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


[e]ncourage clients to provide information freely to their attorneys to allow the attorney to give sound and informed advice to guide their clients’ actions in accordance with the law. As the privilege encourages clients to speak openly with their counsel, we recognize that in many cases, [t]he privileged communications kept from the court do not really represent a loss of evidence since the client would not have written or uttered the words absent the safeguards of the attorney-client privilege.


In 2014 Pa.R.E. 502, Attorney-Client Privilege; Exceptions; Waiver, was published for comment. This comment period closed in early 2015. Since then there has been no promulgation (or withdrawal) of the proposed Rule. A “confidential communication” is a “communication made to obtain or effectuate professional legal services for the client and that a client would reasonably intend to be disclosed only to persons engaged in obtaining, providing, or effectuating those services.” This privilege, not to disclose a communication belongs to the client and would apply to confidential communications (1) between the client or a representative of the
client and the client’s attorney or representative of the attorney; (2) between the attorney and a representative of the attorney; (3) between representatives of the client or between the client and a representative of the client; or (4) by the client or a representative of the client or the client’s attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein. An attorney or a representative of the attorney may only claim the privilege on behalf of the client.

II. 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?

Pennsylvania does recognize/preserve the attorney-client privilege for communication among co-defendants for the client or a representative of the client or the client’s attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein. The exceptions noted previously would be applicable here as well.

Pennsylvania’s Commonwealth Court addressed the use of joint defense agreements in its decision in In re: Condemnation by the City of Philadelphia of Certain Property Interest in 16.2626 Acre Area. The Court recognized that a joint defense or common interest privilege is a valid extension of the attorney-client privilege. Therefore, when defendants and their attorneys participate in a joint defense, the attorney-client privilege is not waived by the sharing of information within the joint defense group. This privileged is limited to co-defendants who have a shared legal interest and does not apply if they only have a shared commercial or monetary interest.

Executive Risk Indemnity, Inc. v. CIGNA Corp., 111 A.3d 204 (Pa. Super. 2015), held that an informal and unwritten joint defense agreement that extended the attorney client and work product privileges to co-defendants and their counsel ceased to protect these communications if they were made after the date that the co-defendants ceased to have a common interest. In that case, the co-defendants’ interest diverged after one co-defendant determined that it would not participate in mediation of the claims with the others.

III. 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 is meant to protect confidential communications between an attorney and client. The privilege is generally waived when those communications are shared
with a third party. Under the proposed Rule, a communication would not be privileged under the following circumstances:

1. If the services or advice of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud;

2. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction *inter vivos*;

3. As to a communication relevant to an issue of breach of duty by an attorney to the client or by the client to the attorney;

4. As to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;

5. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness; or

6. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by or to any of them by or to an attorney retained or consulted in common, when offered in an action between or among any of the clients.

Additionally, the privilege is waived if the client intentionally discloses or consents to disclosure of the subject matter of the confidential communication. It is not waived if disclosure is inadvertent.

A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney’s advice at issue in the lawsuit. Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and advice does not necessarily become an issue merely because it might affect the client’s state of mind in a relevant manner. The advice of counsel is placed at issue when the client asserts a claim or defense and attempts to prove that claim or defense by disclosing or describing an attorney-client communication. The Court has identified a two-step inquiry into whether the privilege has been waived due to advice of counsel: (1) the assertion of a claim or defense, and (2) an attempt to prove that claim or defense by disclosing or describing an attorney-client communication.

In the corporate setting, the privilege can be inadvertently waived, and its protections will be lost. The attorney works for the corporation. The attorney does not represent any of the
officers, directors or employees of the corporation as individuals with respect to their corporate activities if their interest are different from the corporation. Any personal information given to the attorney by an officer, director or employee (such as an employee’s admission to the attorney that he embezzled corporate funds) is not privileged and is not protected from disclosure. The attorney must disclose such information to corporate management if the information involves conduct harmful to the corporation. Routine business communications are not privileged just because they are sent to an attorney.

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

There have been two recent decisions in Pennsylvania regarding the attorney-client privilege and the attorney work product doctrine.

In Newsuan v. Republic Services, the trial court sanctioned defense counsel for meeting with employees and former employees of the defendant company. The trial court ordered defense counsel to turn over to Plaintiff’s counsel the personal information about the employees, all written communications to them, and the attorney’s own meeting notes. The trial court further ordered defense counsel to send letters to the employees telling them defense counsel had a conflict in representing them, requiring the employees to sign written waivers, and ordering defense counsel not to “obstruct” Plaintiff’s “access to evidence”.

The Superior Court reversed, holding that the defendant corporate client “possesses a privilege over the communications supplied at the behest of corporate counsel to assist him in advising [Defendant corporation] in the present litigation.” The privilege applied equally to employees and former employees. The Superior Court agreed that dual representation of employees and the corporation presents a concurrent conflict of interest for which a conflict waiver is necessary, but that the absence of such a waiver did not destroy the privilege under the circumstances.

The Superior Court also held that the trial court erred in ordering disclosure of the attorney’s work product, for two reasons. First, the order had been based on the trial court’s erroneous conclusion of no attorney-client privilege, and second, even if there had been no attorney-client privilege, the materials were protected by the broader attorney work-product privilege.

In BouSamra v. Excela Health, the Pennsylvania Supreme Court held that the attorney work-product doctrine is not waived by disclosure to a third party “unless the alleged work product is disclosed to an adversary or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it.” The decision partially reversed the Pennsylvania Superior Court, which had found that work-product protections were waived when information from an attorney was forwarded to an outside public relations consultant.
The Pennsylvania Supreme Court reasoned that the attorney work-product doctrine is not founded on the type of enhanced confidentiality considerations implicated by the attorney-client privilege. Instead, the work-product doctrine aims to protect “the mental impressions and processes of an attorney acting on behalf of a client.” The Court also stressed that work-product protections belong to the attorney, not to the client, and that the doctrine applies to an attorney’s work “regardless of whether the work product was prepared in anticipation of litigation.” Attorney work product can sometimes be disclosed to third parties without waiving the doctrine’s protections. However, work product protections would be waived when the material is shared with an opponent, or shared in a way that “significantly increases the likelihood” that an opponent or a potential opponent would discover the information. This must be determined on a case-by-case basis and the Court should consider “whether the disclosure was consistent with the maintenance of secrecy from the disclosing party’s adversary.” The standard “should not be conflated with the heightened level of confidentiality required under the attorney-client privilege.” Attorney work product must “be kept confidential only from the adversary,” not necessarily from all third parties.