

## Attorney-Client Privilege - New Hampshire

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

New Hampshire Rule of Evidence 502 governs the scope of the attorney-client privilege, providing that communications are covered by the privilege when the communications are:

1. Between the client or his or her representative and the client's lawyer or the lawyer's representative;
2. Between the client's 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 party in a pending action and concerning a matter of common interest therein;
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.

N.H. R. Ev. 502(b). The rule defines "client" as "a person, public officer, or corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." N.H. R. Ev. 502(a)(1). A "representative of a client" is defined as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." N.H. R. Ev. 502(a)(2). The rule defines "lawyer" as "a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation." N.H. R. Ev. 502(a)(3). A "representative of a lawyer" is defined as "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." N.H. R. Ev. 502(a)(4).

Communications protected by attorney-client privilege are generally understood as those "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." N.H. R. Ev. 502(a)(5).

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Rule 502 formally adopted the common law rule that communications relating to legal advice, sought from a lawyer or the lawyer's representative and made in confidence by the client, are protected from disclosure, unless an exception applies, or the protection is waived by the client. See Hampton Police Ass'n, Inc. v. Town of Hampton, 162 N.H. 7, 15, 20 A.2d 994, 1001 (2011) (citing Riddle Spring Realty Co. v. State, 107 N.H. 271, 273, 220 A.2d 751 (1966)). Protected communications can be nonverbal if intended to be confidential by the client but do not include "matter that the lawyer learns from sources other than the client's intentional communication." See N.H. R. Ev. 502, Reporter's Notes.

### **Does the jurisdiction recognize/preserve the attorney-client 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. New Hampshire recognizes a privilege among co-defendants in joint-defense and common interest situations.

In matters of common interest, privilege exists between co-defendants when communications are "by the client or the client's representative, and the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party *in a pending action and concerning a matter of common interest therein*." N.H. R. Ev. 502(b)(3) (emphasis added); see also Fortune Laurell, LLC v Yunnan New Ocean Aquatic Product Science and Technology Group Co., Ltd., No. 218-2017-CV-01449, 2018 WL 3942230 at \*2 (N.H.Super. Aug. 14, 2018) (noting that the common interest doctrine applies in situations where "two or more clients consult or retain the same attorney to represent them on a matter of common interest" and where "communications [are] made by the client or the client's lawyer to a lawyer representing another in a matter of common interest"). However, the privilege does not extend to direct client-to-client communications made outside the presence of counsel. See Fortune Laurell, LLC, 2018 WL 3942230 at \*6.

Rule 502(d)(5) contains an exception to the attorney-client privilege in common interest situations. In joint-client situations, communications to a lawyer jointly retained or consulted by two or more clients are not privileged when the communication is "offered in an action between or among any of the clients." N.H. R. Ev. 502(d)(5); see also Dumas v. State Farm Mut. Auto. Ins. Co., 111 N.H. 43, 49, 274 A.2d 781, 784 (1971) ("[w]here two parties are represented by the same attorneys for their mutual benefit, the communications between the parties are not privileged in later action between such parties or their representatives").

### **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 502(d) of the New Hampshire Rules of Evidence includes five exceptions to the rule of attorney-client privilege:

1. The privilege is lost when the lawyer's services are sought in furtherance of crime or fraud. N.H. R. Ev. 502(d)(1) ("if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit in the future what the client knew or reasonably should have known to be a crime or fraud there is no privilege"). Importantly, this exception applies only to "future wrong-doing, not to discussions or confessions of past misconduct." See N.H. R. Ev. 502, Reporter's Notes.

2. There is no privilege for "a communication relevant to an issue between parties who claim through the

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same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.” N.H. R. Ev. 502(d)(2). Since attorney-client privilege continues after the death of a client, the basis for this exception is that “all reason for assertion of the privilege disappears when the privilege is being asserted not for the protection of the testator or his estate but for the protection of a claimant to his estate. . . because the best way to protect the client’s intent lies in the admission of all relevant evidence that will aid in the determination of his true will.” Petition of Stompor, 165 N.H. 735, 739, 82 A.3d 1278, 1281–82 (2013) (cleaned up).

3. There is no privilege as to a communication “relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer.” N.H. R. Ev. 502(d)(3).

4. There is no privilege as to a communication “relevant to an issue concerning an attested document to which the lawyer is an attesting witness.” N.H. R. Ev. 502(d)(4); see, e.g., Patten v. Moor, 29 N.H. 163, 167–69 (1854).

5. The final exception, N.H. R. Ev. 502(d)(5), relates to joint clients, which is discussed in Section II above.

Beyond these exceptions, there are still situations that could result in the loss of the attorney-client privilege, including when the privilege is deemed waived. A client can expressly or impliedly waive the privilege. In re Dean, 142 N.H. 889, 890, 711 A.2d 257, 258 (1998). An implied waiver occurs when the asserting party has put the privileged communications “at issue” in the present dispute. Id. “When the party asserting the privilege has injected privileged material into the case, such that the information is actually required for resolution of the issue, the privilege-holder must either waive the attorney-client privilege as to that information or . . . be prevented from using the privileged information to establish the elements of the case. Aranson v. Schroeder, 140 N.H. 359, 370, 671 A.2d 1023, 1030 (1995).

