohn Co. v United States, 449 U.S. 383 (1981). The privilege also covers documents generated in the course of the investigation – such as interview memoranda, presentations and reports, although the scope of that protection remains an open question. See Banneker Ventures, LLC v. Graham, 253 F.Supp.3d 64(D.D.C. 2017). The privilege can extend to the communications and work product of non-attorneys assisting in an investigation, but only if the investigation is conducted "at the direction of counsel" and "to gather information to aid counsel in providing legal services". See Gucci Am., Inc. v. Guess?, Inc. et. al., 271 F.R.D. 58, 72 (S.D.N.Y. 2010).

To maintain the privilege during an internal investigation, counsel must direct the investigation and provide sufficient oversight to other participants. Failure to do so may result in a finding that materials produced in the investigation are not protected by the attorney–client privilege. For example, in United States v. ISS Marine Servs., Inc., 905 F. Supp. 2d 121, 130 (D.D.C. 2012), the court found that an investigative report was not privileged in part because counsel was largely absent from the fact-gathering process and it was not made clear to corporate personnel that the investigation was for the purpose of obtaining legal advice.

5. To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege?

To be protected by the attorney–client privilege, the communication must be confidential when made and the client must intend that the communication remain confidential. Communications carelessly exposed to the public may deemed unprotected, and precautions must be taken against inadvertent disclosures to third parties.

Communications may be made or shared with third parties reasonably necessary to the lawyer's ability to provide competent advice to the client. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). However, both lawyer and client must be careful not to include non-essential third parties in communications because that third party's presence may jeopardise the privilege. For example, in United States v Evans, 113 F.3d 1457, 1462 (7th Cir. 1997), the court held that the presence of a third-party attorney who was acting as a friend and prospective character witness for the client waived the privilege.

6. Is the underlying information privileged if it can be obtained from a non-privileged source?

The privilege protects communications, not the underlying information about which the communication is made. Information from a non-privileged source is likely to be outside of the attorney–client privilege in the first instance and inclusion of it in an attorney–client discussion does not thereby make the underlying information privileged. At the same time, disclosure of the underlying information does not waive the privilege with respect to the communication between attorney and client about it.

7. Are there any notable exceptions or caveats to the privilege?

There are many, but perhaps the most notable is the crime-fraud exception, which recognises that communications made by a client to a lawyer to further illegal activity are not protected by the attorney–client privilege. The exception is grounded in the notion that the privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime," United States v. Zolin, 491 U.S. 554, 562 (1989), because "[a] client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." Clark v. United States, 289 U.S. 1, 15 (1933). The crime fraud inquiry focuses primarily on the intent of the client: courts have held the privilege inapplicable even where the attorney was unaware of the intended fraud and the crime was not completed. But, where an attorney persuades a client to terminate criminal conduct, the privilege does apply, consistent with the idea that the ultimate purpose

of the privilege is to promote legal conduct. See In re Grand Jury Investigation, 772 N.E.2d 9, 21-22 (Mass. 2002).

8. Are there laws unrelated to privilege that may protect certain communications between attorney and client?

Each state has rules of professional conduct which guide attorneys' conduct, and those rules often include a duty of confidentiality. In most instances, the duty of confidentiality is broader than the attorney–client privilege and applies not only to matters communicated in confidence but also to all information relating to the representation. An attorney who breaches that duty of confidentiality and reveals confidential client information to the detriment of the client may face sanction by the state in which he or she is licensed. There are instances in which an attorney may disclose confidential client communications, for example, if the client reveals the intent to commit an act that could cause death, serious injury, or in some states, financial damage.

Protected parties

9. To what extent does the privilege extend to in-house counsel?

So long as the in-house counsel is providing legal advice (as opposed to business advice) to his or her client, the privilege protects those communications. While the privilege does not protect business advice given by an in-house counsel that has both legal and business roles, the mere fact of an in-house counsel's dual role does not automatically void the privilege. See In re Grand Jury Proceeding, 68 F.3d 193, 196 (7th Cir. 1995) ("A client does not lose the privilege merely because his attorney serves a dual role."). Courts faced with a waiver claim in such a circumstance will determine the purpose of the in-house counsel's communication.

10. Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances? And who possesses the privilege - the corporate client, the employee or both?

