

Attorney-Client Privilege - Virginia

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

The formula to establish the attorney-client privilege under Virginia law is often stated as follows: “[c]onfidential communications between attorney and client made because of that relationship and concerning the subject matter of the attorney’s employment ‘are privileged from disclosure, even of the purpose of administering justice.’” *Commonwealth v. Edwards*, 235 Va. 499, 508-09 (1988) (quoting *Grant v. Harris*, 116 Va. 643, 648 (1914)). This privilege also attaches to “communications of the client made to the attorney’s agent, including accountants, when such agent’s services are indispensable to the attorney’s effective representation of the client.” *Id.* at 509 (citing *U.S. v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972), *U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)). The party must make the claim expressly and specify the facts supporting the designated privilege sufficient to enable the demanding party to assess the claim. See *Eppard v. Kelly*, 62 Va. Cir. 57, 58 (Va. Cir. Ct. 2003). Your privilege log must comply with state law, as well as your court’s local rules and case law, your judge’s standing and/or case management order, and any agreements between counsel. *Id.* Your privilege log should contain an entry for each document withheld and should detail: The document type; The document date; The author or sender; Each recipient; The subject matter (without disclosing privileged information); and The basis for withholding the document. *Id.*

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?

Yes. Virginia recognizes an exception to waiver of the privilege for co-defendants with a common interest in the litigation. The Virginia Supreme Court has applied the common interest doctrine in criminal matters. See *Chahoon v. Commonwealth*, 62 Va. 822, 839-40 (1871). Albeit in dicta, the Virginia Court of Appeals has approved of the common interest doctrine applying in civil matters as well. “Whether an action is civil or criminal, potential or actual, whether the commonly interested parties are plaintiffs or defendants, ‘persons who have a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.’” *Hicks v. Commonwealth*, 17 Va. App. 535, 537 (Va. Ct. App.

1994) (quoting *In re Grand Jury Subpoenas*, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990)). Since the Hicks decision, Virginia Circuit courts have since applied the common interest doctrine in civil matters as long as the privilege is limited to parties to the litigation that have similar interest in their claims. *Cluverius v. James McGraw, Inc.*, 44 Va. Cir. 426, 430 (Richmond 1998) (noting common interest privilege does not apply to communications with non-parties even if they are similarly interested).

The courts have not identified specific requirements to establish the common interest privilege. Based on the cases, the parties would have to establish all the elements of the attorney-client privilege noted above, they must be parties to the litigation, and they must share a common interest in the litigation.

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 most litigated pitfall in Virginia is waiver. A client may explicitly waive the privilege or waiver by implication when “his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final.” *Commonwealth v. Edwards*, 235 Va. 499, 509 (1988) (quoting *Wigmore*, §2327 at 636).

Intentionally transmitting attorney-client information to a non-qualifying recipient waives the privilege. Inadvertent disclosure of such information can result in a waiver “if the disclosing party failed to take reasonable measures to ensure and maintain the document’s confidentiality, or to take prompt and reasonable steps to rectify the error.” *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 126-27 (2010).

If the client communicates information to an attorney knowing that attorney will reveal such communication to others, waiver occurs once the attorney does so. *Commonwealth v. Edwards*, 235 Va. 499, 509-10 (1988).

Virginia recognizes the “advice of counsel” defense, at least to a claim for malicious prosecution. At least one trial court has held that reliance on this defense waives the privilege with respect to all such communications concerning the matter. *7600 Ltd. P’ship. v. QuesTech, Inc.*, 41 Va. Cir. 60, 62 (Fairfax County Cir. Ct. 1996). Since the client must prove that all relevant information was provided to the attorney, it is likely that a court would find complete waiver as a result of asserting such defense.

The crime-fraud exception has never been applied by the Supreme Court of Virginia, but several lower courts have applied. See, e.g., *Sevachko v. Commonwealth*, 35 Va. App. 346 (Va. Ct. App. 2001), *Patel v. Allison*, 54 Va. Cir. 156 (Va. Beach 2000), *Peterson v. Fairfax Hosp. Sys.*, 32 Va. Cir. 294 (Fairfax Co. 1993).

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

The Virginia Supreme Court takes a relatively “middle of the road” approach to the attorney-client privilege, and it typically follows well-established common law rules when applying the privilege.

Attorneys and clients must be vigilant when asserting the attorney-client privilege in federal courts in Virginia. The federal courts typically require strict adherence to procedural requirements to assert the privilege. Federal courts will find a party waived or did not assert the privilege properly if the party’s privilege log is insufficient or was not produced in a timely fashion.