

Attorney-Client Privilege - Michigan

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

The attorney-client privilege is rooted in Michigan's common law, but can also be found in Michigan's statutory law, specifically, MCL 767.5a(2), which provides: "[a]ny communications between attorneys and their clients ... are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys ... to serve as such attorney."

The purpose of the attorney-client privilege is to permit a client to confide with his attorney with the knowledge that his communications are safe from disclosure. *U.S. Fire Ins. Co. v. Citizens Ins. Co. of America*, 156 Mich. App. 588, 592, 402 N.W.2d 11 (1986) The privilege is narrow in scope and attaches only to communications between the client and his attorney made for the purpose of obtaining legal advice. *Reed Dairy Farm v. Consumers Power Co.*, 227 Mich. App. 614, 619-620, 576 N.W.2d 709 (1998). The person asserting the privilege is burdened with establishing that the privilege exists. *In re Dow Corning Corp.*, 2010 WL 3927728, June 15, 2010 at *4.

For the privilege to be applicable, "the communication in question must be made: (1) in confidence; (2) in connection with the provision of legal services; (2) to an attorney; and (4) in the context of an attorney-client relationship." *Estate of Nash*, 321 Mich. App. at 595, citing *U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 814-817 (CA 7, 2007).

The privilege applies to confidential communications between a client (or prospective client) and his/her attorney for the purpose of obtaining or rendering legal advice. *Taylor v. Blue Cross & Blue Shield*, 205 Mich. App. 644, 654, 517 N.W.2d 864 (1994); *U.S. Fire Ins. Co. v. Citizens Ins. Co.*, 156 Mich. App. 588, 402 N.W.2d 11 (1986). The privilege generally protects not only an attorney's communications with his client, but also the attorney's opinions, conclusions and recommendations based on facts conveyed in confidence by the client to the attorney. *Hubka v. Pennfield Twp.*, 197 Mich. App. 117, 122, 494 N.W.2d 800 (1992). The privilege extends to the communications between the attorney (or an attorney's agent) and the client (or the client's agent). Therefore, the privilege is not waived by disclosure of the communication to an expert witness, the trial court, or a shorthand reporter. *People v. Hilliker*, 29 Mich. App. 543, 185 N.W.2d 831 (1971) (privilege extended to psychiatrist employed to assist defense counsel in preparing defense); *Grubbs v. K Mart Corp.*, 161 Mich. App. 584, 411 N.W.2d 477 (1987). Compare, *McCarthy v. Belcher*, 128 Mich. App. 344, 340 N.W.2d 848 (1983) (although examination

Michigan

results of client sent by attorney for an examination in preparation for litigation are generally treated as a confidential communication between client and attorney, the plaintiff waived the privilege because he testified on direct, cross-, and redirect examination concerning the medical examination.)

Where the client is an organization, the privilege extends to communications between the attorney and the agents and employees authorized to speak on behalf of the corporation as to the subject matter of the communication. *Reed*, 227 Mich. App. at 619. An attorney for a corporation has an attorney-client relationship with the corporation, not with its shareholders. *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich. App. 509, 309 N.W.2d 645 (1981).

The privilege is personal to the client and may be waived only by the client, not by the attorney. *Paschke v. Retool Indus*, 445 Mich. 502, 519 N.W.2d 441 (1994); *Kubiak v Hurr*, 143 Mich. App. 465, 372 N.W.2d 341 (1985). The privilege survives even after the client dies. *Swidler & Berlin v United States*, 524 U.S. 399 (1998). However, the privilege may be waived by the deceased client's representative. However, this rule does not apply to instructions given to an attorney for the preparation of a will, in a will contest. *In re Loree's Estate*, 158 Mich. 372, 377, 122 N. W. 623 (1909).

The presence of non-essential third persons renders the communication non-privileged. *People v. Compeau*, 244 Mich. App. 595, 597, 625 N.W.2d 120 (2001) (communication between client and attorney overhead by court bailiff standing six feet away was not privileged). Further, the privilege cannot be invoked to exclude evidence of communications between an attorney and client where the communications are intended to be related to a third party. *Yates v. Keane*, 184 Mich. App. 80, 83, 457 N.W.2d 693 (1990).