Federal courts and most state courts apply a "subject matter" test to determine if the privilege extends to communications with a corporate client's employees. In Upjohn Co. v United States, 449 U.S. 383 (1981), the Supreme Court held that the employee communications were privileged because: (i) they were made to counsel at the direction of corporate superiors; (ii) the information was not available from upper-level management; (iii) they concerned matters within the scope of the employees' work duties; and (iv) the employees were aware that the purpose of the communications was for the corporation to obtain legal advice. The Upjohn test has been widely applied in the corporate context.

In a minority of states, courts employ a "control group" test, which focuses on whether the communication was made by a "decision maker" who is in a position to control, or take a substantial role in the determination of, the course of action a corporation may take based on legal advice rendered.

The corporate client, and not the employee, possesses the privilege. In re Grand Jury Proceedings, 219 F.3d 175, 185 (2d. Cir. 2000) (explaining that "the privilege belongs to the corporation, not to the agent" but acknowledging that some courts have held that testimony from a corporate officer could lead to an implied waiver of the privilege).

11. Does the privilege protect communications between non-lawyer employees of a corporate client if they are acting at the direction of counsel or gathering information to provide to counsel?

Courts have applied the privilege to protect communications among non-lawyer employees, although the communications must still be made for the purpose of seeking legal advice and the advice must still be maintained in confidence. For example, courts have protected communications "between nonlegal employees in which the employees discuss or transmit legal advice given by counsel" and "in which an employee discusses her intent to seek legal advice about a particular issue." United States v. ChevronTexaco Corp., 241 F.Supp.2d 1065, 1077 (N.D. Cal. 2002). At the same time, a corporation may waive the privilege if an otherwise privileged communication is disclosed "to employees of the corporation who are not in a position to act or rely on the legal advice contained in the communication". Scott v. Chipotle Mexican Grill, Inc., 94 F.Supp.3d 585, 598 (S.D.N.Y. 2015). Thus, courts may ask whether the recipient of the communication "need[ed] to know the content of the communication in order to perform her job effectively or to make informed decisions concerning, or affected by, the subject matter of the communication". Scholtisek v. Eldre Corp., 441 F.Supp.2d 459, 464 (W.D.N.Y. 2006).

12. Must the attorney be qualified to practise in your country to invoke the privilege?

Not necessarily. Courts have applied the privilege to foreign attorneys and some have even applied the privilege where practitioners are not attorneys in their home country. For example, because "many foreign countries treat their patent agents as the functional equivalent of an attorney and recognize what amounts to an attorney-client privilege for his communications with his clients", where the communications occur between entirely foreign clients and foreign patent agents, courts may look to the law of the foreign jurisdiction to answer the question of whether the communications should be treated as confidential "unless that law is clearly inconsistent with important policies embodied in federal law". Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 519-21 (S.D.N.Y. 1992). Similarly, one court explained that because France has no clear equivalent to the American bar, the applicability of the privilege depends on whether the practitioner is functionally a lawyer, someone "competent to render legal advice and [who] is permitted by law to do so." Renfield Corp. v. E. Remy Martin & Co., S.A., 98 F.R.D. 442, 444 (D. Del. 1982). But other courts have rejected the "functional equivalency" test and have required that the foreign attorney be "a member of the bar of a court" for the privilege to apply. Wultz v. Bank of China, Ltd., 979 F.Supp.2d 479, 494-95 (S.D.N.Y. 2013).

13. Does the privilege extend to non-lawyer third parties? In which circumstances does the privilege protect communications with third parties if they are providing advice related to a legal matter? What measures in such circumstances should an attorney take to protect those communications?

The privilege may extend to non-lawyer third parties where they are engaged for the purpose of providing legal advice, or obtaining information in order to provide legal advice, and the communications are kept in confidence. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). Thus, courts have held that where an attorney retains a third-party, such as an accountant, to provide expertise that the attorney does not possess "so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought to fall within the privilege". Id. But where the advice is sought for the purpose of securing accounting or other non-legal advice, the privilege does not apply.

Some jurisdictions may require that the consultant be directly supervised by an attorney.

In addition, some courts apply a "functional equivalency" test, holding that communications may be protected by the corporation's attorney-client privilege where the third-party professional is "a functional employee" and is "empowered to act on behalf of the corporation." United States v. Graf, 610 F.3d 1148, 1159 (9th Cir. 2010) (internal citations omitted).

