

## Attorney-Client Privilege - West Virginia

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

In West Virginia, in order to assert an attorney-client privilege, three elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his or her capacity as a legal adviser; and (3) the communication between the attorney and client must be intended to be confidential. *Syl. Pt. 2, State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979); *Hawkins v. Stables*, 148 F.3d 379 (4<sup>th</sup> Cir. 1998). “Confidentiality is defined under West Virginia and federal law in terms of intent—communication is confidential if it is not intended to be disclosed to persons others than those who [render] legal services or those who are necessary for the transmission of the communication.” Louis J. Palmer, Jr., *Handbook on Evidence for West Virginia Lawyers* § 501.07[2], at 690 (7th ed. 2021).

This privilege has been further described as “a common law privilege that protects communications between a client and an attorney during consultation.” *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 213 W. Va. 457, 465, 583 S.E.2d 80, 88 (2003) (citing *State ex rel. John Doe v. Troisi*, 194 W. Va. 28, 35–36, 459 S.E.2d 139, 146–47 (1995)). “Communications made in confidence, between a client—as the privilege holder—and his or her attorney, are protected by the privilege.” *Id.* Both verbal and written communications are protected, including electronically transferred communications. *Id.*; see also Palmer, *supra*, § 501.07[2], at 690.

**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?**

In West Virginia, attorney-client privilege extends to communications among co-defendants in joint-defense or common-interest situations. The Supreme Court of Appeals has stated that attorney-client privilege extends “to others who are advised of confidential information at the direction of the attorney.” *Recht*, 213 W. Va. at 465, 583 S.E.2d at 88 (citing *Troisi*, 194 W. Va. at 36, 459 S.E.2d at 147). “Therefore, the privilege extends to protect communication between the

attorney and the agents, supervisors, or attorneys in joint representation.” *Id.*

The three elements necessary to assert attorney-client privilege (*see above*) remain the same when the privilege is asserted in the joint-defense or common-interest context, and for a third-party seeking to establish quasi attorney-client privilege. *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 373, 508 S.E.2d 75, 90 (1998) (“If the trial court determines that some or all of the specifically requested communication has been shown to satisfy the elements of the traditional common law attorney-client privilege, then such communication is protected from disclosure by the quasi attorney-client privilege.”).

Furthermore, attorney-client privilege is not waived by exchange of documents and information between persons with common interests in the subject matter. *Chambers v. Allstate Ins. Co.*, 206 F.R.D. 579 (S.D. W. Va. 2002). “Disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke the work product doctrine’s protection and would not amount to such a waiver . . . .” *Id.* (quoting *In Re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981)).

### **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.**

Attorney-client privilege is not absolute; it is subject to certain exceptions. To preserve attorney-client privilege, “there must be no evidence that the client intentionally waived the privilege.” Palmer, *supra*, § 501.07[2], at 692. Instances wherein waiver will or might arise include: the crime-fraud exception; assertion of advice of counsel; designation of an attorney to testify on behalf of a party; testifying as to conversations with an attorney; and transmittal to additional non-qualifying recipients.

#### ***Crime-Fraud Exception***

The crime-fraud exception applies even if the attorney is unaware of the client’s criminal or fraudulent intent, and applies, of course, where the attorney knows the forbidden goal. As the Supreme Court of Appeals observed in *State ex rel. Allstate Ins. Co. v. Madden*, 215 W. Va. 705, 717, 601 S.E.2d 25, 37 (2004) “[t]he crime-fraud exception has long been recognized as a means to overcome the privilege ordinarily afforded to communications between a client and his or her counsel when such communications have been made in furtherance of the commission of a crime or fraud.” In other words, “[i]t is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the ‘seal of secrecy’ . . . between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud or crime.’” This Court articulated that

[t]o establish the application of the crime-fraud exception, a party must demonstrate an adequate factual basis exists to support a reasonable person’s good faith belief that an *in camera* review of the privileged materials would produce evidence to render the exception applicable. In making this prima facie showing, the party must rely on non-privileged evidence, unless the court has not previously made a preliminary determination on the matter of privilege, in which case the allegedly privileged materials may also be considered. Discretion as to whether to conduct an *in camera* review of the privileged materials rests with the court. If, however, the prima facie evidence is sufficient to establish the existence of a crime or fraud so as to render the exception operable, the court need not conduct an *in camera* review of the otherwise privileged materials before finding the exception to apply and requiring disclosure of the previously protected materials.

