

ALASKA

Peter A. Dubrawski
Annette F. Mijanovic
HAIGHT BROWN & BONESTEEL LLP*
555 South Flower Street
Forty-Fifth Floor
Los Angeles, CA 90071
Phone: (213) 542-8000
Fax: (213) 542-8100
E-Mail: pdubrawski@hbblaw.com
E-Mail: amijanovic@hbblaw.com

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

Communications between a client and lawyer are typically protected under attorney-client privilege (“ACP”) and are not subject to discovery. *Alaska Interstate Const., LLC v. Pac. Diversified Investments, Inc.*, 279 P.3d 1156, 1179 (2012).

To satisfy the elements of ACP, there must be a confidential communication, between a lawyer and a client, divulged in the pursuit of legal services or advice. Alaska R. Evid. 503(b). ACP is designed to encourage those who “may have committed a prior wrong to seek protection of their rights.” *Munn v. Bristol Bay Hous. Auth.*, 777 P.2d 188, 195 (1989).

A current or prospective client holds the privilege and can refuse to disclose, and prevent anyone else from disclosing, the protected communications. Alaska R. Evid. 503(b). Also, the privilege extends to protect a client’s communications with a representative of the lawyer, including an attorney’s secretary or paralegal. *Id.* When a party withholds information based on asserting the privilege, that party must provide sufficient information to enable the opposing party to assess the validity of the alleged privilege. Alaska R. Civ. P. 26.

Importantly, the privilege only thwarts disclosing the content of a conversation between a client and an attorney in some circumstances. *Moudy v. Superior Court*, 964 P.2d 469, 470 (Alaska Ct. App. 1998). The privilege does not protect an attorney’s dissemination of some third-party information, such as a judge’s communications during a hearing, and it does not protect a lawyer from divulging the fact that a conversation occurred between a lawyer and a client. *Id.*

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?

Alaska codified a joint client or common interest exception to ACP in Alaska's Rules of Evidence, Rule 503(b). The rule provides that a communication is privileged, between clients represented by different lawyers, when concerning matters of common interest. Alaska R. Evid. 503(b)(3).

Commentary to the rule explains that when different lawyers engage in a "joint defense," each client maintains a privilege protecting their respective statements, regardless of whether the disclosure occurred in a joint consultation. *Commentary to Alaska Rules of Evidence*, Alaska Court System <https://public.courts.alaska.gov/web/rules/docs/evcomm.pdf> (last visited June 27, 2019). However, if there is not a common interest at the core of the legal services, the protection does not apply. *See* Alaska R. Evid. 503(d)(5) (delineating that information communicated through the joint retention of a lawyer, loses the privilege between all clients in the matter, when a subsequent civil proceedings arises between the clients).

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.

Generally, a person who fails to take reasonable steps to safeguard a confidential communication demonstrates an indifference to confidentiality and loses the privilege. *Blackmon v. State*, 653 P.2d 669, 671-72 (Alaska Ct. App. 1982).

Also, Alaska R. Evid. 503(d) outlines several exceptions to the privilege. For instance communications may be disclosed if a client knowingly uses a lawyer's services in furtherance of a crime or fraud, if breach of the attorney-client relationship is put at issue, or if parties contest the disposition of a deceased client's property.

Further, an exception applies to issues concerning evidentiary documents that require an attorney's testimony, as well as when former joint clients pursue an action against each other as previously stated. Alaska R. Evid. 503(d) et seq.

The Alaskan Rules of Professional Conduct also recognize that a lawyer may reveal a client's confidential communications when the lawyer reasonably believes disclosure is necessary to prevent a person's death or serious bodily harm, or when the lawyer seeks advice about compliance with the Rules of Professional Conduct, other laws, or court orders. AK R. RPC. Rule 1.6.

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

Recently, the Alaskan Bar Association published a couple of ethic opinions on inadvertently disclosing information in the modern digital era.

One opinion stated that lawyers risk violating Alaska’s Rules of Professional Conduct when a client is “cc’d” or “bcc’d” on emails. *E-mail Correspondence with Opposing Counsel While Sending a Copy to the Client*, Adopted Ethics Opinions: Chronological (adopted Jan. 18, 2018), <https://alaskabar.org/wp-content/uploads/2018-1.pdf>. Specifically, a lawyer or client waives the ACP by acting inconsistent with maintaining the privilege, and the ease of “reply all” makes it more likely that a client could disclose unauthorized, confidential information to opposing counsel. *See Id.*; *Blackmon*, 653 P.2d at 671-72. The Committee recommends not including a client on an email to opposing counsel, but instead, directly forwarding the email to a client.

Further, Alaska does not formally recognize a rule like Federal Rule of Civil Procedure 26(b)(5), which contains a “claw back” provision allowing lawyers to maintain a privilege over inadvertently disclosed material. *A Lawyer’s Duty Upon Receipt of Confidential Information – Inadvertent but Unauthorized Disclosure*, Adopted Ethics Opinions: Chronological (adopted Jan. 31, 2019), <https://alaskabar.org/wp-content/uploads/2019-2.pdf>.

** The author would like to acknowledge the assistance of Jaynee Mathis in the preparation of this submission.*