To protect communications, attorneys should manage the third party and take measures to define the relationship to make clear that the purpose of the engagement is to assist the lawyer in providing legal advice.

14. Does the privilege apply to communications with potential clients?

Yes, the privilege protects a prospective client seeking legal representation. And communications between the lawyer and their potential client remain privileged, even where the lawyer is not ultimately retained. But further communications following the decision not to enter into a client–lawyer relationship are not protected.

Ownership of the privilege

15. Does the attorney or the client hold the privilege? Who has rights under the privilege?

The client holds the privilege and is the decisionmaker as to whether to assert or waive the privilege. The same holds true whether the client is an individual or a corporation. Although the client is the decisionmaker, the attorney may assert the privilege.

16. Can the privilege be waived? Who may waive it?

The attorney–client privilege can be waived. Under Rule 502 of the Federal Rules of Evidence, the privilege may "be preserved as long as its holder did not intentionally disclose privileged material and took steps to protect the privilege" United States Equal Employment Commission v. George Washington Univ., 502 F.Supp.3d 62, 77 (D.D.C. 2020). The client, as the holder of the privilege, has the ultimate right to waive the privilege.

There is little consensus on which employees of a corporate client (other than the board of directors) have the right to waive the privilege. See Jonathan Corp. v Prime Computer, Inc., 114 F.R.D. 693 (E.D. Va. 1987) (holding that a salesman's disclosure of a private memorandum waived the corporation's privilege). But generally, "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). "[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well," including to "the trustee of a corporation in bankruptcy." Id. at 349, 358. The attorney, acting as the client's agent, may waive the privilege but not if the client expressly forbids it. If a client fails to affirmatively consent to an attorney's waiver, it is assumed that the waiver was authorised.

Where a company is cooperating with the government, courts may consider whether the provision of "materials to a potential adversary . . . destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges." United States v. Coburn, No. 2:19-cr-00120, 2022 WL 357217, at *7 (Feb. 1, 2022 D.N.J.) (holding that where a company voluntarily providing "detailed accounts" of interviews, it waived the privilege as to communications concerning those interviews, including interview memoranda).

17. Is waiver all or nothing? Is it possible to waive the privilege for certain communications but not others?

Waiver is generally all or nothing. Thus, "a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party." In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d. Cir. 2000). Further, "courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure", rejecting attempts by a party "to pick and choose among

his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit". Permian Corp., v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981). Under this reasoning, most courts have rejected agreements that allow clients to disclose information to investigating government agencies without waiving the privilege.

At the same time, some courts have limited the scope of waiver "where disclosure occurred in a context that did not greatly prejudice the other party in the litigation", including where communications are revealed inadvertently, extrajudicially, or early in the proceedings and not to the court. In re Grand Jury Proceedings, 219 F.3d at 183.

18. If two defendants are mounting a joint defence, can they share privileged information without waiver? What about two parties with a common interest?

Yes. The joint defence and common interest doctrines are waiver exceptions that allow parties with aligned legal interests to share otherwise privileged information. However, the contours of these rules vary across jurisdictions. Some courts use the terms interchangeably while others view the concepts as distinct.

Regardless of which doctrine applies, the parties must share a common legal, rather than business or commercial, interest. Some courts may require that this interest "be identical, not simply similar". In re AGE Ref., Inc., 447 B.R. 786, 806 (Bankr. W.D. Tex. 2011). Some courts require pending litigation while others apply the doctrines in the case of potential litigation. Even where courts may not require pending litigation, they still may require "a palpable threat of litigation." In re Hardwood P-G, Inc., 403 B.R. 445, 459 (Bankr. W.D. Tex. 2009). Further, some courts may require that communications regarding the common legal interest be made "to another party's lawyer, not to the other party itself". In re XL Specialty Ins. Co., 373 S.W.3d 46, 53 (Tex. 2012).

Some courts view "[a] written agreement [a]s the most effective method of establishing the existence of a common interest agreement, although an oral agreement whose existence, terms and scope are proved by the party asserting it, may provide a basis for the requisite showing." Intex Rec. Corp. v. Team Worldwide Corp., 471 F.Supp.2d 11, 16 (D.D.C. 2007) (citing Minebae Co., Ltd., 228 F.R.D. 13, 16 (D.D.C. 2005)). Communications made during the existence of such an agreement remain protected even after the parties' interest diverge, while any communications made after the joint efforts terminate may not be privileged. See United States v. Gonzalez, 669 F.3d 974, 981 (9th Cir. 2012).