The privilege is limited to communications between attorney and client, not facts. Therefore, clients and their agents (attorneys) must disclose, on request, any relevant fact within their knowledge even if it incorporated a statement of that fact into a communication to the attorney. *Reed*, supra, 227 Mich. App. at 619, relying on *Upjohn Co v. U.S.*, 449 U.S. 383, 395-396 (1981). See also, *Fruehauf Trailer Corp. v. Hagelthorn*, 208 Mich. App. 447, 451-452 (1995) where the court determined that a client may not be compelled to reveal what the client said or wrote to an attorney. However, the client may not refuse to disclose any relevant fact within the client's knowledge merely because the client incorporated a statement of fact into communications with the attorney.

"Litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case." "[T]he attorney-client privilege cannot at once be used as a shield and a sword." *In re Dow Corning Corp.*, No. 95-CV-20512-DT, 2010 WL 3927728, at *4 (E.D. Mich. 2010), citing *In re Lott*, 139 Fed. Appx. 658, 2005 WL 1515367 (6th Cir. 2005) and *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

The privilege may be waived through voluntary disclosure of private communications by an individual or corporation to a third party. Waiver also occurs through conduct that implies a waiver of the privilege or a consent to disclosure. *Estate of Nash v. City of Grand Haven*, 321 Mich. App. 587, 594 (2017); *In re Dow Corning Corp.* at *4.

An appellate court reviews de novo the question of whether the privilege may be asserted. *Reed*, 227 Mich. App. at 618.

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?

Michigan courts first applied the common interest doctrine to the attorney-client privilege in *Estate of Nash v.*

Michigan

City of Grand Haven, 321 Mich. App. 587, 598, 909 N.W.2d 862, 869 (2017). The Nash court embraced the Seventh Circuit’s decision in *U.S. v. BDO Seidman, LLP*, 492 F.3d 806 (7th Cir. 2007) holding that the common interest doctrine “encourages parties with a shared legal interest to seek legal ‘assistance in order to meet legal requirements and to plan their conduct’ accordingly.” *Seidman*, 492 F.3d at 816 (citing *In re Regents of the Univ. of California*, 101 F.3d 1386, 1390-91 (Fed. Cir. 1996)). This doctrine further embraces “sound legal advice predicated upon open communication” by those that share a common interest. *Id.*

In *Ford Motor Co. v. Mich. Consol. Gas Co.*, No. 08CV-13503, 2013 WL 5435184 (E.D. Mich., Sept. 27, 2013), both the joint-defense doctrine and the common interest doctrine were discussed. The magistrate judge there noted that the joint-defense doctrine is also known as the “co-client privilege” and recognized that the doctrine permits communications between co-defendants represented by the same attorney to be shared without waiving the privilege. The purpose of the doctrine is to permit confidential communications to be shared between co-defendants as part of an ongoing and joint effort to set up a common defense strategy. In order for the doctrine to apply the communications must already be protected by the attorney-client privilege. *Id.* at *5. The common-interest doctrine, on the other hand, applies where the parties are represented by separate counsel who have an identical legal interest with respect to the subject matter of the communication. *Id.* at *5. Again, the shared communication must be privileged; however, litigation does not necessarily have to be actual or imminent for the communication to be within the common-interest doctrine. *Id.* at *5.

In *State Farm Mut. Auto. Ins. Co. v. Hawkins*, No. 08-10367, 2010 WL 2287454 (E.D. Mich. June 4, 2010), the United States District Court, Eastern District of Michigan determined that Michigan’s highest court would recognize the common interest doctrine. That same court determined in *JP Morgan Chase Bank, N.A. v. Winget*, No. 08-13845, 2010 WL 11545362 (E.D. Mich., Dec. 10, 2010) the fact that there is some adversity among the interests of the parties claiming privilege under the common-interest doctrine does not require a finding of waiver as the doctrine applies to the interests that are common. Therefore, where parties that have some adverse interests seek protection of the common interest doctrine, they must show that they “share[] a common legal interest and that the communications at issue relate[] to that common legal interest, rather than any other interest or subject matter.” *Id.* at *3. “[C]ommonality must be measured on a case by case basis” *Id.* at *4.

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.

