

Attorney-Client Privilege - Montana

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

Attorney-client privilege is codified in Montana under Mont. Code. Ann. § 26-1-803 which states, “(1) An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment. (2) A client cannot, except voluntarily, be examined as to any communication made by the client to the client’s attorney or the advice given to the client by the attorney in the course of the attorney’s professional employment.”

The Montana Supreme Court has enumerated the essential elements of attorney-client privilege as follows: “(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at this instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.” State ex rel. U.S. Fid. and Guar. Co. v. Montana Second Jud. Dist. Ct., 783 P.2d 911, 914-15 (Mont. 1989) (quoting Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Arizona, 881 F.2d 1486, 1492 (9th Cir. 1989)).

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?

The Montana Supreme Court has recognized both the joint-defense and common interest exceptions to the waiver of attorney-client privilege. “[S]hared privilege generally is limited to parties involved in litigation or impending litigation, or where the third party has ‘a common legal interest for the purpose of rendering legal advice to the client.’” Am. Zurich Ins. Co. v. Montana Thirteenth Jud. Dist. Ct., 280 P.3d 240, 245 (Mont. 2012) (quoting Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc., 870 N.E.2d 1105, 1109-10 (Mass. 2007). The Court specified that “[a]ttorney-client communications may be protected if disclosed to a third party ‘where the parties undertake a joint effort with respect to a common legal interest.’” Id. (quoting U.S. v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007)). Communicating with a third party must be “‘necessary for the client to obtain informed legal advice.’” Id. (quoting Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1424 (3d.

Cir. 1991)) (emphasis in original). The “third parties may be co-litigants, or other professionals assisting the attorney in representing the client.” Id. (citing Westinghouse, 951 F.2d at 1424).

Therefore, Montana recognizes instances where co-defendants may be represented by the same attorney or when separate parties do not share an attorney but share a common legal interest.

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.

Rule 503(a), Montana Rules of Evidence, provides that a person holding a privilege waives that privilege if the person “voluntarily discloses or consents to disclosure of any significant part of the privileged matter.” However, “[t]his rule does not apply if the disclosure itself is privileged.”

Voluntary Disclosure

“Disclosure to third parties waives attorney-client privilege unless disclosure is necessary for the client to obtain informed legal advice.” Am. Zurich. Ins. Co. 280 P.3d at 247 (citing Westinghouse, 951 F.2d at 1425).

Failure to Object

Failing to object regarding communications privileged under the attorney-client privilege is a waiver of the privilege. See *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 907 (Mont. 1993). A party’s failure to object may be overlooked if admitting the evidence would be inherently unfair. *State v. Statczar*, 743 P.2d 606, 611 (Mont. 1987).

Advice of Counsel

The attorney-client privilege does not apply if an insurer directly relies on advice of counsel as a defense to a bad faith charge. *Palmer by Diacon*, 861 P.2d at 908. Mere reliance or being influenced by the advice of counsel does not constitute waiver of the privilege. Id.

Crime-fraud Exception

Montana recognizes the crime-fraud exception to attorney-client privilege. See *State ex rel. U.S. Fidelity and Guar. Co.*, 783 P.2d at 916. “The civil fraud exception to the attorney-client privilege has traditionally been invoked where an attorney or client is involved in unlawful or criminal conduct, or future fraudulent activity.” Id. (citing 2 J. Weinstein, *Evidence* § 503(d)(1)(01) and Annot., 31 ALR 4th 458. However, the Court refused to extend the crime-fraud exception in the instance of a bad faith cause of action. Id.

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

In *Nelson v. City of Billings*, the plaintiff filed a petition against the city and Montana Municipal Interlocal Authority (MMIA) for the release of all documents relating to a civil judgment MMIA paid on behalf of the city, arguing that Montana’s constitutional “right to know” foreclosed the city’s privilege claims. 412 P.3d 1058, 1061-62 (Mont. 2018). The Montana Supreme Court held that documents protected by attorney-client privilege are not subject to disclosure under the Montana state constitution’s right-to-know provision. Id. at 1069.