19. Is it common for attorneys and clients to agree to a confidentiality provision in a contract?

No. Confidentiality provisions are not common because attorneys are already bound by a duty of confidentiality absent such an agreement, including under bar rules governing their professional conduct.

Enforcement considerations

20. Describe the legal basis of the rules governing the privilege. Are these rules found in a constitution or statute, or in case law?

The rules governing privilege in the United States developed in the common law over time and are thus interpreted in case law. Indeed, "[t]he attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

Some states have codified the privilege in statute or court rule, but most states' privilege rules are found in the case law of those states' courts. In the federal system, "[t]he common law – as interpreted

by United States courts in the light of reason and experience—governs a claim of privilege" unless that common law is contravened by the federal Constitution, statute or Supreme Court rules. Fed. R. Evid. 501. Federal courts also defer to state law on privilege in civil cases "regarding a claim or defense for which state law supplies the rule of decision". Id.

21. Is the privilege primarily characterised as a procedural or evidentiary rule, or is it characterised as a substantive right?

Courts vary in terms of how they characterise the privilege. For example, it has been described as "a rule of evidence" that protects against disclosure of communications in court proceedings but "does not provide a legal basis" to police voluntary, out of court communications. Wharton v. Calderon, 127 F.3d 1201, 1205-06 (9th Cir. 1997). But while "testimonial privileges used to be considered procedural, . . . the trend is to regard them as substantive." Ford Motor Co. v. Leggat, 904 S.W.2d 643, 646 (Tex. 1995) (citing Weintraub, Commentary on the Conflict of Laws, § 3.2C1, at 53–55 n. 40 (3d ed. 1986)). Indeed, other courts have stated that they "do not consider the question of attorney-client privilege to be only a procedural question." Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967). And in the choice of law context, "[m]any courts have recognized that when the substantive-procedural distinction is tailored to these aims, privilege must be considered substantive because it affects conduct beyond the context of litigation." Wellin v. Wellin, 211 F.Supp.3d 793, 803 (D.S.C. 2016).

22. Describe any differences in how the privilege is applied in the criminal, civil, regulatory or investigatory context.

The privilege is recognised in the criminal, civil, regulatory, and investigatory contexts. It can be asserted in criminal and civil court proceedings as well as in the investigatory setting of the grand jury. See In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d 16, 21 (1st Cir. 2003). The US Congress does not formally recognise the attorney–client privilege because it is grounded in the common law and not the US Constitution, but in many circumstances, Congress will honor a valid privilege claim and consider alternative methods of obtaining information relevant to its work.

23. Are the rules regarding the privilege uniform nationwide or are there regional variations within your country?

There are regional variations, although the general definitions and rules governing the privilege are similar nationwide. Each state has their own rules governing the attorney–client privilege. In addition, federal courts have adopted their own rules governing the privilege, leading to some variation across the different federal circuits.

24. Does a professional organisation enforce the maintenance of the privilege among attorneys? What discipline do attorneys face if they violate privilege rules?

Whether the privilege is going to be maintained or waived is a decision made by the client, rather than being something enforced by a professional organisation. Moreover, the privilege is analysed and applied by the courts rather than by professional organisations. That said, while professional organisations may not enforce privilege rules, they do set out ethical rules regarding the duty of confidentiality owed to a client. Therefore, attorneys may face discipline ranging from a formal reprimand to suspension or debarment.

25. What sanctions do courts impose for violating the attorney–client privilege?

Courts may impose sanctions for failing to comply with court orders during the discovery process. For example, upon a finding of bad faith or wilfulness, as a sanction, a court may rule that a party has waived its privilege claims because it failed to properly assert the privilege in a privilege log. And attorneys may be sanctioned for violating their ethical duty of confidentiality to the client, though usually not in the case of an inadvertent disclosure but rather for an intentional disclosure.

26. How can parties invoke the privilege during investigations or court proceedings? Can the privilege be invoked on the witness stand?

