

## Attorney-Client Privilege - Colorado

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**State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.**

a. Attorney-client privilege has been codified in Colorado under Colo. Rev. Stat. § 13-90-107(1)(b) (2024) which states, “[a]n attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.”

b. For attorney-client privilege to apply, the party asserting the privilege must show: (1) a communication between an attorney and client, (2) made in confidence, (3) for the purpose of seeking or obtaining legal advice. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982).

c. The privilege “applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential.” *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992).

d. The attorney-client privilege remains after the client’s death unless the client’s actions prior to death impliedly or explicitly waived this privilege. *Freirich v. Rabin (In re Estate of Rabin)*, 474 P.3d 1211, 1220 (Colo. 2020).

e. In the corporate setting, attorney-client privilege exists between an entity’s attorney and its agents, employee, or independent contractors if (1) there is a significant relationship between the agent, employee, or independent contractor and the entity’s need for legal services, (2) the communication “was within the scope of the duties provided to the entity by its employee, agent, or independent contractor” and (3) “the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents.” *Alliance Constr. Solutions, Inc. v. Dep’t of Corr.*, 54 P.3d 861, 869-70 (Colo. 2002).

**Does the jurisdiction recognize/preserve the attorney-privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants’ communications qualify?**

a. The Colorado Supreme Court has recognized the joint-defense exception to the general rule that attorney-client privilege is waived when privileged information is disclosed to third parties when co-defendants are represented by the same counsel. In *Gordon v. Boyles*, the court stated: “[t]he principles that

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support the attorney-client privilege apply equally when two or more defendants conduct a joint defense through the same attorney . . . ” 9 P.3d 1106, 1124 (Colo. 2000).

b. The requirements for attorney-client privilege to apply to communications between co-defendants and an attorney are the same as they are between a single party and the attorney. The attorney-client privilege is “extended to communications made between co-defendants and the attorney who represents them both, for the sake of discussing their common interests in a joint defense in civil or criminal litigation.” *Id.*

c. The Colorado Appellate Court has similarly recognized the common interest exception. *Black v. Southwestern Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003). It applies in circumstances where information is shared between persons who have a common interest in a case but are not represented by the same attorney.

i. The common interest privilege states that “[c]ommunications shared with third persons who have a common legal interest with respect to the subject matter thereof will be deemed neither a breach nor a waiver of the confidentiality surrounding the attorney-client relationship.” *Id.* (citing *Metro Wastewater Reclamation Dist. v. Cont’l Cas. Co.*, 142 F.R.D. 471 (D. Colo. 1992)).

ii. The privilege applies only to communications given in confidence and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy. *Id.* It includes any communication made throughout and for the purpose of a common enterprise. *Id.*

d. However, the joint defense/common interest doctrine does cover information that an individual learned independently from a confidential meeting even if that information was later shared during such a meeting. *People v. Lesslie*, 24 P.3d 22, 27 (Colo. App. 2000).

### **Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g. failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.**

a. Voluntary disclosure: Privilege may be waived by voluntary disclosure of otherwise privileged communications to a third person. *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 881 (Colo. App. 1987). The presence of a third person during a conference with a client and an attorney “ordinarily destroys the confidentiality required to assert the attorney-client privilege.” *Lesslie*, 24 P.3d at 26, (quoting *D.A.S. v. People*, 863 P.2d 291,295 (Colo. 1993)).

b. Implied Waiver: Pursuant to C.R.S. 18-1-417(1), upon alleging ineffective assistance of counsel, a defendant automatically waives attorney client privilege regarding information that is related to the claim. *People v. Cortes-Gonzalez*, 506 P.3d 835, 839 (Colo. 2022). Additionally, privilege is impliedly waived when (1) assertion of privilege was caused by an affirmative act that (2) placed the protected information at issue, and (3) applying this privilege denies the opposing party access to information vital to their defense. *People v. Madera*, 112 P.3d 688, 691-93 (Colo. 2005).

c. Failure to object: Failing to object in a timely manner when privileged matter is requested will waive the privilege. *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001).

d. Advice of Counsel: When a client asserts a claim or defense that focuses on advice given by the attorney (i.e. placing privileged communications at issue), the privilege is waived. *People v. Trujillo*, 144 P.3d 539, 543 (Colo. 2006).

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e. Crime-fraud exception: Communications between attorney and client are not privileged if they are made for the purpose of aiding the commission of a future or present continuing crime. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1220 (Colo. 1982).

f. Testamentary exception: permits an attorney who drafted the will of a deceased client to disclose attorney-client communications concerning the will and transactions leading to its execution in a suit between the testator's heirs, devisees, or other parties who claim succession from the testator. *Wesp*, 33 P.3d at 200.

### **Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.**

a. The Colorado Supreme Court recently determined that privilege was waived when a plaintiff's parents were present during a conference with the lawyer because "the third party's presence was [not] reasonably necessary to the consultation" and therefore the communication between client and lawyer was no longer considered confidential for purposes of attorney-client privilege. *Fox v. Alfini*, 432 P.3d 596, 602 (Colo. 2018).

b. Concerning the crime-fraud exception, the Colorado Supreme Court recently stated that "a party seeking to invoke the crime-fraud exception and defeat the attorney-client privilege must show probable cause that communications furthered the crime. *In re 2015-2016 Jefferson County Grand Jury*, 410 P.3d 53, 64 (Colo. 2018). The court noted that, prior to this decision, it had not specified the quantum of proof required to defeat attorney-client privilege through the crime-fraud exception. *Id.* at 59.

c. Concerning the testamentary exception, the Colorado Supreme Court recently held that a client "impliedly waives any claim of attorney-client privilege with respect to communications necessary for estate administration" upon appointing a personal representative. *Freirich*, 474 P.3d at 1220. This ruling overturned the appellate court's conclusion that a personal representative becomes the attorney-client privilege holder after the client's death. *Id.* at 1221.

d. The Colorado Supreme Court recently held that sharing facts with an expert witness does not waive attorney-client privilege regarding communications between clients and their attorney where the clients relayed the facts that were then passed on to the expert even if the facts are non-privileged information. *Jordan v. Terumo BCT, Inc.* 550 P.3d 628, 634 (Colo. 2024).