Syl. Pt. 7, *Madden*, 215 W. Va. at 709, 601 S.E.2d at 29 (2004) (emphasis added).

This doctrine extends to instances where counsel is implicated or alleged to be engaged in conspiracy with a bad actor. For example, in *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 233 W. Va. 258, 757 S.E.2d 788 (2014), the Court determined that the retention agreement between a liability insurer and a law firm and the law firm's billing statements were relevant and discoverable in a bad-faith action brought against the insurer, where the plaintiffs alleged that the law firm and insurer entered into civil conspiracy, in which the law firm would create "paid for hire" coverage denial opinions that were not based on proper investigation of facts, and which were designed solely for the purpose of giving the insurer a defense to any bad faith or unfair trade practices claim and to deny proper claims. See also Stephen P. Meyer, *Trial Handbook for West Virginia Lawyers* § 18:7, at 259 (2018-2019 ed.).

### ***Assertion of Advice of Counsel***

A party may waive attorney-client privilege by asserting claims or defenses that put his or her attorney's advice at issue. Syl. Pt. 8, *State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 434, 460 S.E.2d 677, 680 (1995). Courts will generally apply one of three approaches for determining whether the attorney-client privilege has been waived in this instance: (1) automatic waiver approach, where the privilege holder waives privilege simply by raising a claim or defense to which the privileged material is relevant; (2) an intermediate approach, where the privilege is waived only when the material is relevant to the issues raised in the case and either vital or necessary to the opposing party's claim or defense; and (3) a restrictive approach, where a litigant waives the privilege if, and only if, the litigant directly puts the attorney's advice at issue in the litigation. Palmer, *supra*, § 501.07[5][i], at 707.

Legal advice by counsel only becomes an issue for attorney-client privilege where "a client takes affirmative action to assert a defense and attempts to prove that defense by disclosing or describing an attorney's communication." *Canady*, 194 W. Va. at 442, 460 S.E.2d at 688. The party asserting the privilege must take the affirmative step of placing the legal advice they received in issue. Advice is not at issue merely because it is relevant, and it does not come in issue merely because it may have some effect on a client's state of mind.

In instances where the attorney-client privilege is jeopardized, the burden of establishing and protecting attorney-client privilege always rests upon the person asserting it. To successfully assert privilege, the party must show certain threshold requirements in order to avail himself of the privilege by showing that (1) the communication originated in confidence, (2) that it would not be disclosed, (3) that it was made by an attorney acting in his or her legal capacity for the purpose of advising a client, and (4) that it remained confidential. *Canady*, 194 W. Va. at 438, 460 S.E.2d at 684.

### ***Designation of an Attorney to Testify***

When a corporation, partnership, association or governmental agency designates an attorney to testify on its behalf at a deposition pursuant to Rule 30 of the West Virginia Rules of Civil Procedure [effective until January 1, 2025], such entity waives the attorney client-privilege and work product doctrine with regard to matters set forth in the notice of deposition, about which their attorney was designated to testify. Syl. Pt. 9, *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W. Va. 316, 320, 484 S.E.2d 199, 203 (1997).

