

## Attorney-Client Privilege - New Jersey

**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 protects confidential communications between clients and their attorneys that are made for purposes of seeking or rendering legal advice. N.J.S.A. 2A:84A-20; N.J.R.E. 504; N.J. Court Rules, RPC 4.4(b). Communications are privileged when they are: 1) made between a client and an attorney acting in his or her professional capacity as a lawyer; and 2) disclosed in confidence. See *In re Advisory Op. No. 544* of N.J. Sup. Ct. Advisory Comm. on Pro. Ethics, 511 A.2d 609, 611 (N.J. 1986); *O'Boyle v. Borough of Longport*, 94 A.3d 299, 309 (N.J. 2014).

**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 Jersey extends the attorney-client privilege to communications amongst clients and attorneys in joint-defense agreements and common-interest situations. In cases involving multiple defendants, co-defendants and their counsel may elect to mount a joint defense strategy and memorialize that strategy in a joint defense agreement. New Jersey extends the attorney-client privilege to parties and their counsel that have entered a joint defense agreement. *O'Boyle*, 94 A.3d at 309.

A "common-interest" situation is a broader term referring to two or more parties sharing similar interests in a legal matter. *LaPorta v. Gloucester Cnty. Bd. of Chosen Freeholders*, 774 A.2d 545, 549 (N.J. Super. Ct. App. Div. 2001) (quoting *U.S. v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979)). New Jersey extends attorney-client privilege to communications between parties whose interests are not identical but share a "common purpose" such as the same adversary. *O'Boyle*, 94 A.3d at 312. Under those circumstances, a communication is protected when it is exchanged regarding an ongoing or expected litigation, and is disclosed with the expectation of confidentiality. *LaPorta*, 774 A.2d at 549 (quoting *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 6 (D.D.C. 1995)).

**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.**

A client waives the attorney-client privilege when it knowingly and intentionally discloses, or consents to disclosing, a confidential communication to a third-party. See *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 664 (N.J. 2010). However, a consultation with a third-party may be protected under the privilege if the third party is essential to the client's legal representation. *State v. Kociolek*, 129 A.2d 417, 424 (N.J. 1957).

The attorney-client privilege is also waived when a client asserts a defense based on inadequate advice of counsel because it puts the communications with counsel at issue in the litigation. *State v. Mauti*, 33 A.3d 1216, 1223-24 (N.J. 2012) (citing *Kinsella v. Kinsella*, 696 A.2d 556 (N.J. 1997)).

New Jersey also recognizes a crime or fraud exception to the attorney-client privilege. If a client communicates with counsel for the purpose of furthering criminal or fraudulent conduct, the privilege does not apply. *Fellerman v. Bradley*, 493 A.2d 1239, 1244 (N.J. 1985).

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

New Jersey courts have clarified who can assert or waive the attorney-client privilege on behalf of an organization such as a corporation or government entity. New Jersey extends attorney-client privilege to communications made by employees of an organization to the organization's attorney. *Hedden v. Kean Univ.*, 82 A.3d 238, 244 (N.J. Super. Ct. App. Div. 2013). Similarly, attorney-client privilege extends to protect communications exchanged between a government entity's employees and its attorney. See *In re Grand Jury Subpoenas Duces Tecum Served by Sussex Cnty.*, 574 A.2d 449, 454-55 (N.J. Super. Ct. App. Div. 1989). However, only officers or directors who manage or control the organization's activities may waive the attorney-client privilege on behalf of the organization. *Hedden*, 82 A.3d at 247; *In re Est. of Fedor*, 811 A.2d 970, 972 (N.J. Super. Ct. Ch. Div. 2001).