

CONNECTICUT

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

Connecticut common law has long recognized the attorney-client privilege, *Doyle v. Reeves*, 112 Conn. 521, 523 (1931), and the state considers the attorney-client privilege to be “foundational to our legal system,” *Woodbury Knoll LLC v. Shipman and Goodwin, LLP*, 305 Conn. 750, 768 (2012). Connecticut’s Code of Evidence codified the privilege as follows: “Communications when made in confidence between a client and an attorney for the purpose of seeking or giving legal advice are privileged.” § 5-2. The privilege is intended to encourage full disclosure by the client to his or her attorney of all relevant facts, *see Blumenthal v. Kimber Mfg., Inc.*, 265 Conn. 1, 10 (2003).

For the privilege to apply, the communication must be of information necessary to obtain “informed legal advice.” *Ullman v. State*, 230 Conn. 698 (1994). While historically Connecticut common law only protected communication *from* the client to the attorney, *Ullman, id.* at 713-714 (1994); in *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, the Connecticut Supreme Court extended the scope of the privilege beyond communications by the client to counsel, stating, “the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice.” 249 Conn. 36, 52 (1999). This is reflected in Connecticut’s Code of Evidence as of February 1, 2018; indeed, the Commentary notes that the privilege is bi-directional. *See* § 5-2, Commentary.

To invoke the attorney-client privilege, the person claiming privilege must demonstrate that: (1) the attorney participating in the communication was acting in a professional capacity as an attorney; (2) the communication was between the attorney and the client; (3) the communication was for the purpose of providing legal advice; and (4) the communication was made in confidence.” *Dowling v. Bond*, 2019 WL 2151656, at *2 (Conn. Super. Ct. Apr. 24, 2019).

“[T]he attorney-client privilege is strictly construed because it tends to prevent a full disclosure of the truth in court.” *Ullman*, 230 at 710. Thus, to be protected, the communications must be in connection with and necessary for the seeking or giving of legal advice. *PSE*

Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 330 (2004). Information which does not involve the subject matter of the engagement, or which is not necessary to obtain legal advice, will not be privileged, even if it came from the client.

Communications from an attorney to a client solely regarding a matter of fact are not ordinarily privileged, “unless it is shown to be inextricably linked to the giving of legal advice.” *Town of Ledyard v. WMS Gaming, Inc.*, 2016 WL 2728317, at *1 (Conn. Super. Ct. Apr. 19, 2016). An attorney may be compelled to testify regarding by whom he is employed and in what capacity, *Turner’s Appeal*, 72 Conn. 305, 318 (1899); and while there is no appellate authority on point, at least one trial court has held that absent a showing that the information was provided as part of providing legal advice, the addresses and phone numbers of clients are not privileged, *Harris v. Kimmel & Silverman, P.C.*, 2016 WL 7742928 (Conn. Super. Court, 2016); nor is fee information, *id.* If a lawyer wears more than one hat (i.e., is also a lobbyist), her law degree alone will not cloak all communications within the privilege; instead, the person seeking to invoke the privilege must establish that the communications with the lawyer were for the purpose of receiving legal advice (as opposed to performing lobbying activities). *Harrington v. Freedom of Information Comm’n*, 323 Conn. 1 (2016).

The presence of a third party generally bars the invocation of the privilege, *State v. Gordon*, 197 Conn. 413, 423-24 (1985). If, however, the third party is an agent or employee of the client or attorney involved with or necessary to the giving of legal advice, *State v. Gordon, supra*, or an expert retained by counsel, *State v. Toste*, 178 Conn. 626, 628 (1979); or certain officers or employees (including in-house counsel) of the client, *Shew v. Freedom of Information Commission*, 245 Conn. 149, 158 n. 11 (1998); the privilege survives. As discussed below, the privilege is not waived if other clients or counsel with a common interest in the action are present.

Connecticut extends the attorney-client privilege to corporate entities. *Shew v. Freedom of Information Commission*, 245 Conn. 149, 158 (1998). For a corporation to invoke the privilege, “(1) the attorney must be acting in a professional capacity for the [corporation], (2) the [communication] must be made to the attorney by current employees or officials of the [corporation], (3) the [communication] must relate to the legal advice sought by the [corporation] from the attorney, and (4) the [communication] must be made in confidence.” *Blumenthal v. Kimber, supra*, 265 Conn. at 10-11.

II. 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?

Connecticut recognizes a joint-defense or common-interest privilege. *State v. Cascone*, 195 Conn. 183, 186-87 (1985). Where one attorney represents more than one client, the privilege applies as to outsiders, but not in the event of a later dispute between or among the clients. *Id.* In addition, Connecticut recognizes “the joint defense privilege, also called the “common-interest”

rule, [as] an extension of the attorney-client privilege that protects communications between parties and the parties' attorney when the parties have decided upon and undertaken a joint defense strategy in litigation. . . . 'It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel ... Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.'" *McPhee Elec. Ltd., LLC v. Konover Const. Corp.*, 2009 WL 455866, at *1 (Conn. Super. Ct. Jan. 29, 2009) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989)). Thus, "[t]he joint defense privilege is an extension of the attorney-client privilege and it serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Town of Ledyard, supra*, 2016 WL 2728317, at *2 (internal citations omitted).

