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Attorney-Client Privilege - Utah

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

Governing Law

The attorney-client privilege is recognized in Rule 504(b) of the Utah Rules of Evidence and codified in Utah Code Ann. § 78B-1-137(2), which states that "An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication in the course of the professional employment." It "is intended to encourage candor between attorney and client and promote the best possible representation of the client." *Krahenbuhl v. The Cottle Firm*, 427 P.3d 1216, 1219 (Utah App. 2018). The privilege, however, is not absolute and "the mere existence of an attorney-client relationship 'does not ipso facto make all communications between them confidential.'" *S. Utah Wilderness All. v. Automated Geographic Ref. Ctr., Div. of Info. Tech.*, 200 P.3d 643, 655 (Utah 2008) (quoting *Gold Stand., Inc. v. Am. Barrick Resources Corp.*, 801 P.2d 909, 911 (Utah 1990)).

Under Utah law, a party attempting to rely on the attorney-client privilege must establish: "(1) an attorney-client relationship, (2) the transfer of confidential information, and (3) the purpose of the transfer was to obtain legal advice." *Id. See also* Utah R. Evid. 504(b) ("A client has a privilege to refuse to disclose . . . confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's . . . lawyers."). Additionally, an attorney's secretary, stenographer, clerk, or licensed paralegal practitioner "cannot be examined . . . concerning any fact, the knowledge of which has been acquired as an employee." *See* Utah Code § 78B-1-137(2); and Utah R. Evid. 504 Advisory Committee Note 2021 Amendment.

The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a client who is deceased, the successor, the trustee, or similar representative of a client that was a corporation, associate, or other organization, and the lawyer or the lawyer referral service on behalf of the client. *See* Utah R. Evid. 504(c). Rule 504 is only concerned with defining whether a communication is privileged when it is made; whether the privilege was subsequently waived is a question properly considered under Utah R. Evid. 510.

The Utah Supreme Court has stated that "the purpose of the privilege is to 'encourage clients to make full disclosure to their attorneys.'" *Gold Stand.*, 801

P.2d. at 911 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). The Court in *Gold Stand*. cautioned that "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Id.*

1. Attorney-Client Relationship

A party asserting attorney-client privilege has the burden of establishing that an attorney-client relationship exists.

Attorney/Lawyer

Under Utah R. Evid. 504(a)(3) a "Lawyer" means "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." However, the attorney must be consulted in his/her professional role as an attorney. For example, communications to a friend who happens to be an attorney does not automatically make those communications privileged. *See Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 305 P.2d 480, 485 (1956) ("This court has recognized the inapplicability of privilege to a friendly relationship between attorney and another not arising during the course of professional employment."). That said, in some circumstances an attorney-client relationship can be implied even in the absence of an express attorney-client relationship. *See State v. Snowden*, 23 Utah 318, 65 P. 479, 482 (1901) (noting that the relation of attorney and client exists when a "close confidence existed between the parties, and that the defendant made the statement in confidence to a person whom he regarded, and had reason to regard, as his attorney …."); *Margulies By and Through Margulies v. Upchurch*, 696 P.2d 1195, 1200 (Utah 1985) (finding that "circumstances may give rise to an implied professional relationship or a fiduciary duty towards the client, thereby invoking the ethical mandates governing the practice of law ….").

Additionally, under Utah Code 78B-1-137(2), agents/representatives of the attorney are also not to be examined concerning their knowledge of privileged matter. Utah R. Evid. 504(a)(6) defines the attorney's representative as "a person or entity employed to assist the legal professional in a rendition of legal services." Furthermore, Utah courts have clarified that it is not necessary that the "legal representative" be paid directly by the attorney "so long as the representative is 'engaged to assist the lawyer in providing legal services.'" *Cricut, Inc. v. Enough for Everyone, Inc.*, 2023 WL 7496306, *2–4 & n.22 (D. Utah 2023) (quoting Utah R. Evid. 504 advisory comm. note (2011)). However, Utah has recognized a few exceptions to the agent/representative rule. In *Young v. Taylor*, the 10th Circuit allowed an attorney's secretary to testify about a conversation between the attorney and a co-defendant about defrauding the plaintiffs. 466 F.2d. 1329 (10th Cir. 1972). The court ruled the attorney-client privilege did not apply because the attorney was involved personally, not as the co-defendant's lawyer. *Id.*

Lastly, agents of the attorney may be required to disclose privileged communications if the joint-client exception is applicable. See infra, Sec. II p. 4. Note, however, that the privilege is not generally extended to client agents. *Busch v. Doyle*, 141, U.S. Dist. LEXIS 5805 (Utah Dist. Court 1992).

