

Attorney-Client Privilege - Louisiana

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

In Louisiana, attorney-client privilege is governed by Article 506 of the Louisiana Code of Evidence. LA C.E. Art. 506(B) sets forth the general rule that “a client has a privilege to refuse to disclose or prevent another from disclosing any confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.” *Bridlington Co., L.L.C. v. S. Disposal Servs., L.L.C.*, 51,138 (La. App. 2 Cir. 2/15/17). This confidentiality applies to communications between specific categories of individuals, whether oral, written, or otherwise, made for the purpose of providing professional legal services to the client. It also covers any perceptions or observations about the client's mental, emotional, or physical condition related to such communications. *Maldonado v. Kiewit Louisiana Co.*, 2012-1868 (La. App. 1 Cir. 5/30/14), 152 So. 3d 909, 927, writ denied, 2014-2246 (La. 1/16/15), 157 So. 3d 1129. A person who asserts attorney-client privilege must show 1) the holder of the privilege is or sought to become a client; 2) the communication was made to an attorney or his subordinate in a professional capacity; 3) the communication was made outside the presence of strangers; 4) the communication was made for the purpose of obtaining a legal opinion or services; and 5) the privilege has not been waived. *In re Shell Oil Refinery*, 812 F.Supp. 658, 661 (E.D.La.1993); *Maldonado v. Kiewit Louisiana Co.*, 2012-1868 (La. App. 1 Cir. 5/30/14), 152 So. 3d 909, 927, writ denied, 2014-2246 (La. 1/16/15), 157 So. 3d 1129.

Attorney-client relationship

The attorney-client relationship is contractual in nature and is based upon an express agreement of the parties as to the nature of the work to be undertaken by the attorney. *Spicer v. Gambel*, 2000-1995 (La. App. 4 Cir. 6/20/01), 789 So. 2d 741. However, the existence of the attorney-client relationship turns not only on continuous contacts involving advice or service, but also on the client's subjective belief that such a relationship exists. Although the client's belief may be subjective, the belief that an attorney represents him or her must be reasonable under the circumstances. *Pearce v. Lagarde*, 2020-1224 (La. App. 1 Cir. 10/7/21), 330 So. 3d 1160, writ denied, 2022-00010 (La. 2/22/22), 333 So. 3d.

Confidential Communications

Statements made by a client to their attorney that are considered privileged generally include those that are confidential and made for the purpose of obtaining professional legal services. *Bridlington Company, L.L.C. v. Southern Disposal Services, L.L.C.*, 216 So.3d 219 (2017). These communications can be oral, written, or otherwise and may include the client's perceptions,

Louisiana

observations, and conditions related to the communication. *Hoerner v. Anco Insulations, Inc.*, 729 So.2d 640 (1999); *Keith v. Keith*, 140 So.3d 1202 (2014).

Protected communications include not only direct communications between a client and the client's attorney, but also communications:

- between the attorney and the attorney's representative.
- between the client or their representative and a representative of the lawyer,
- between the client or his lawyer, or a representative of either, to a lawyer, or representative of a lawyer, who represents another party concerning a matter of common interest;
- between representatives of the client or between the client and a representative of the client;
- among lawyers and their representatives representing the same client; and
- between representatives of the client's lawyer. La. Code Evid. Ann. art. 506(B)(1)-(6)

For example, the privilege extends to communications made to a client's insurance broker, where the broker was the client's representative, had authority to act on legal advice obtained on behalf of insured and received confidential communications from lawyer for purposes of effectuating legal representation for client. *Exxon Corp. v. St. Paul Fire & Marine Ins.*, E.D.La.1995, 903 F.Supp. 1007.

Representative of the lawyer, for purposes of attorney-client privilege, is not merely one from whom the attorney requests information, but rather, involves a more direct and substantial relationship with the rendition of legal services. For example, in *Hoerner v. Anco Insulations, Inc.*, 98-1398 (La. App. 4 Cir. 2/3/99), 729 So. 2d 640, writ denied, 99-0642 (La. 4/7/99), 740 So. 2d 621, attorney-client privilege did not protect medical reports prepared by a patient's physician and directed to patient's counsel, when the patient did not claim that physicians were "engaged" or employed by counsel to assist in rendition of legal services, but that physicians were "used by" counsel to assist in rendition of legal services and that reports were requested by attorney for purpose of rendition of legal services.

Additionally, the presence of necessary third parties, such as an accountant or interpreter, does not necessarily strip communication of its confidential and privileged status if their assistance is essential for the client to consult with the lawyer. *Smith v. Kavanaugh, Pierson & Talley*, 513 So.2d 1138 (1987).

