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Attorney-Client Privilege - New York

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

In New York State, the law codifying the attorney-client privilege can be found at CPLR 4503(a)(1). Additional sections of the statute abolish the "fiduciary exception" to the attorney-client privilege regarding communications between counsel and the personal representative of a decedent's estate (CPLR 4503(a)(2)) and create a statutory exception to the privilege where the confidential communication in dispute was held between a deceased client and the client's attorney that involved the preparation, execution, or revocation of any will of that client or other relevant instrument (CPLR 4503(b)).

To invoke the privilege under CPLR 4503, the information sought to be protected must be a communication between counsel (or counsel's subordinate) and the (current or prospective) client that was had for the purpose of securing legal advice and not for the purpose of committing a crime or tort. In re Grand Jury Subpoena for Documents in Custody of Bekins Storage Co., 118 Misc2d 173, 177 (N.Y. Sup. Ct. 1983); United States v. United Shoe Machinery Corp., 89 F.Supp 357, 358 (D. Mass. 1950). Additionally, the communication must have been made with the intention that its contents remain confidential. Id. The party asserting the privilege bears the burden of proving his or her entitlement to its invocation. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 NY3d 616, 622-624 (2016). The privilege is one that belongs to the client, not the attorney, and because the privilege is an "obstacle to the truth-finding process, its scope is limited to that which is necessary to achieve its purpose." In re Grand Jury Subpoena for Documents in Custody of Bekins Storage Co., 118 Misc2d 173, 178 (N.Y. Sup. Ct. 1983).

Of relevance to the attorney-client privilege inquiry is Rule 1.6 of the New York Rules of Professional Conduct entitled "Confidentiality of Information" which holds that "[a] lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person[.]" N.Y. RULES OF PROF'L CONDUCT, 22 NYCRR § 1200.0, r. 1.6(2024). The Rule provides that "confidential information" can be any information learned during or relating to the representation of a client that is either protected by the attorney-client privilege, embarrassing or detrimental to the client, or information the client has otherwise requested to remain confidential, but it does not typically include an attorney's legal knowledge or research or generally known information. Id.

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?

In general, a client in New York State does not enjoy confidential privilege when communicating with counsel in the presence of any co-defendant or third person as it constitutes a waiver of that privilege. However, where co-defendants are establishing a common defense, their statements are privileged, but only if such communications are for that purpose. This is known as the common interest doctrine. Otherwise, the mere presence of a co-defendant, his/her counsel, or any other third party will destroy any expectation of confidentiality between the original client and his/her attorney. People v Osorio, 75 NY2d 80, 84 (1989).

The common interest doctrine has been applied to both criminal and civil matters and to communications of both co-plaintiffs and co-defendants. See, e.g., Hyatt v. State of Cal. Franchise Tax Bd., 105 AD3d 186 (2d Dept 2013); NY CPLR 3103, "Protective Orders" The requirements for invocation of the common interest doctrine are that (1) the communications in question must otherwise qualify as privileged, (2) the party asserting the doctrine must share a common legal interest with the party with whom the information was shared, and (3) the statements for which protection is sought must have been in furtherance of that shared legal interest. Egiazaryan v. Zalmayev, 290 FRD. 421, 434 (S.D.N.Y. 2013). The doctrine will also apply where the co-parties are represented by different attorneys. Id. The New York Court of Appeals has interpreted an additional requirement that litigation must also be pending or anticipated which differs from that of the federal standard, extending the privilege regardless of whether litigation is pending or threatened. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 NY3d 616, 628-629 (2016); In re Teleglobe Communications Corp., 493 F3d 345 (3d Cir. 2007).

The decision in Ambac Assurance Corp., 27 NY3d at 616 places a substantial limit on the attorney-client privilege in common-interest situations. The Court held that while parties who share a common legal interest may invoke the attorney-client privilege for communications relating to litigation, either pending or anticipated, under the common-interest doctrine, the privilege will not apply in the context of business transactions. In essence, the Court distinguished clients who share a common legal interest "in a commercial transaction or other common problem but do not reasonably anticipate litigation," from clients that do anticipate litigation or are co-litigants in pending litigation. Id. at 628.