Client

Rule 504(a)(2) defines a client as one "who is rendered legal services" and can include both natural person as well as entities. *See Snow, Christensen & Martineau v. Lindberg*, 2013 UT 15, 299 P.3d 1058, 1065 (Utah 2013) ("[A] trustee can claim the privilege on behalf of the entity that it represents just as a representative of a corporation can assert the privilege on behalf of the corporation."). Utah courts also recognize that in certain circumstances the privilege may extend to communications of agents of individual clients. *See Hofmann v. Conder,* 712 P.2d 216, 217 (Utah 1985) ("The record establishes that the presence of petitioner's hospital nurse was reasonably necessary under the circumstances….Since the presence of the hospital nurse was reasonably necessary [] the privilege was not waived because of that presence."); *Utah Dept. of Transp. v. Rayco Corp.*, 599 P.2d 481, 491 (Utah 1979) ("The attorney-client privilege protects a report where the expert is required to examine the client,

his personal affairs, or his property, or his mental impressions, in order to evaluate and transmit the same in a manner in which the client is unable, by reason of insufficient scientific or technical training.).

2. Confidential Communications

Rule 504(b) of the Utah Rules of Evidence protects communications made to " facilitate the rendition of … legal services." If the client has a reasonable belief that the information they are sharing with the attorney might be relevant to the legal help they are seeking—essentially, if it could aid in that service—then the principle behind the privilege (which is to encourage open communication from the client) requires that the privilege protect this information. *See Madsen v. United Television*, Inc., 801 P.2d 912, 917 (Utah 1990). That said, Utah recognizes the distinction between communications and information. *See Snow, Christensen & Martineau v. Lindberg*, 2013 UT 15, 299 P.3d 1058, 1070 (Utah 2013) ("The attorney-client privilege protects communications, not facts.").

Furthermore, the communications must be of a nature intended to be confidential. To determine whether a communication is confidential, Utah courts will analyze whether the circumstances demonstrate an intent for confidentiality. *Anderson v. Thomas*, 159 P.2d 142 (Utah 1945) (("The mere fact that the relationship of attorney and client exists between two individuals does not ipso facto make all communications between them confidential …. 'No express request for secrecy, to be sure, is necessary; but the mere relation of attorney and client does not raise a presumption of confidentiality, and the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential.'") (quoting Wigmore on Evidence, § 2311). *See also State v. Snowden*, 23 Utah 318, 65 P. 479, 481 (1901) ("The communication must be confidential, and so regarded, at least by the client, at the time.").

The factual circumstances surrounding the communication will determine whether confidentiality was subjectively expected and objectively reasonable. *See Snowden*, 23 Utah 318, 65 P. at 482 (citing *Bacon v. Frisbie*, 80 N.Y. 394, 1 Ky. L. Rprt. 128, 1880 WL 12404 (1880), as authority that factual circumstances are relevant to determining whether the communication was intended to be confidential).

3. To Obtain Legal Advice

A party asserting attorney-client privilege has the burden of establishing that the primary purpose of the communication(s) was to obtain legal advice. *See Gold Stand., Inc. v. American Barrick Resources Corp.*, 801 P.2d 909, 911 (Utah 1990) (noting that the privilege is to be narrowly construed only to cover communications "which might not have been made absent the privilege"); *Jackson v. Kennecott Copper Corp.*, 27 Utah 2d 310, 495 P.2d 1254, 1257 (1972) (noting that the proponent of the privilege must establish that the primary purpose of submitting material to an attorney is for legal advice).

In *Jackson v. Kennecott Copper Corp.*, the Utah Supreme Court identified the general requirements of the attorney-client relationship, which must be shown by the party asserting the privilege. Communication "must be for (a) the purpose of securing primarily either an opinion on law, (b) or legal services, (c) or assistance in some legal proceeding, (d) and not for the purpose of committing a crime []." 495 P.2d 1254, 1257 (Utah 1972) (citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950)). *See Mem. Decision and Order Granting Pl.'s Mot. for Special Master, Entrata, Inc. v. Yardi Systems, Inc.*, No. 2:15-cv-00102 (Utah D. 2018) (finding that the mere fact that an attorney is "CCed" in an email does not render the communication subject to the attorney-client privilege).