Who may assert the privilege

The statutory definition of a "client" includes a corporation or partnership "to whom professional legal services are rendered by a lawyer." La. C.E. art. 506(A)(1). When control of a corporation passes to new management, authority to assert or waive the attorney-client privilege also passes to the new management. *Brown v. Car Ins. Co.*, 1993-2372 (La. 04/11/94), 634 So.2d 1163, 1166. Former managers may not assert or waive the privilege, even as to statements they may have made to counsel concerning matters within the scope of their corporate duties. *Id.*

Proving that the privilege applies

The party seeking to assert attorney-client privilege has the burden of proving that the privilege applies. LA C.E. Art. 506; *Cacamo v. Liberty Mut. Fire Ins. Co.*, 798 So.2d 1210 (2001). To prove the attorney-client privilege, the holder must demonstrate that they are or sought to become a client; the communication must have been made to an attorney or their subordinate in a professional capacity outside the presence of strangers; for the purpose of obtaining a legal opinion or services; and that the privilege was not waived. *Id.* It is essential for the party asserting the privilege to substantiate the claim adequately rather than rely on a blanket assertion. *Id.*

Duration of privilege

The attorney-client privilege extends indefinitely, as it does not cease with the cessation of the attorney-client relationship. *State v. Green*, 493 So.2d 1178 (1986). Thus, any privileged communication made during the existence of the attorney-client relationship continues to be protected indefinitely unless the privilege is waived, or exceptions apply. *Id.*

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?

There is no privilege under La. C.E. 506(C)(5) as to a communication:

Which is relevant to a matter of common interest between or among two or more clients if the communication was made by any of them or their representative to a lawyer or his representative retained or consulted in common, when subsequently offered by one client against the other in a civil action.

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.

Exceptions and Waiver

Several exceptions to attorney-client privilege exist under LA C.E. Art. 506(C). Under the crime or fraud exception, attorney-client privilege does not apply to communications intended to aid in a crime or fraud that the client knew or should have known was illegal. *Arabie v. CITGO Petroleum Corp.*, 8 So.3d 558 (2009); *Bridlington Company, L.L.C. v. Southern Disposal Services, L.L.C.*, 216 So.3d 219 (2017). To vitiate the attorney-client privilege, the party challenging the privilege must (1) make an independent prima facie case that a crime has been committed, and (2) then demonstrate that the privileged information bears a relationship to the alleged crime or fraud. *Cleco Corp. v. Sansing*, 2009–0806 (La. 05/15/09), 8 So.3d 555, 556. The trial court must make specific findings regarding the intention to further fraudulent or criminal activity in order to determine if the document in question receives protection. *Id.*

The testamentary exception involves the estates of deceased clients, where communications relevant to the testament may not be privileged in disputes among heirs. *Succession of Norton*, 351 So.2d 107 (1977). The attorney-client privilege may also be waived if a party injects into litigation an issue that requires testimony from its attorney or testimony regarding the reasonableness of its attorney's conduct. *Bank One, N.A. v. Payton*, 2007-0139 (La. App. 4 Cir. 9/26/07), 968 So. 2d 202

Regarding waivers, the client is the holder of the privilege; therefore, the power to waive it is his alone, or his attorney or agent acting with his authority, or his representative may exercise this power. *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1143 (La. 1987). Thus, a waiver must be founded on an affirmative act by the privilege-holder that creates some further detriment to the truth-seeking process in addition to that already taken into account in the creation of the privilege itself. *Id.*

For example, when the communication at issue is made in the presence of third parties, the client's intent of

Louisiana

confidentiality is usually absent and may serve to waive the protections of the privilege. *State v. Montgomery*, 499 So. 2d 709, 711 (La. Ct. App. 3 Cir. 1986). Additionally, an express waiver can occur if the client explicitly permits privileged communications to be disclosed, such as during a hearing or trial. The privilege can also be waived by "partial disclosure," where part of a larger class of privileged material is introduced, including pretrial partial disclosure or placing privileged communications at issue by affirmative pleading of a claim or defense. *Id.*

However, a disclosure of a communication or information covered by the attorney-client privilege does not operate as a waiver if the disclosure is inadvertent and is made in connection with litigation or administrative proceedings, provided the person entitled to assert the privilege took reasonably prompt measures to notify the receiving party of the inadvertence of the disclosure and the privilege asserted. LSA-C.C.P. Art. 1424.