

Attorney-Client Privilege

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I. Thanks

The Texas Bar CLE has a longstanding tradition of sharing of papers and thoughts among authors and presenters. This paper is no different. We thank several other authors, on whose shoulders we stand. Kim Askew of K&L Gates in Dallas, has written papers on privileges for the Advanced Evidence and Discovery Course for many years. She has also authored the same article in the Advanced Civil Trial Course. These updates are invaluable for lawyers engaged in trial practice. One of the best articles on joint defense agreements was written by Mike McKetta and Richard Yeomans of the Graves Dougherty Hearon & Moody firm in Austin. Mike was kind enough to let us borrow from his wisdom.

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II. Overview of the Attorney-Client Privilege

A. Purpose:

The attorney-client privilege furthers and protects unrestrained communications between lawyers and clients so that a lawyer's professional advice can be sought and obtained without fear of disclosure. This is especially true when a client's full disclosure to the lawyer includes facts, which if disclosed, could have an adverse effect.

Originally a creature of common law, the attorney-client privilege is now codified. *See* TEX. R. EVID. 503; FED. R. EVID. 501.

B. What It Protects:

1. **TEX. R. EVID. 503:** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services:
 - a. between the client or a representative of the client and the client's lawyer or a representative;
 - b. between the lawyer and the lawyer's representative;
 - c. by the client or a representative of the client, or the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
 - d. between representatives of the client or between the client and a representative of the client; or
 - e. among lawyers and their representatives representing the same client.
2. **Federal Rule:** The federal attorney-client privilege is addressed in an often cited case—*United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass 1950). In that case, the Court held that the privilege applies only when:

- a. A client is seeking legal advice or a lawyer's services;
- b. The person to whom the communication is made is a lawyer or his or her representative;
- c. The communication relates to a fact disclosed from a client (a representative) to a lawyer (a representative);
- d. Strangers are not present;
- e. A client requires confidentiality.

3. Loss of the Privilege

The attorney-client privilege, like all other privileges, can be lost. There are several ways in which the attorney-client privilege can be forfeited:

a. Selective disclosure:

Texas courts have recognized that the attorney-client privilege can be waived by disclosing all or any significant part of the confidential communication. *See Axelson, Inc. v. McIlhany*, 755 S.W.2d 170 (Tex. App.—Amarillo 1988, orig. proceeding) (a company revealed information relating to the company's internal investigation into kickbacks to federal law enforcement agencies as well as a national publication).

For better or worse, some of the most frequently encountered instances of losing the privilege through selective disclosure occur in:

- Responding to a government investigation
- Information supplied to a governmental agency
- Certain SEC/financial disclosure filings
- Under some circumstances, auditor or accountant responses
- Any disclosure to third-parties not affiliated with a lawyer

b. Waiver:

The Restatement (Third) of the Law Governing Lawyers provides that only an authorized agent of a corporation may waive the privilege of the corporation. In other words, privilege cannot be waived by unauthorized disclosure by either current or former employees.

In many instances, the presence of a third person eliminates the intent for confidentiality on which the privilege rests. *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992). However, courts are reluctant to apply this rule too harshly. *National Converting & Fulfillment Corp. v. Bankers Trust Corp.*, 134 F. Supp. 2d 804 (N.D. Tex. 2001). In *National Converting & Fulfillment Corp.*, the district court decided a matter of first impression—where the person who was not employed by the corporation, but who is a close relative of the owner and has the authority to speak on behalf of the corporation, is a representative of the client under TEX. R. EVID. 503(a)(2). The father, who owned the company, asked his son to talk to the corporation's legal counsel regarding a lawsuit. The son was not an employee of the corporation, but frequently acted as a business adviser. The court held

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