For communications used to secure primarily legal opinions on law, etc., the party asserting the privilege must prove the communication was provided pursuant to the underlying litigation. *S. Utah Wilderness All. v. Automated Geographic Reference Ctr.*, 200 P.3d 643, 655 (Utah 2008). "Channeling work through a lawyer does not itself create a basis for attorney client privilege." *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 the case of multiple clients represented by the same attorney, Utah has adopted the joint-client exception to attorney-client privileged communications. Under Utah R. Evid. 504(d)(5), the joint client exception applies to "communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." Under this exception, the communications between previously jointly represented parties, and their single representing attorney are privileged in relation to the outside world but not between themselves. *See Evans v. Evans*, 8 Utah 2d 26, 327 P.2d 260, 261–62 (1958) ("When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese [between themselves]. By selecting the same attorney, each party waives his right to place those communications under the shield of professional confidence. Either party may introduce testimony concerning the same as against the other, or his heirs or representatives. The reason assigned for the rule is that, as between the clients, communications made for the mutual benefit of all lack the element of confidentiality which is the basis of privileged communications …. Thus, if two or more persons consult an attorney at law for their mutual benefit, and make statements in his presence, he may disclose those statements in any controversy between them or their personal representatives or successors in interest.").

Utah courts look to see if (1) the communications pertained to a matter in which both parties had a common interest and (2) the information was divulged to the attorney for the common interest of both. *Evans*, 372 P.2d 260. The court examines several factors to determine whether a common interest exists. These factors include (a) whether the parties and their attorney equally shared the knowledge of the two parties; (b) the nature of the communications; (c) the intent to be regarded as confidential; (d) if the attorney indicates a pattern of behavior that treats all of the parties as one "family" and does not segregate the activities of one from the other. *Evans*, 372 P.2d 260; *Farnsworth v. Van Cott, Bagley, Cornwall & McCarthy*, 141 F.R.D. 310 (D. Colo. 1992). If a joint-client relationship does exist, the attorney, its employees, officers, and those related will be required to provide documents and testimony concerning the attorney-client relationship. *Farnsworth*, 141 F.R.D. at 314.

Additionally, the Federal District of Utah recognizes the common-interest privilege and protects communications among separately represented co-defendants as long as the parties interests are "identical" and not merely "similar." "The common interest doctrine . . . operates as a shield to preclude a waiver of the attorney-client privilege when a disclosure of confidential information is made to a third party who shares a community of interest with the represented party." *Gulf Coast Shippers, Ltd. P'ship v. DHL Express (USA), Inc.*, No. 2:09-cv-221 (D. Utah July 15, 2011); see also, *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 705 (10th Cir. 1998)). "'A community of interest exists where different persons or entities have an identical legal interest with respect to the subject matter of a communication between an attorney and client concerning legal advice . . . . The key consideration is that the nature of the interest be identical, not similar.'" *Id.* (quoting *NL Indus. Inc. v. Commercial Union Ins. Co.*, 144 F.R.D. 225, 230-31 (D. N.J. 1992)).

It is currently unclear whether Utah state courts will apply the common-interest doctrine in the same manner as Federal Courts. Utah's adoption of the joint-client exception to attorney-client privileged communications, Rule 504(d)(5), suggests that Utah would recognize the doctrine as a logical extension of the current law.

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.

504(d) Exceptions

Utah R. Evid. 504(d) provides five (5) exceptions to the privilege. Rule 504(d) specifically states that the privilege does not apply if: (1) the services of the lawyer were sought or obtained to enable or aid to commit or plan to commit a crime or fraud; (2) communications are relevant to an issue between parties who claim through the same deceased client; (3) there was a breach of duty by the lawyer or client; (4) there are issues concerning a document to which the lawyer was an attesting witness; (5) the communications relevant to a common interest between two or more clients to a lawyer retained or consulted in common.

Waiver of the Privilege

Rule 504 is only concerned with defining whether a communication is privileged when it is made; whether the privilege was subsequently waived is a question properly considered under Utah R. Evid. 510. Only the client or one who acts on the client's behalf may waive the privilege protection. *See Krahenbuhl v. The Cottle Firm*, 2018 UT App 138, 427 P.3d 1216, 1220 (Utah Ct. App. 2018) ("only the client can waive the attorney-client privilege, not the clients' prior counsel."); *In re Young's Estate*, 33 Utah 382, 94 P. 731, 732 (1908) ("It will be observed that … the privilege … as at common law, is purely personal, and belongs to the client. If the client waives the privilege, neither the attorney nor anyone else may invoke it.").

