

Attorney-Client Privilege - Maryland

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

In Maryland, attorney-client privilege is a privilege by statute. See MD. CTS. & JUD. PROC. CODE ANN. § 9-108. It is an evidentiary rule that prohibits the disclosure of the substance of a communication made in confidence by a client to his attorney for the purpose of obtaining legal advice. *Levitsky v. Prince George's Cty.*, 50 Md. App. 484, 491 (1982). The elements of attorney-client privilege are the same as those recognized in federal law. *Harrison v. State*, 276 Md. 122, 135 (1975). They are: "(1) [w]here legal advice of kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Id.*

The first of these elements states that communications are only privileged to the extent that they are related to obtaining legal advice. *Id.* Therefore the main purpose of the communication must be for soliciting legal, rather than business advice. *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 422 (1998). The second of these elements states that the communication must come from an attorney. If not the actual attorney, it must be with one of the attorney's agents, whose services are required by the actual attorney to prepare the case. *Rubin v. State*, 325 Md. 552, 566 (1992). When an attorney directs an agent to speak to that client, and then the agent provides legal assistance, then the privilege applies. *State v. Thomas*, 325 Md. 160, 173 (1992).

The third element states that the communications protected must be related to the legal advice. *Harrison*, 276 Md. at 135. The privilege applies only to these communications and not to any underlying facts of the case, even if discussed between an attorney and a client. *Blanks v. State*, 406 Md. 526, 539 (2008). These communications also do not need to be exclusively verbal to be protected. *Brosan v. Cochran*, 307 Md. 662, 673 (1986). In fact, the form of communication is irrelevant. *Levitsky*, 50 Md. App. at 493 n.3. If the communication is non-verbal, the act must still communicate information because nonassertive acts by the client to the attorney are not protected. See *In re Criminal Investigation No. 1/242Q*, 326 Md. 1, 10 (1992). Further, notes of the client can also be protected if they are direct communications to the attorney. *Carter v. State*, 149 Md. App. 509, 520 n.5 (2003). This includes notes such as a to-do list to facilitate future negotiations. *Id.* at 519. However, this protection does not extend to *all* notes and documents. For example, documents that came into existence outside of the attorney-client relationship

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do not suddenly become privileged if the client communicates them to the attorney. *Rubin*, 325 Md. at 556. In addition, communications such as fee information is not protected. *In re Criminal Investigation No. 1/296X in Circuit Court for Anne Arundel County*, 336 Md. 1, 11 (1994).

The fourth element requires that the communications between the client and attorney be confidential. *Harrison*, 276 Md. at 135. This element is crucial because the moment confidentiality ceases, privilege ceases. *Shawmut Mining Co. v. Padgett*, 132 Md. 397, 400 (1918). However, Maryland has held that privilege is not automatically waived or destroyed if the communication takes place in the presence of a third party. *Newman v. State*, 384 Md. 285, 306-07 (2004). The client must reasonably understand the communication to be confidential, even with the presence of a third party. *Id.*

The fifth element requires that the communications be by the client, and not a third party. *Harrison*, 276 Md. at 135. This applies to corporations and government entities. *City of College Park v. Cotter*, 309 Md. 573, 591 (1987); *Baltimore Transit Co. v. Mezzanotti*, 227 Md. 8, 18 (1961). The term “client” under this element also includes prospective clients that may not have a formal relationship with the attorney. *Lanasa v. State*, 109 Md. 602, 608 (1909).

Finally, the last three elements require that the communications be permanently protected unless disclosed or privilege is waived. *Harrison*, 276 Md. at 135. Attorney-client privilege exists in perpetuity for an individual client. *Camden v. State of Md.*, 910 F.Supp. 1115, 1120 (1996). This means that the death of a client does not affect the privilege, and it also attaches to the client’s successors in interest. *Trupp*, 24 Md. App. at 609; *Tillinghast v. Lamp*, 168 Md. 34 (1935). Although this privilege exists in perpetuity, it can be broken by the client’s disclosure or waiver. *Harrison*, 276 Md. at 135.

