

Attorney-Client Privilege - Delaware

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

In Delaware, the attorney-client privilege is governed by Delaware Uniform Rule of Evidence 502. D.R.E. 502. The privilege protects communications between a client and an attorney where the communications are confidential. See *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010) (quoting *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992)). The rule states:

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 to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

D.R.E. 502(b). In order to assert the privilege, four elements must be satisfied: (i) a communication, (ii) that is confidential, (iii) that is made for the purpose of facilitating the rendition of legal services to the client, and (iv) that is between the client and its attorney. *Moyer*, 602 A.2d at 72 (citing *Ramada Inns, Inc. v. Dow Jones & Co.*, 523 A.2d 968, 970 (Del. Super. 1986)). However, Delaware courts have also discussed a more complex framework:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or [their] subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by [their] client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."

Deutsch v. Cogan, 580 A.2d 100, 103-04 (Del. Ch. 1990) (citing *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

Delaware

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?

Yes, Delaware recognizes the common-interest doctrine. The doctrine is codified in Rule 502(b), providing in relevant part,

[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 legal services to the client . . . (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest . . .

D.R.E. 502(b) (emphasis added). The party asserting a common interest must show that a common legal interest existed, not just a common commercial interest or objective between the parties. *RCS Creditor Tr. v. Schorsch*, 2020 WL 1320919 at *2 (Del. Ch. Mar. 20, 2020); *In re Quest Software Inc. S'holders Litig.*, 2013 WL 3356034, at *4 (Del Ch. July 3, 2013); *Glassman v. Crossfit, Inc.*, 2012 WL 4859125, at *3 (Del. Ch. Oct. 12, 2012); *Titan Inv. Fund II, L.P. v. Freedom Mortg. Corp.*, 2011 WL 532011, at *4 (Del. Super. Feb. 2, 2011).

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.

Delaware has codified certain exceptions to the attorney-client privilege, the privilege does not apply (1) in furtherance of crime or fraud (crime-fraud exception); (2) when parties are claimants through the same deceased client; (3) when a lawyer or client breaches a duty; (4) there are accusations against a lawyer; (5) documents are attested by a lawyer; and (6) in joint client representations if the communication is offered in an action between or among the clients. D.R.E. 502(d)(1)-(6).

Delaware courts have long recognized that the attorney-client privilege can be waived. A waiver can result from the voluntary disclosure to third parties, including partial disclosures. D.R.E. 510; see also *Zirn v. VLI Corp.*, 621 A.2d 773, 781-82 (Del. 1993); *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992) (recognizing partial disclosure waiver); *Dutton v. State*, 452 A.2d 127, 145 (Del. 1982); *Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 525 (Del. Ch. 1970). Rule 510, governing waiver by voluntary disclosures provides:

(a) Waiver by intentional disclosure. A person waives a privilege conferred by these rules or work-product protection if such person or such person's predecessor while holder of the privilege or while entitled to work-product protection intentionally discloses or consents to disclosure of any significant part of the privileged or protected communication or information. This rule does not apply if the disclosure itself is privileged or protected.

(b) Disclosure; scope of a waiver. When the disclosure waives a privilege conferred by these rules or work-product protection, the waiver extends to an undisclosed communication or information only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

Delaware

D.R.E. 510(a)-(b). The waiver doctrine rests on fairness principles. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995). Thus, waiver can occur from the “disclosure of otherwise privileged information by the client under circumstances where it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to that subject matter.” *Id.* (internal quotation marks and citation omitted). However, “[a] claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.” D.R.E. 511.

The doctrine of partial waiver is that a disclosure of a part of the contents of a privileged communication surrenders the privilege as to those communications. *Am. Bottling Co. v. BA Sports Nutrition, LLC*, 2021 WL 529099 at *5 (Del. Super Ct. Feb. 11, 2021). “The waiver is ‘partial’ because it is limited to the subject matter of the disclosed communication.” *Id.*

A subcategory of the waiver doctrine is the “at issue” exception. Under this doctrine, a client can waive the privilege if they place a privileged communication “at issue” in the litigation. See *Tackett*, 653 A.2d 254; *Zirn*, 621 A.2d 773; *Citadel*, 603 A.2d 818. The exception applies either where “(1) the party injects the communications themselves into the litigation, or (2) the party injects an issue into the litigation, the truthful resolution of which requires an examination of the confidential communications.” *Hoechst Celanese Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1118, 1125 (Del. Super. 1992); see also *Alaska Elec. Pension Fund.*, 988 A.2d at 418-20; *Princeton Ins. v. Vergano*, 883 A.2d 44, 59-60 (Del. Ch. 2005).

Finally, Delaware recognizes the “Garner exception.” In *Garner v. Wolfenbarger*, the Fifth Circuit Court of Appeals recognized a “good cause” exception to the attorney-client privilege for stockholder suits (both class and derivative). 430 F.2d 1093, 1104 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971). The Garner exception is also known as the “good cause” exception or “fiduciary duty exception.” See, e.g., *Wal-Mar Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264 (Del. 2014); *Zirn*, 621 A.2d 773. The exception recognizes a tension in these types of lawsuits when a corporation asserts the privilege against the stockholders of that corporation. The Delaware Supreme Court has stated that:

The attorney-client privilege finds full application where a corporation is the client seeking professional advice and assistance. Where the privilege is sought to be asserted in litigation initiated by a shareholder, however, an inevitable conflict arises. The corporation may only assert the privilege through its agents, i.e., its officers and directors, who must “exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. Thus, the privilege, as reflected in Rule 502 of the Delaware Rules of Evidence, is not absolute and, if the legal advice relates to a matter which becomes the subject of a suit by a shareholder against the corporation, the invocation of the privilege may be restricted or denied entirely.

Zirn, 621 A.2d at 781 (citation omitted). *Garner*, however, clarified that “a corporation is not barred from asserting [the privilege] merely because those demanding the information enjoy the status of stockholders.” *Garner*, 430 F.2d at 1103-04. The Garner exception, therefore, “balances the privilege’s purpose of encouraging open communication between counsel and client against the right of a stockholder to understand what advice was given to fiduciaries who are charged with breaching their duties.” *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., Inc.*, 2018 WL 346036, at *3 (Del. Ch. Jan 10, 2018) (internal quotation marks omitted). A court may consider a list of factors in deciding whether the exception applies:

[1] the number of shareholders and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders’ claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;

Delaware

[5] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information whose confidentiality the corporation has an interest for independent reasons.

Garner, 430 F.2d at 1104. Delaware courts have placed emphasis on three factors: "(1) the colorability of the claim; (2) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and (3) the apparent necessity or desirability of shareholders having the information and availability of it from other sources." *Buttonwood*, 2018 WL 346036, at *3 (internal quotation marks and citation omitted). In addition, Delaware courts have been especially reluctant to apply Garner when the availability factor is not met. *Emps'. Retirement Sys. of R.I. v. Facebook, Inc.*, 2021 WL 529439 at *9 (Del. Ch. Feb. 10, 2021).

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

No recent trends on limitations on attorney-client privilege have emerged in Delaware.

There has, however, been increased scrutiny on claims of privilege and sufficiency of privilege logs. See e.g. *Mechel Bluestone Inc. v. James C. Justice Cos., Inc.*, 2014 WL 7011195 (Del. Ch.) (ordering production of documents listed on multiple amended privilege logs where: "almost no pertinent information" was provided on privilege log entries; documents were re-designated on the privilege log as "non-responsive;" and entire documents were redacted before production).