Additionally, privilege can be waived through the unnecessary involvement of a third party. See N.H. R. Ev. 502, Reporter’s Notes (“Generally the presence of an unrelated third party will defeat a finding of confidentiality and thus the privilege”); see, e.g., State v. Willis, 165 N.H. 206, 212-13, 75 A.3d 1068, 1072–73 (2013) (religious privilege under N.H. R. Ev. 505 was waived relating to statements also made in the presence of defendant’s wife). To maintain privilege, the third party involved must be “reasonably necessary for the transmission of the communication.” N.H. R. Ev. 502(a).

A waiver may also occur if the person claiming privilege “while holder of the privilege, knowingly and voluntarily discloses or consents to disclosure of any significant part of the privileged matter.” N.H. R. Evid. 510; see, e.g., Coburn v. Odell, 30 N.H. 540, 555 (1855) (holding that the disclosure of “part of a transaction” without claiming privilege requires the disclosure of the whole transaction). If the disclosure itself is privileged, this rule is inapplicable. Id. The requirement that a disclosure is made “knowingly and voluntarily” is intended to exclude situations where the disclosure is made “accidentally, or unknowingly, such as by eavesdropping.” See N.H. R. Ev. 510, Reporter’s Notes.

In New Hampshire, one must be sure to provide opposing parties with a privilege log if they are withholding any communications as privileged, or they will risk waiving the privilege. See N.H. Super. Ct. Civil R. 21 (“When a party withholds materials or information otherwise discoverable under this rule by claiming that the same is privileged, the party shall promptly and expressly notify the opposing party of the privilege claim and, without revealing the contents or substance of the materials or information at issue, shall describe its general character with sufficient specificity as to enable other parties to assess the applicability of the privilege claim. Failure to comply with this requirement shall be deemed a waiver of any and all privileges”).

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Finally, there are situations where, even if privilege applies, materials could be made discoverable. Such a situation can arise when a party is successful in “piercing the privilege.” See, e.g., McGranahan v. Dahar, 119 N.H. 758, 764, 408 A.2d 121, 125 (1979) (“The attorney-client privilege may not be absolute when there is a compelling need for the information and no alternate source is available”); Desclos v. S. New Hampshire Med. Ctr., 153 N.H. 607, 615-19, 903 A.2d 952, 960–63 (2006) (outlining the framework of review in piercing privilege in the context of psychotherapist-client privilege). One compelling need, as ruled by the New Hampshire Supreme Court, is public interest. Desclos, 153 N.H. at 618, 903 A.2d at 962–63 (explaining that by showing there would be a deprivation of a fair trial without access to the privileged information presents a sufficiently important public interest to qualify as a compelling need).

Despite the pitfalls that may result in loss of privilege, New Hampshire Rule of Evidence 511 affords additional protections. The rule states that “[a] claim of privilege is not defeated by a disclosure that was completed erroneously or by a disclosure that was made inadvertently during the course of discovery.” N.H. R. Ev. 511. The rule protects privileged material that was disclosed through compulsion later found by a court to be improper, as well as when disclosure was made through “mistake and inadvertence, rather than through carelessness or neglect.” See N.H. R. Ev. 511, Reporter’s Notes.

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

There are no significant recent trends in the law of attorney-client privilege in New Hampshire. However, there was a recent decision of interest concerning the scope of attorney client privilege regarding in-house advice within a law firm: Moore v Grau, No. 2013-CV-150, 2014 WL 11115797 (N.H.Super. Dec. 15, 2014).

When a client sued her lawyer and lawyer’s firm for legal malpractice, the lawyer and firm withheld e-mails sent to the law firm’s “de-facto” in-house ethics counsel, claiming attorney-client privilege because the ethics attorney was acting as legal counsel for the lawyer. Id. at \*1. In addressing this issue, the court discussed the Rules of Professional Conduct for attorneys and how it requires under Rule 5.1 that “attorneys [must] make reasonable efforts to ensure that their law firm has in effect measure giving reasonable assurance that all lawyers in the firm conform to the professional conduct rules.” Id. at \*4. Therefore, when a firm guarantees the confidentiality to ensure its attorneys provide the information needed to obtain sound legal advice (relating to compliance with ethical rules), the attorney-client privilege serves the same purpose as it does for corporations or governmental entities. Id. at \*4-5.

After looking to case law in various jurisdictions, the court was persuaded that there should be a recognition of an in-house attorney-client privilege. Id. at \*5-8. The court adopted a flexible four-part test from a Georgia case governing the assertion of a law-firm’s in-house counsel privilege. Id. at \*8. In a legal malpractice claim, the communications are generally privileged when: (1) there is a genuine attorney-client relationship between the firm’s lawyers and in-house counsel; (2) the communications in question were intended to advance the firm’s interests in limiting exposure to liability rather than the client’s interest in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence; and (4) no exception to the privilege applies. Id. Because the court did not adopt a “bright line rule” in this case, it found that it had to conduct an *in-camera* review of the communications to determine whether the privilege applied. Id. at \*9.