

# PRIVILEGES: Protecting and Defending Confidentiality (2006) ©

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## *Overview of Privileges*

- For a communication to be privileged, it must be made in a private setting. The privilege is lost when all or part of the communication is disclosed to a third person (except for work product).
- Only the person holding the privilege can waive it and that person can prevent the other party to the privilege from disclosing the communication.

## *Attorney-Client Privilege*

- The attorney-client privilege protects confidential communications between an attorney and his client that are made in the course of legal representation and are for the purpose of the attorney providing legal advice to the client.
- Only the communication is protected, not the underlying facts.
- The client holds the privilege and only the client can waive it.
- The lawyer must be acting in his or her capacity as a legal adviser for the privilege to apply, not as a business adviser, director/board member of the company, or friend. The communication must concern legal advice, not business advice.

- A client cannot shield documents from disclosure simply by sending them to his lawyer. Further, a communication, such as a letter or email, is not protected simply by copying the communication to the lawyer. The communication must concern legal advice.
- Regarding corporations, a lawyer's communications with any company employee is protected if the communication regards information the lawyer needs in order to give the company legal advice.
- The privilege generally survives if the communications are made to or from, or within the presence of, a lawyer's agents.

## *Work Product Privilege*

- The work product privilege protects from disclosure materials prepared by an attorney or others in anticipation of litigation.
- This is not an absolute privilege. The other party can obtain work product documents if it has a "substantial need" for them and cannot obtain substantially equivalent information without "undue hardship."
- This privilege does not rely on confidentiality, so documents can be shared with third parties without waiving the privilege.

### *Priest-Penitent or Clergyman-Communicant Privilege*

- A priest or clergyman has the right to refuse to divulge confidential information received from a person during confession or similar exchanges.
- Both the clergyman and the communicant hold the privilege.
- Every state has adopted some form of the clergyman-communicant privilege. State laws, however, vary on whether the privilege applies only to confessions or also to communications regarding “spiritual advice.”

### *Physician-Patient Privilege*

- Information communicated between a doctor and patient is privileged. A physician may refuse to testify in a trial or other legal proceeding about any statement made to him/her by a patient, on the basis that any communication between doctor and patient is confidential.
- The patient holds the privilege, not the physician, thus only the patient can waive it.
- Most states recognize some form of the physician-patient privilege by express law.

### *Husband-Wife Privilege*

- Communications between spouses are privileged, thus one spouse cannot be forced to testify against the other spouse or to disclose those communications.
- The speaking (not spoken-to spouse) holds the privilege and only that spouse can elect to waive it.

### *Privileges in Other Countries*

- The absence of privilege in a country where a communication originates may result in it being denied privilege in another country, even where privilege would attach to that communication if it originated in the other country.
- Countries vary widely on the scope and application of the various privileges. For example, the attorney-client privilege applies to in-house counsel in both the United States and the United Kingdom, but is not recognized in many other European and Asian countries. Some states do not even recognize privileges, including the attorney-client privilege.
- Note that many countries base the privilege on who holds the document. For example, the document may be privileged if it is in the attorneys’ hands but may not be privileged if it is in the client’s hands.