

Attorney-Client Privilege - New Mexico

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

Pursuant to Rule 11-503 of New Mexico's Rules of Evidence, the basic elements of a general circumstance under which attorney-client privilege may apply are: (1) a communication; (2) made in confidence; (3) between privileged persons; (4) for the purpose of facilitating the attorney's rendition of professional legal services to the client. Rule 11-503 NMRA; *Albuquerque Journal v. Board of Education of Albuquerque Public Schools*, 436 P.3d 1, 9 (N.M. Ct. App. 2018). Furthermore, the communication must be between the following parties to be considered within privilege of attorney-client communications:

- a client and the client's lawyer or representative;
- a client's lawyer and representative;
- the client or client's lawyer and another lawyer in matters of common interest;
- between representatives or lawyers representing the client.

However, privilege is waived if the communication is in furtherance of a crime or fraud, is with claimants through a deceased client, is relevant to a breach of duty by a lawyer or client, is from a document attested by a lawyer, or is between joint clients made to a lawyer retained or consulted in common when offered in an action between the clients. Rule 11-503 NMRA.

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?

Common interest or joint defense privilege protects the confidentiality of communication between one party to the attorney of another party where a joint defense agreement or strategy has been undertaken by the parties and their counsel. See *S.F. Pacific Gold Corp. v. United Nuclear Corp.*, 175 P.3d 309 (N.M. Ct. App. 2007). The parties bear the burden of establishing that: (1) the parties to the communication share an identical legal interest in the subject matter of each communication claimed to be privileged; (2) the communication is made during the course of a joint defense effort between the resisting party and the third

party and in furtherance of that effort; and (3) the shared identical legal interest exists at the time the communication is made as reflected by a preexisting, or at the very least contemporaneous, agreement of the parties.” *Albuquerque Journal v. Board of Education of Albuquerque Public Schools*, 436 P.3d 1, 9 (N.M. Ct. App. 2018). Furthermore, the court has clarified that the nature of the common interest between parties must be identical and for legal purposes, not just similar or for solely commercial reasons. *S.F. Pacific Gold Corp.* at 318.

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.

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- in furtherance of a crime or fraud, is with claimants through a deceased client, is relevant to a breach of duty by a lawyer or client
- from a document attested by a lawyer
- between joint clients made to a lawyer retained or consulted in common when offered in an action between the clients

However, there are additional situations or pitfalls which may result in the waiver or loss of privilege:

First, voluntary disclosure of a communication between a client and lawyer or representative to another party not privileged under the relationship will waive the privilege of that communication. Rule 11-511 NMRA (“A person who possesses a privilege against disclosure of a confidential matter or communication waives the privilege if the person voluntarily discloses or consents to disclosure of any significant part of the matter or communication.”). For example, if a client discusses or describes a conversation with his attorney to a friend or colleague, that communication will no longer be privileged. See *Hartman v. El Paso Natural Gas Co.*, 763 P.2d 1144 (N.M. 1988). Additionally, a communication or statement from a client to his attorney intended to be communicated to others is not privileged. In *Wilcoxon v. United States*, the court held that a communication between a client and his attorney that involved a client’s directions for the attorney to ask a witness certain questions was not covered under attorney-client privilege. *Wilcoxon v. United States*, 231 F.2d 384, 386 (10th Cir. 1956).

Second, privilege is waived when an attorney or client inadvertently discloses a communication protected under attorney-client privilege to opposing counsel or another outside the protected sphere. In determining whether a communication or document has lost its privilege, the court will consider the precautions taken by the disclosing party were reasonable to prevent, the number of inadvertent disclosures, the extent of a disclosure, whether there was delay or measures taken to rectify the disclosure, and whether overriding interests of justice would be served by relieving party of its error. *Hartman* at 1152.

Third, the court will treat the observations and conclusions of an expert witness as facts whether these are contained in a report to an attorney or not. *State ex rel. State Highway Commission v. Steinkraus*, 417 P.2d 431, 433 (N.M. 1966). While expert testimony may be covered under attorney-client and work product privilege, the court has clarified that this is not a blanket protection. *Id.* Facts constitute evidence and thus cannot be covered under attorney-client privilege. *Id.* However, an attorney’s notes or self-produced work product of an expert’s conclusions or observations are generally privileged under rules protecting attorney work product. See *State ex rel. State Highway Commission v. Steinkraus*, 417 P.2d 431 (N.M. 1966).

Thus, there are several situations in which attorney-client privilege will be waived set forth in Rule 11-511 NMRA. However, attorneys and clients must be careful of the common pitfalls of voluntary disclosure, inadvertent disclosure, and communications from expert witnesses which may result in the unintended loss of attorney-client protections.

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

In New Mexico, an attorney must assert privilege in order to ensure a communication is protected. The burden falls upon the attorney because privilege will not be assumed by the court. *See generally Albuquerque Journal v. Board of Education of Albuquerque Public Schools*, 436 P.3d 1 (N.M. Ct. App. 2018). While these rules and limitations have been in place for years, New Mexico courts are avowing strict adherence as evidenced by *Albuquerque Journal* decision, in which the New Mexico Court of Appeals reinforced most of the standard rules of attorney-client privilege. Furthermore, the court held that it disapproves of “initial conclusory assertions” with a gradual “unveiling” of a basis to support claims of privilege by attorneys. The court emphasized that the attorney should provide clear and well-founded basis for claims of privilege and objections to disclosure at the time of initial assertion. *Id.* at 6. Thus, recent trends in New Mexico regarding attorney-client privilege protections focus on stricter adherence to the rules of evidence and increasing pressure on attorneys to properly and thoroughly assert privileges over their communications.

Notable is a State Bar of New Mexico Ethics Advisory Committee Informal Ethics Advisory Opinion, 2015-01, wherein the Committee issued an advisory opinion that “[a] lawyer may contact former managerial employees of an opposing party, though he should be certain those communications comply with the rules for communicating with unrepresented person and include full disclosure of his role in relation to the former employee. The lawyer must not act in any way that would cause the former managerial employee to violate any duty of confidentiality that applies to the matter at hand.” The Committee looked to Rules 16-402 and 16-403 (modeled after ABA Model Rules, Model Rules 4.2 and 4.3), as well as *Todd v. Montoya*, No. CIV 10-0106 JB/WPL, 2011 U.S. Dist. LEXIS 14435 (D.N.M. Jan. 12, 2011).