"At Issue" Waiver

Generally, when a client places "privileged matters at issue in the litigation," that client consents to disclosure of those matters. *Terry v. Bacon*, 269 P.3d 188 (Utah App. 2011). Courts have disagreed, however, regarding when a matter is placed "at issue." *Id.* There are, generally, three approaches. The first is the "automatic waiver" rule, which provides that a litigant automatically waives the privilege upon the assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant. *Id.* The second provides that the privilege is waived only when the material to be discovered is both relevant to the issues raised in the case and either vital or necessary to the opposing party's defense of the case. *Id.* The third provides that a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney's advice at issue in the litigation. *Id.* Ultimately, the *Terry* court adopted the most restrictive approach that the waiver of the privilege occurs when the attorney's advice was directly put at issue. *Terry*, 269 P.3d 188.

The Court of Appeals subsequently followed suit in *Krahenbuhl. Krahenbuhl v. The Cottle Firm*, 427 P.3d 1216 (Utah Ct. App. 2018). The privilege may not be used both as a sword and a shield. Thus, the "at issue" waiver is triggered when the party seeking application of the attorney-client privilege places attorney-client communications at the "heart of a case." *Id.* "More specifically communication between the attorney and client are 'placed in issue where the client asserts a claim or defense, and attempts to prove the claim or defense by disclosing or describing an attorney client communication.'" *Id.* However, even when a court determines that the privilege has been waived, courts should exercise caution to ensure that only communications relevant to the subject matter at issues are introduced. *Id.* Utah courts reiterate that in an "at issue" matter, it is the client, and the client only, who is the holder of the privilege and who may waive the privilege. *Id.*

That said, the mere fact that requested communications concern subjects that are "at issue in a case" is not "a sufficient basis to disregard the attorney-client or work-product privileges." *Jones Waldo Holbrook & McDonough PC v. 3293 Harrison Blvd. LLC*, 2023 UT App 8, 524 P.3d 1022, 1027 (Utah Ct. App. 2023). The mere act of bringing an action does not waive the attorney-client privilege protection for all communications that might be relevant to proving or disproving that claim. Otherwise, the privilege would be eviscerated because it would be waived whenever a client-initiated legal proceedings. Therefore, it was held in *Doe v. Maret*, that a lawyer could not be deposed simply because he possessed relevant information.

Third-party Waiver

"It is almost uniformly held that this prohibition does not apply where the communication between the attorney and client takes place in the presence of a third party." *Anderson v. Thomas*, 108 Utah 252, 159 P.2d 142, 146–47 (1945). The standard determining when the presence of a third-party during communications between a lawyer and client results in a waiver of the attorney-client privilege is whether the third person's presence is reasonably necessary under the circumstances. *Hofmann v. Conder*, 712 P.2d 216 (Utah 1985). In *Hoffman*, the court held that the petitioner's statement to his attorney, in the presence of the hospital nurse, was an intentionally confidential communication and still protected. *Id.* The court reasoned that privilege was not waived by the presence of a third-party because the client: (1) requested his attorney immediately before the communication; (2) requested that the police and hospital personnel be out of "earshot"; and (3) was in a helpless physical condition and receiving hospital care. *Id.*

Voluntary Disclosure

Voluntary disclosure of privileged communications waives privilege protection. Utah R. Evid. 510(a)(2) provides, in part, that "A person who holds a privilege under these rules waives the privilege if the person or a previous holder of the privilege: (1) voluntarily discloses or consents to the disclosure of any significant part of the matter or communication." *See State v. Hoben*, 36 Utah 186, 102 P. 1000, 1004 (1909) ("The rule is well settled that, if the client himself testifies to conversations with his attorney regarding the matters claimed to be privileged, the privilege is waived …. The client may not thereafter be heard to claim the privilege when the attorney is called to impeach him, and for much stronger reasons may the attorney not be heard to claim the privilege for himself."). Such a voluntary disclosure can occur when the client stipulates the admissibility of disclosures by the client's former attorney. *State v. Johnson*, 2008 UT App 5, 178 P.3d 915, 921 (Utah Ct. App. 2008).

If a client relies on the advice received from counsel as a defense, the privilege protection is waived for all communications relating to the advice relied upon. The client cannot use the privilege as both a sword and a shield. *See Terry v. Bacon*, 2011 UT App 432, 269 P.3d 188, 194 (Utah Ct. App. 2011) ("The case presents precisely the type of situation where the attorney-client privilege must be deemed waived to ensure fairness to both parties …. To hold otherwise would 'deny [defendants] access to the very information that [defendants] must refute in order to' succeed against the Terry' argument that the settlement was not authorized … The trial court correctly determined that, by asserting the defense that they never authorized former counsel to accept the settlement offer, the Terrys waived the attorney-client privilege with respect to communications about that issue.").