The privilege can be invoked to prevent compelled disclosure during investigations and court proceedings, including on the witness stand. Further, the privilege can be applied during the discovery process, in response to subpoenas or interrogatories and during a deposition. In fact, because privilege claims must be timely raised, a privilege objection must be made during the proceeding or a party risks waiver.

27. In disputes relating to privilege, who typically bears the burden of proof?

In a dispute, "the party asserting the privilege bears the burden of proof", though "[o]nce the privilege has been established, the burden shifts to the other party to prove any applicable exceptions." E.E.O.C. v. BDO USA, L.L.P., 876 F.3d 690, 695 (5th Cir. 2017) (quoting Perkins v. Gregg Cty., 891 F. Supp. 361, 363 (E.D. Tex. 1995)). Courts have held that where a party makes "a prima facie showing of privilege and tenders documents to the trial court, the trial court must conduct an in camera inspection of those documents before deciding to compel production" and "[t]he documents themselves may constitute sufficient evidence" to satisfy the prima facie standard. In re E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004).

28. Does the privilege protect against compulsory disclosures such as search warrants or discovery requests? Is there a distinction between documents held by the client and documents held by the attorney?

Yes, the privilege protects against compelled disclosure related to court proceedings, including discovery requests. Privilege objections may also be raised in connection with a search warrant, but the existence of the privilege does not impede the ability of the government to search the premises. Rather, it impacts their review of seized materials.

There is no distinction in the applicability of the privilege between documents held by the client or by the attorney. That said, the procedures for obtaining documents from an attorney may differ from obtaining materials from the client. The Department of Justice generally does not use search warrants to obtain materials from lawyers where they could use "a subpoena, or other less intrusive means of obtaining the materials". US Department of Justice, Procedures Where Privileged Materials Sought Are in Possession of Disinterested Third Party Physician, Lawyer, Or Clergyman, 9-19.220, https://www.justice.gov/jm/jm-9-19000-documentary-material-held-third-parties#9-19.220. Moreover, using a search warrant for a law office requires Deputy Assistant Attorney General approval. Id. at 9-19.221, https://www.justice.gov/jm/jm-9-19000-documentary-material-held-third-parties#9-19.221. Even where the attorney is a subject of the investigation, the Justice Manual sets out special rules for the use of a search warrant at a law office. US Dep't of Justice, Searches of Premises of Subject Attorneys, 9-13.420, https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420.

29. Describe the choice-of-law rules applied by your courts to determine which country's privilege laws apply. To what extent does your country recognise the validity of choice-of-law provisions in contracts, particularly as they apply to privilege?

Courts apply multiple approaches to answer the question of which country's privilege laws apply. Most courts apply "traditional principles of comity" and ask whether communications "touch base" with the United States or with the foreign country, and then apply the laws of the country with the "most compelling or predominant interest in whether the communications should remain confidential". Gucci America, Inc. v. Guess?, Inc., 271 F.R.D. 58, 64-65 (S.D.N.Y. 2010). But "several other approaches to the choice of law analysis have been suggested, including a 'territorial' analysis, several 'functional' analyses, and a 'better law' approach." VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 16 n.4 (D. Mass. 2000) (citations omitted).

Courts recognise the validity of choice-of-law provisions and have applied them in the privilege context. However, where the provision is general, and does not specifically include privileged communications, some courts may take a strict view as to whether the provision applies to privilege questions.

Termination of the privilege

30. Does the privilege terminate on the death of either the attorney or the client?

Generally, the privilege survives despite the death of either the attorney or the client. Under limited circumstances, however, the privilege may be broken. For example, the testamentary exception allows disclosure of communications in litigation among the testator's heirs. See Swindler & Berlin v. United States, 524 U.S. 399, 404-05 (1998).

Courts disagree as to whether the privilege survives the dissolution of a corporation if there is no surviving entity. Compare Favila v. Katten Muchin Rosenman LLP, 188 Cal.App.4th 189, 219 (Cal. Ct. App. 2010) (explaining that "a dissolved corporation continues to exist for various purposes" and "the persons authorised to act on the dissolved corporation's behalf during the wind-up process – its ongoing management personnel – should be able to assert the privilege, at least until all matters involving the company have been fully resolved and no further proceedings are contemplated") with S.E.C. v. Carrillo Huettel LLP, No. 13 Civ. 1735 (GBD)(JCF), 2015 WL 1610282, at * 2 (S.D.N.Y. 8 April 2015) (concluding that "[t]he weight of authority, however, holds that a dissolved or defunct corporation retains no privilege").

