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Attorney-Client Privilege - Massachusetts

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

Massachusetts' highest court, the Supreme Judicial Court, has defined the attorney client privilege as follows:

> The classic formulation of the attorney-client privilege… is found in 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961): (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 303, 901 N.E.2d 1185, 1194 (2009); See Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 448 (2007) (privilege protects "all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice").

Such privilege, however, is destroyed when the communication is made in the presence of a "non-necessary agent of the attorney or client." Commonwealth v. Senior, 433 Mass. 453, 457 (2001). The privilege can also be waived expressly or implicitly. See Commonwealth v. Woodberry, 26 Mass. App. Ct. 636, 637 (1988).

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?

Yes. Defendants invoking the joint defense privilege need only prove that (1) the communication was made in the course of a joint defense effort, (2) the statement was designed to further such an effort, and (3) the privilege was not waived. See Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 619 (2007).

Massachusetts courts have also held that it is fundamental that the joint defense privilege cannot be waived without the consent of all parties to the defense. ZVI Const. Co., LLC v. Levy, 90 Mass.App.Ct. 412 (2016).

In Brauner v. Valley, 101 Mass. App. Ct. 61 (2022), the Appeals Court held that the common interest doctrine protects communications between clients who share a common interest only if, at the time of the communications, both are represented by counsel.

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.

The attorney client privilege does not apply to the following:

- Furtherance of a crime or fraud. See Matter of John Doe Grand Jury Investigation, 408 Mass. 480, 486 (1990).
- Disputes between joint clients. See Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 19 (1st Cir. 2012).
- A decedent's intent as to the disposition of property by will. See Doherty v. O'Callaghan, 157 Mass. 90, 92 (1892).
- Actions by an attorney against a client for fees or by a client against an attorney alleging wrongful conduct. See Com. v. Woodberry, 26 Mass. App. Ct. 636 (1988).
- The identity of an attorney's client, the source of payment for attorney's fees, the date of any communications and the amounts paid to the attorney. See Conlon v. Rosa, 2004 WL 1627337 (Mass. Land Ct. 2004).

Additionally, in RFF v. Burns & Levinson, 465 Mass. 702, 703 (2013), the Massachusetts Supreme Judicial Court ruled that the privilege does not necessarily apply to confidential communications between law firm attorneys and a law firm's in-house counsel. Specifically, the Court stated that such can only be deemed confidential "provided that (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential." Id.

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

There is a modern trend against finding waiver based on inadvertent disclosure of otherwise privileged material, which is particularly important in complex business litigation or other document-intensive cases where the volume of documents increases the likelihood of an inadvertent disclosure. While Massachusetts has yet to rule on the waiver of the privilege specifically in the e-discovery context, courts look to a balancing test as set forth in Matter of Reorganization of Elec. Mut. Liab. Ins. Co., (Bermuda), 425 Mass. 419, 423, (1997). Courts look to whether the disclosure was inadvertent and whether reasonable and prompt steps were taken prevent disclosure. Id; See also Yi v. Kavlakian, 52 Mass. App. Ct. 1105 (2001). The privilege would not be lost if the privileged communication is overheard, intercepted, or leaked from an anonymous source, provided that reasonable precautions were taken against such inadvertent disclosure. In re Reorganization of Elec. Mut. Liab. Ins. Co., 425 Mass. at 423.

With the growth of discovery involving electronically stored information (ESI) and metadata, there are new challenges and concerns for the attorney-client privilege. Massachusetts courts have not expressly addressed these concerns, but the (2021) *MA Guide to Evidence § 523. Waiver of Privilege* does reflect the discussion regarding the inadvertent disclosure of privileged matter in *Federal Rules of Evidence Rule 502*: A purpose of the

new rule is to "respond[ ] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure ... will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery."

Similarly, concerns regarding disclosure of metadata, which is not generally visible to the sender, have not been addressed by Massachusetts courts (or bar associations). However, the American Bar Association has taken the position that there is no duty, aside from, "presumably, a lawyer's general duties with regard to the confidentiality of client information under Rule 1.6 [for] metadata." That said, some state bar associations have adopted a standard of reasonable care with regard to inadvertent disclosure of metadata.