In *Bedell*, the Court concluded that the hospital could have designated and properly prepared someone to testify at the deposition to speak on its behalf other than its general counsel. *Id.* at 333, 484 S.E.2d at 216. Rather, the hospital deliberately designated its general counsel and risked the possibility that opposing counsel would delve into privileged matters relevant to the topics designated to be addressed during the deposition. *Id.* From a public policy standpoint, the Court determined that allowing a corporation or organization to designate counsel to

testify at a deposition and refuse to answer questions based upon the attorney-client privilege confers unfair advantage on the party and is contrary to the spirit of Rule 30 and the discovery process as a whole. *Id.*

### ***Testifying as to Conversations with an Attorney***

“A client who testifies as to conversations with his attorney waives an objection on the grounds of privilege that he might have had on the admission of testimony by the attorney on the matter.” Meyer, *supra*, § 18:7, at 257 (citing *Bennett v. Bennett*, 137 W. Va. 179, 70 S.E.2d 894 (1952) overruled in part on other grounds by, *Gallaher v. Gallaher*, 147 W. Va. 463, 128 S.E.2d 464 (1962)). In *Bennett*, an attorney for the wife in a divorce proceeding moved for a continuance on the wife’s behalf. 137 W. Va. at 186, 70 S.E.2d at 898. The wife, however, challenged the validity of her attorney’s motion, by stating that, she had employed the attorney only for the sole purpose “of obtaining a delay in the hearing in the case, out of court, through some arrangement with the attorney for her husband.” *Id.* However, evidence was put forward that made it clear “that the attorney was authorized by the wife to appear in the proceeding and to move for a continuance.” *Id.* On appeal, the Supreme Court of Appeals determined that a party, by testifying herself as to whether she had authorized her attorney to appear for her in her divorce action, effectively waived any objection on grounds of attorney-client privilege that she might otherwise have had as to admission of that testimony on that matter.

### ***Transmittal to Additional Non-Qualifying Recipients***

Privilege may be waived if privileged communications are disclosed to third parties. Syl. Pt. 1, *State ex rel. McCormick v. Zakaib*, 189 W. Va. 258, 430 S.E.2d 316 (1993). If a party turns over material during discovery and fails to claim attorney-client privilege, then such privilege is waived. *Id.* Syl. Pt. 2. However, attorney-client privilege is not negated simply because the documents were received and/or reviewed by a party’s insurer. *Recht*, 213 W. Va. at 468, 583 S.E.2d at 91 (2003).

When attorney-client privileged documents are inadvertently disclosed during discovery, such disclosure does not automatically constitute a waiver of the privilege. In order to determine whether to apply the waiver doctrine to such disclosure, trial courts must consider the following factors: (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of the measures taken to rectify the disclosure, (5) whether the overriding interest of justice would be served by relieving the party of its error and (6) any other factors found to be relevant. The party inadvertently disclosing the attorney-client privileged communication bears the burden of showing by a preponderance of the evidence that the communication should retain its privileged status. The trial court’s determination of this issue will not be reversed absent an abuse of discretion. Syl. Pt. 14, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998).

In *McCormick*, when an insurer disclosed the claim files to the plaintiff during discovery without objection, any attorney-client privilege was waived which arguably could have been asserted regarding three sealed documents because the information contained within those documents related to the same subject matter and did not disclose any additional privileged communications. 189 W. Va. at 262, 430 S.E.2d at 320.

In accordance with the holdings of the Fourth Circuit, the Supreme Court of Appeals held that “[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege [and] [a]ny voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter.” See *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982); see also *McCormick*, 189 W. Va. at 261, 430 S.E.2d at 319.

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

Recent trends or limitations imposed on the scope of attorney-client privilege in West Virginia more or less mirror recent trends or limitations nationwide. West Virginia case law on the matter of attorney-client privilege has been substantively consistent for many years. On January 31, 2024, the West Virginia Supreme Court of Appeals adopted amendments to its Rules of Civil Procedure. These amendments will go into effect on January 1, 2025, and the updates use language more consistent with that of federal law. For the purposes of attorney-client privilege, the amended Rule 30(b)(6) adds that “before or promptly after the notice or subpoena directed to an organization is served, the serving party shall confer in good faith about the matters for examination.”