

ARIZONA

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

Arizona's attorney-client privilege is set out in A.R.S. §12-2234. In a civil action an attorney shall not, without the consent of the client, be examined as to any communication made by the client to the attorney or on the advice given in the course of professional employment. The statute extends the confidentiality to legal assistants, paralegals, stenographers and clerks. In a case handled by our Firm, *Salvation Army v. Bryson*, 273 P.3d 656 (Az. Ct. App., Div. 2, 2012) the privilege was extended to include investigators, and held the investigators' witness statements were covered by attorney-client privilege.

Arizona Ethical Rule 1.6, which is similar to the Model Rules of Professional Responsibility, also addresses confidentiality of client communications. E.R. 1.6(d)(4) allows a lawyer to disclose confidential information to establish a claim or defense in certain circumstances, but a court is likely to place restrictions on such disclosures, as the attorney-client privilege is strictly enforced.

As to entities which are clients, A.R.S. §12-2234 specifies that the communications are privileged only if for the purpose of giving legal advice, or if for the purpose of obtaining information in order to provide legal advice.

Arizona has addressed the attorney-client relationship with corporate employees in several different circumstances. *Lang v. Superior Court*, 826 P.2d 1228 (Az. Ct. App. Div. 1, 1992), involved Ethical Rule 4.2 on *ex parte* communications. It held that counsel could not have *ex parte* communications with a former employee if that employee was a managerial level whose admissions could bind the employer, or was one whose conduct gave rise to the litigation. In *Samaritan Foundation v. Superior Court*, 844 P.2d 593, there were a series of decisions defining the scope of attorney-client privilege. Ultimately, the legislature resolved the confusion with A.R.S. § 12-2234, which extended the attorney-client privilege to include all employees of a party, not just those directly involved in the litigated matter.

While the attorney-client communications are privileged, the witness' knowledge of the facts of the dispute are not privileged and are subject to discovery.

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?

Arizona recognizes attorney-client privilege under the common interest doctrine. *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088 (Az. Ct. App. Div. 1, 2003). The court adopted the Restatement (Third) of Law Governing Lawyers § 76(1). It requires an agreement to exchange information, a communication that otherwise qualifies as privileged, and a communication on the privileged common matter. Further, the privilege does not apply unless an attorney is involved in the communication, or the communication is intended to be made to the attorney by an intermediary. (*See* Sec. 70 of the Restatement).

Fields did not reach the issue of sharing communication with all persons having a common interest as is required with communications among co-clients of an attorney. That being said, Arizona would likely follow the Restatement and allow privileged communications among some members, but not thereby require disclosure to all members.

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.

Arizona recognizes that the attorney client privilege and work product confidentiality can be waived several ways.

- a. Expert: Communications with a consulting expert are privileged, but not communications with a testifying expert (even if the testifying expert had previously been a consulting expert). *Emergency Care Dynamics, Ltd. v. Superior Court*, 932 P.2d 297 (Az. Ct. App. 1997).
- b. Presence of Non-client. Typically, the presence of a non-party waives the attorney-client privilege. *Accomazzo v. Kemp*, 319 P.3d 231 (Ariz. Ct. App. Div. 1, 2014). However, the case recognized that parents are often present with a child client, and held there was no waiver by the presence of a parent. The Court adopted a rule that there is no waiver if the client understood the conference to be confidential notwithstanding the presence of third parties.
- c. Administrative Investigation. Sharing privileged information with the Department of Human Services was not a waiver of attorney-client privilege due to the department's statutory duty to investigate. The policy favoring

full disclosure to the department was held better served by that conduct not being considered a waiver. *Bickler v. Senior Lifestyle Corp.*, 266 F.R.D. 379 (D. Ariz. 2010).

- d. **Implied Waiver.** The waiver issue most frequently litigated is implied waiver, which occurs when a party asserts a claim or defense based on advice of counsel. Waiver occurs when three conditions are met. First, the assertion of privilege was the result of an affirmative act such as filing suit or asserting an affirmative defense. Second, through the affirmative act, the party put the protected information at issue by making it relevant in the case. Third, non-waiver would deny the opponent to information vital to its position, *Roehrs v. Minnesota Life Insurance*, 228 F.R.D. 642 (D. Az. 2005), *Baird v. Whitten*, 418 P.3d 894 (Az. Ct. App. Div. 1, 2017), *State Farm Mut. Auto Ins. Co. v. Lee*, 13 P.3d 1169 (Az. 2000).

State Farm, supra, clarified the phrase “putting the matter at issue” by noting there was no waiver merely by consulting with an attorney, no waiver by acting on attorney’s advice, and no waiver by making a subjective evaluation based on counsel’s advice. The waiver occurred when the party asserts advice of counsel as a justification or defense.

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

There are no recent decisions other than those identified above, and therefore no discernible trend or limitation on the scope of attorney-client privilege.