Involuntary Disclosure

Utah R. Evid. 510(b) states, "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or made without opportunity to claim the privilege."

Inadvertent Voluntary Disclosure

Utah courts recognize inadvertent voluntary disclosures; however, "inadvertence" is yet to be defined. In *Lifewise*

Master Funding v. Telebank, 206 F.R.D. 298 (D. Utah, 2002), the 10th Circuit applied the federal standards outlined in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D. N.Y. 1985) to evaluate a claim of inadvertence. In *Lois Sportswear*, the court listed five factors that would be considered: 1) the reasonableness of the precautions to prevent inadvertent disclosure; 2) the time taken to rectify error; 3) the scope of the discovery; 4) the extent of the disclosure; and 5) the "overreaching issue of fairness." *Lois Sportswear, U.S.A., Inc.*, 104 F.R.D. at 105.

The precautionary measures that must be taken to guard against inadvertent disclosure depend on the nature of the circumstances (e.g., time constraints and number of documents) and the resources of the parties. *Lifewise Master Funding v. Telebank*, 206 F.R.D. 298, 305 (D. Utah 2002). In *Lifewise Master Funding*, the court found precautionary measures adequate. 206 F.R.D. at 305. The documents had been carefully segregated—those to be produced from those to be withheld on privilege grounds. The disclosure occurred because of a mistake by a paralegal who sent the wrong set with other properly disclosed documents. Because the number of documents mistakenly sent was small, the court concluded that the oversight was not gross.

Furthermore, the client who inadvertently produces privileged communications must act quickly to rectify the mistake. This ensures fairness to the party to whom disclosures were made. However, the obligation to be fair goes both ways. The party receiving privileged communications has an obligation to notify the producing party of its apparent mistake and not to use the communications until the issue has been clarified and resolved. *See* Utah Ethics Opinion, 99-01.

Additional Waivers Examples

There are several additional ways in which a client may expressly or implicitly waive the privilege:

- Reliance on Counsel: Statements made by the client to the attorney subsequently used in a "Notice of Defense Alibi" *State v. Gay*, 307 P.2d 885 (Utah 1957).
- Failure to Timely Object: Privilege claims are waived if the client does not timely object to the disclosure of privileged communications. *See State v. Woods*, 62 Utah 397, 220 P. 215, 219 (1923) (Client was asked what he said to his attorney. After answering, his counsel objected but made no motion to strike the question and answer, which resulted in the client's counsel's eventual withdrawal of the objection.).
- Examination of Attorney: Examination of the attorney by the client during litigation or pre-trial proceedings. *Young v. Taylor*, 466 F.2d. 1329 (10th Cir. 1972). *See also Chard v. Chard*, 2019 UT App 209, 456 P.3d 776, 793–94 (Utah Ct. App. 2019) (holding that plaintiff effected a broad disclosure when she "identified her two attorneys as witnesses whom she planned to call at trial to testify about 'matters in the pleadings,' [and] placed the attorneys' knowledge—about all matters raised in the pleadings—at issue in the litigation…. and did not limit her disclosure to any particular issue or issues.").

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

In the most recent case interpreting Utah's attorney-client privilege doctrine, *Jones Waldo Holbrook & McDonough PC v. 3293 Harrison Blvd. LLC*, 524 P.3d 1022 (Utah App. 2023), the Utah Court of Appeals clarified the "at issue" waiver boundaries. The court rejected the idea that merely denying allegations in a complaint could be sufficient to place privileged communications at issue. Instead, it emphasized that to effectuate a waiver of attorney-client privilege, the plaintiff must either use privileged communication as a sword (to advance their claims) or as a shield (to defend against claims). Denying allegations alone does not meet this standard.

The court's ruling is significant because it prevents defendants from circumventing the privilege by pressuring plaintiffs into a position where their denial of allegations would allegedly waive the privilege. Such a ruling would have allowed defendants to indirectly erode the ACP by forcing plaintiffs to confront privileged communications without their consent. The court's decision reaffirms that only the client or their representative has the authority to waive the privilege, thus preserving the fundamental policy of the ACP—to protect the confidentiality of communications between clients and their attorneys. By maintaining these protections, the court reinforced the role of the ACP in ensuring that clients can communicate openly with their legal counsel without fear that their words will be used against them.