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?

Maryland preserves attorney-client privilege between co-defendants in joint-defense or common-interest situations. See *Trupp*, 24 Md. App. at 611. An attorney represents joint clients when the attorney simultaneously acts as a legal advisor for two or more individuals regarding the same legal matter. *Id.* However, it is more than the fact that the advisor’s services will benefit two or more individuals. *Id.* There is a common interest rule that is followed, which states that parties must have a shared interest in the litigation against a common adversary, so that they can share privileged information without waiving privilege. *Gallagher v. Office of Attorney Gen.*, 141 Md. App. 664, 676 (2001). Although the joint-clients’ interests may change over the course of litigation, this does not negate the privilege. *Id.* at 677. The privilege between the joint parties will last until the parties become adversaries. See *Koogle v. Cline*, 110 Md. 587 (1909).

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.

One way to lose the ability to assert attorney-client privilege is through waiver. In Maryland, attorney-client privilege can only be waived by the client, and no one else. *State v. Pratt*, 284 Md. 516, 520 (1979). A waiver can be expressed or implied by the client; however, Maryland requires proof of intent to show that privilege was waived. *City of College Park*, 309 Md. at 589-94; *Agnew v. State*, 51 Md. App. 614, 648 (1982). For example, a voluntary disclosure to a third party generally waives the privilege. *Harrison*, 276 Md. at 136.

Privilege can also be waived by governmental entities and corporations. See *Caffrey v. Department of Liquor*

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Control for Montgomery County, 370 Md. 272, 287 (2002); *Shawmut Mining Co.*, 132 Md. at 397. A governmental entity can waive privilege through legislative enactments. *Caffrey*, 370 Md. at 288. A corporation can waive privilege if a corporate employee, acting as an agent for the company, testifies without objection. *Shawmut Mining Co.*, 132 Md. at 397.

Privilege can be waived in a joint defense situation as well when an attorney represents two parties who have a common interest, but then a controversy ensues between those same two parties. *Helperstay v. Creamer*, 58 Md. App. 263, 279 (1984). The communications between the two clients and the attorney can be material in a controversy between the two original clients; therefore, those communications are no longer protected. *Id.*

During will contests, privileged statements made to an attorney may also be waived. See *Benzinger v. Hemler*, 134 Md. 581 (1919). During a lawsuit between the testator's devisees and heirs, and the deceased's estate, any statements made to the attorney by the deceased, are no longer privileged. *Id.* Maryland follows federal law, which does not apply privilege after the death of a client in a dispute between parties claiming under the decedent's will. *Trupp*, 24 Md. App. at 609.

Attorney-client privilege is also waived during malpractice proceedings. See *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671 (2000). Specifically, Maryland recognizes that the attorney-client privilege is waived when a client challenges a hired professional's activity or advice. *Id.* at 692.

Lastly, the crime-fraud exception can also result in the loss of the ability to claim the protections of privilege. This exception only applies to criminal cases, as Maryland has refused to extend it to civil cases. *Wadman v. McBirney*, 51 Md. App. 385, 396 (1982). For this exception to apply, Maryland courts require more than just a mere statement of an intent to commit a crime. *Newman*, 384 Md. at 310. The client must consult the lawyer for the specific purpose of obtaining assistance in furtherance of a future crime or fraud. *Id.* The attorney may be an "innocent pawn" in this situation, as it is the client's intent to further an unlawful act that is at issue. *Poore v. State*, 39 Md. App. 44, 70 (1978). However, if a client seeks advice regarding a completed crime, the communication remains privileged if it is in preparation for a defense. *Attorney Grievance Com'n of Maryland v. Rohrback*, 323 Md. 79, 95-99 (1991).

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

At this time, there are no evident or major trends expanding or limiting the scope of attorney-client privilege.