The privilege is not available if waived. Waiver ordinarily requires “‘an intentional, voluntary act and cannot arise by implication,’ or ‘the voluntary relinquishment of a known right.’” *Franzel v. Kerr Mfg. Co.*, 234 Mich. App. 600, 616, 600 N.W.2d 66 (1999) (quoting *Sterling v. Keidan*, 162 Mich. App. 88, 95–96, 412 N.W.2d 255 (1987)). As a result, inadvertent disclosure does not waive privilege, nor is a privilege deemed abrogated simply because a third party has obtained the same information from an independent source. *Leibel v. GMC*, 250 Mich. App. 229, 241, 646 N.W.2d 179 (2002). However, an “omission to speak or act” can work as a waiver as there comes a point when inaction must be recognized as tantamount to acquiescence. *Sterling*, supra., 162 Mich. App. at 96.

A client who alleges that his/her lawyer has breached a duty to the client waives the attorney-client privilege regarding all communications relevant to that issue. *People v. Houston*, 448 Mich. 312, 532 N.W.2d 508 (1995). Also, the privilege does not preclude an attorney from testifying about witnessing a will because disclosures a testator makes to a person functioning as a witness are necessarily intended to be disclosed if the witness is called on to prove the will. *McCarthy v. Ford* (*In re Ford Estate*), 206 Mich. App. 705, 522 N.W.2d 729 (1994).

Another exception to the attorney-client privilege applies where the attorney-client communications were made

Michigan

for the purpose of advancing a crime or a fraud. While the privilege may apply to communications that relate to a client's past wrongdoing, it does not apply to future crime or fraud. *People v Paasche*, 207 Mich. App. 698, 525 N.W.2d 914 (1994).

When a client intentionally and voluntarily discloses an attorney-client communication to a third party, or fails to take precautions to keep remarks confidential, the client has waived any claim of attorney-client privilege because the communication is no longer confidential. *People v. Rolark*, No. 313207, 2013 WL 2278083, at *6 (Mich. Ct. App. May 23, 2013). The privilege is limited to the communication itself and attaches to some documents but does not automatically shield documents given by a client to his counsel, when, for instance, the documents would have been otherwise subject to discovery. For example, in *Rolark*, a prisoner had a letter in his cell that he intended to give his attorney. When his cell was raided, the jail claimed the letter was not subject to attorney-client privilege. The *Rolark* court disagreed and held that the letter was privileged since the prisoner intended to give the letter to an attorney. The court also determined that the letter would not have been privileged if the prisoner had just intended to give it to a family member such as his uncle.

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

Michigan procedural law requires an individual who knows that he/she will be raising the attorney-client privilege at deposition to move for a protective order to preclude the taking of the deposition. MCR 2.306(D)(4) provides:

“(4) Raising Privilege Before Deposition. If a party knows before the time scheduled for the taking of a deposition that he or she will assert that the matter to be inquired about is privileged, the party must move to prevent the taking of the deposition before its occurrence or be subject to costs under subrule (G).”

There are no known published Michigan cases addressing the attorney-client privilege in relation to social media. However, it can be anticipated that the privilege and waiver of the privilege will likely arise in this area at some time in the future. Another area ripe for privilege and waiver issues is the use of artificial intelligence by law firms, particularly the use of open loop AI systems. As of the date of publication, no Michigan court has addressed the issue of privilege in the use of artificial intelligence.

A case of interest can be found in *Compulit v. Banctec, Inc.*, 177 F.R.D. 410, 412 (W.D. Mich. 1997) where the court determined that “a law firm does not waive its client’s privilege by contracting with an independent contractor, such as Compulit, to provide a necessary service that the law firm feels it needs in order to effectively represent its clients.” (emphasis added) Compulit was a litigation support company that sued the defendant supplier for fault document scanners. The defendant sought information regarding Compulit’s law firm customers. The court determined that the information was protected by the attorney-client privilege that existed between Compulit’s law firm customers’ and their clients, which neither Compulit nor its law firm customers could waive. The court went on to state that Compulit could not raise the privilege. It therefore determined that Compulit’s law firm customers had standing to raise the privilege on behalf of their clients.

Open.P0739.P0739.33978655-1