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 most common pitfall in the realm of attorney-client privilege is a waiver due to the disclosure of otherwise confidential information to third parties, or the presence of third parties during communications. This may occur by means of verbal face-to-face communications, a release of documents, or even sending an e-mail. This also may happen intentionally or unintentionally. People v. Osorio, 75 NY2d 80 (1989). In this regard, the scope of the privilege depends on "whether the client had a reasonable expectation of confidentiality under the circumstances." Id. at 84-85 (citing Matter of Jacqueline F., 47 NY2d 215 (1979); In re Kaplan, 8 NY2d 214 (1960)).

A second common mistake which may result in the loss of the attorney-client privilege is confusing business advice with legal advice or mixing the two into a singular discussion. "The communication must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose. Conversely, one who seeks out an attorney for business or personal advice may not assert a privilege as to those communications." *In re Grand Jury Subpoena Served upon Bekins Record Storage Co.*, 62 NY2d 324, 329 (1984) (citing Matter of Priest v. Hennessy, 51 NY2d 62, 68-69 (1980)). Similarly, it is important to keep in mind that underlying factual information is not protected. See Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 NY2d 371 (1991).

A third situation to be wary of when attempting to maintain confidentiality under the attorney-client privilege derives from Rule 1.6 (b) of the New York Rules of Professional Conduct. Under this Rule, an attorney may (meaning he or she is not required to, but may elect to do so) disclose otherwise confidential information: (1) to prevent reasonably certain death or bodily harm, (2) to prevent the client from committing a crime, (3) to withdraw a written or oral opinion by the lawyer who now believes the opinion to be materially inaccurate or is being used to further a crime or fraud, (4) to secure legal advice about compliance with the Rules, (5) to defend the lawyer or his or her employees/associates against a claim of wrongful conduct, or (6) when otherwise permitted or mandated to under the Rules or to comply with another law or court order. N.Y. RULES OF PROF'L CONDUCT, 22 NYCRR § 1200.0, r. 1.6 (2024). Thus, when the attorney is placed in any of these situations, he or she has the discretion to disclose otherwise confidential information of a client without being held to be in violation of the Rules.

Situations that fall within the scope of the crime-fraud exception can also result in the inadvertent loss of the privilege. Under this rule, "[a]dvice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.' Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection." Matter of New York City Asbestos Litig., 109 AD3d 7, 10 (1st Dept 2013) (citing In re Grand Jury Subpoena Duces Tecum, 731 F2d 1032, 1038 (2d Cir. 1984)).

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

In 2023, the Court of Appeals issued a decision in Matter of Appellate Advocates v. New York State Dept. of Corr. & Community Supervision, 40 NY3d 547 (2023) which addressed the issue of attorney-client privilege and confidentiality when training employees on legal duties and obligations. This case involved documents that were created by counsel to train and advise a Board of Parole commissioners on how to comply with their legal duties and obligations in certain situations. The documents reflected counsel's "legal analysis of statutory, regulatory and decisional law[,]" and was meant to provide guidance to the commissioners on "matters relevant to the commissioners' exercise of their discretionary authority" in parole applications and decisions. The petitioner filed a FOIL request for "various materials related to the Board of Parole's decision-making process[,]" and challenged the denial in court. It was held by New York's highest court that the attorney-client privilege applied due to the nature of the communication and provided that, "[t]he critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." Federal courts have also taken the view that "training materials are privileged when the materials convey confidential legal advice." Id.

On the issue of protecting confidential client information and identities, the NYS Bar Association issued an ethics opinion about information stored on an attorney's cellphone. See NYSBA Ethics Opinion 1240, https://nysba.org/ethics-opinion-1240/ (April 11, 2022). Specifically, the opinion discusses the confidentiality of client contacts identified and stored in an attorney's cellphone. NYSBA provided, "[i]f 'contacts' on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent." Additionally, the NYSBA added that [a] contact could be confidential because it reflects the existence of a client-attorney relationship which the client requested not be disclosed or which, based upon particular facts and circumstances, would be likely to be embarrassing or detrimental to the client if disclosed." The NYSBA also added some factors that should be considered in determining whether any contacts are confidential including, whether the owner of the device can be identified as an attorney or their area

of practice; whether people in the contacts list can be identified as clients; and how much information is included in the contact such as telephone numbers, email addresses, home addresses, financial data, etc. Id