31. Does the privilege terminate on the conclusion of the attorney–client relationship?

No, the protections of the privilege do not terminate upon the conclusion of the attorney-client relationship. See United States v. Kleifgen, 557 F.2d 1293, 1297 (9th Cir. 1977) (noting that "[c]onfidential communications had between appellant and his former counsel retain the protection of the attorney-client privilege beyond the termination of the attorney–client relationship").

32. Is the privilege destroyed if the client communicates information to the attorney to further a crime or perpetuate a fraud?

The privilege does not apply to communications from a client to an attorney to further a crime or perpetuate a fraud. "It has always been settled that communications from a client to an attorney about a crime or fraud to be committed are not privileged" and therefore there is no "violation" of the attorney–client privilege where an attorney testifies about "conversations and communications with [the client] during the commission and in furtherance of the crime charged in the indictment". United States v. Bob, 106 F.2d 37, 40 (2d Cir. 1939). This is because "[t]he crime-fraud exception strips the privilege from attorney-client communications that 'relate to client communications in furtherance of

contemplated or ongoing criminal or fraudulent conduct.'" In re John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994) (quoting In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984)).

The client communication must itself be "in furtherance of the crime or fraud," In re Grand Jury Subpoenas Dated March 2, 2015, 628 Fed App'x 13, 14 (2d Cir. 2015) (quoting In re Richard Roe, Inc., 168 F.3d 69, 71 (2d Cir.1999)), rather than being part of a consultation after the alleged crime or fraud. Further, there must be "probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity". Id. at 13-14. The crime fraud exception may apply whether or not the attorney is aware that the advice is being sought in furtherance of a crime or fraud.

33. Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?

The privilege may be terminated through an inadvertent disclosure but whether waiver is accomplished depends on the circumstances. Courts have applied a variety of approaches, from lenient to strict, and some courts take a middle ground, involving "a five-step analysis of the unintentionally disclosed document to determine the proper range of privilege to extend":

> *(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error.*

Gray v. Bicknell, 86 F.3d 1472, 1483-84 (8th Cir. 1996). Further, the Federal Rules of Evidence provide that inadvertent disclosure does not result in waiver "if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." Fed. R. Evid. 502(b).

In addition, parties to an adversarial proceeding may enter into confidentiality agreements that provide for the consequences of inadvertent disclosure and the steps that can be taken to retrieve privileged information to avoid a waiver. These agreements may be incorporated into a protective order issued by the court.

34. Is the privilege terminated if a third party is included in the communication or is subsequently forwarded the communication?

Confidentiality is a key element to maintaining the attorney–client privilege and disclosure to a third party generally waives the privilege. Therefore, attorneys and clients should take precautions to maintain the confidentiality of their communications. But whether inclusion of a third party in a communication, or forwarding a communication to a third party, terminates the protection of the privilege is a fact-intensive question.

For example, "[w]hen disclosure is necessary to accomplish the consultation or assist with the representation, as in the case of an interpreter, translator, or secretary, an exception to waiver preserves the privilege." In re Qwest Commc'n. Int'l Inc., 450 F.3d 1179, 1195 (10th Cir. 2006). Likewise, courts may not find a waiver where certain third-party experts and consultants are involved in communications. See In re Bieter Co., 16 F.3d 929, 939 (8th Cir. 1994); United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). And in the case of an unintentional disclosure to a third party, courts may not find a waiver. See Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996); Fed. R. Evid. 502(b).

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Andrew Wise is the chair of Miller & Chevalier's litigation department. He defends clients in white-collar criminal and civil trials and represents multinational companies in fraud and anti-corruption investigations. In addition to his trial work, Mr Wise has conducted internal investigations into potential violations of US laws and regulations, including most frequently the FCPA, and has advised clients on compliance challenges and enforcement issues arising out of those investigations. He has written and spoken on navigating simultaneous criminal investigations and civil proceedings and mitigating the collateral consequences of governmental enforcement actions. Before joining Miller & Chevalier, Mr Wise worked at the Public Defender Service for the District of Columbia, where he defended indigent clients charged with serious criminal offences in the District of Columbia Superior Court. During his career, Mr Wise has tried more than 50 cases to resolution before juries and judges in federal and state courts.

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