The Connecticut Appellate Court has acknowledged that "when an insurer engages an attorney to represent an insured, the resultant attorney-client privilege belongs to the insured. . . . There is, however, 'a common interest among the insured, the attorney and the insurer, and ordinarily the insured's privilege is not waived because of disclosure to the insurer.' . . . Pursuant to this 'common interest,' the other involved parties are responsible for protecting the insured's or client's privilege." *Kenneson v. Eggert*, 176 Conn. App. 296, 314 (2017) (internal citations omitted).

III. 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.

Because the privilege belongs to the client, he or she must invoke it; if, however, the client is not present, the attorney may invoke it on the client's behalf.

The client alone may waive the privilege, and if the privilege holder fails to timely object when the opportunity arises, waiver occurs. *O'Brien v. Superior Court*, 105 Conn. App. 774, 787 (2008). Notwithstanding, the attorney *does* have standing to assert the privilege, *Woodbury Knoll, supra*, 305 Conn. at 777; and the lawyer "has an affirmative obligation to invoke the attorney-client privilege when the substance of privileged communications is sought, and, unlike the client, cannot unilaterally waive such privilege." *Id.* at 774.

If a party marks a document as "confidential," it creates a rebuttable presumption of confidentiality. *Lash v. Freedom of Information Commission*, 300 Conn. 511, 519 (2011).

The privilege may be lost where a third-party who is not an agent or the attorney or client necessary to the consultation is present, *Harrington v. Freedom of Information Comm'n, supra*, 323 Conn. at 25. If a third person overhears the discussion, he or she may disclose it. *State v.*

Vennard, 159 Conn. 385 (1970). Confidentiality may be lost where a spouse not active in the development of legal strategy is present, *State v. Gordon*, 197 Conn. 413, 424 (1985).

The voluntary disclosure of confidential or privileged material to a third party generally waives privileges with respect to that matter. *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 58 (2009); *Berlin Pub. Sch. v. Freedom of Info. Comm'n*, 2016 WL 785578, at *4 (Conn. Super. Ct. Feb. 2, 2016) (internal citations and quotation marks omitted). Whether partial disclosure results in subject matter waiver has not been addressed by Connecticut's appellate courts, but at least one trial judge applied the Second Circuit's "fairness doctrine" (as articulated in *re Von Bulow*, 828 F.2d 94 (2d Cir.1987)), under which "'testimony as to part of a privileged communication, in fairness, requires production of the remainder.'" While under that doctrine, "it would be 'unfair to permit a party to make use of privileged information as a sword with the public and then as a shield in the courtroom,'" the trial judge declined to apply the doctrine in the context of nonjudicial (in that case, administrative) proceedings, and limited the waiver to those portions of the attorney-client communications that were "actually disclosed." This remains to be further developed.

Connecticut has long recognized certain exceptions to the attorney-client privilege, but they are "made only when the reason for disclosure outweighs the potential chilling of essential communications...". *Cox v. Burdick*, 98 Conn.App. 167, 171-72 (2006).

Among the exceptions is the crime-fraud exception, *Supplee v. Hall*, 75 Conn. 17 (1902); but this is limited to circumstances where the statements reflect that the client intends to commit a crime, and then only on a limited basis, *Blumenthal v. Kimber, supra*, 265 Conn. at 18.. This exception also applies to intent to commit civil fraud, *Olson v. Accessory Controls & Equip. Corp.*, 254 Conn. 145 (2000). A party seeking to rely upon this exception must show "reasonable evidence" that there is "probable cause" that the client intended to commit a crime or fraud *and* that the statement was made in furtherance of that intent, *Olson, supra*, 254 Conn. at 176-77; and the Supreme Court has made it clear that the mere fact that a client consults with an attorney regarding matters about which the client is uncertain but which later are claimed to be improper will not meet the second element, *see Blumenthal v. Kimber*, 265 Conn. at 19. This exception has been extended to claims of bad faith against an insurer, *Hutchinson v. Farm Family Casualty Ins. Co.*, 273 Conn. 33, 41-42 (2005). An insured seeking to invoke the exception must establish that there is probable cause that the insurer acted in bad faith; *and* that the insurer sought the advice of its attorney to conceal or facilitate its bad-faith conduct. *Id.* at 42-43.

Connecticut also recognizes the "at issue" exception or implied waiver, "when the contents of the legal advice is integral to the outcome of the legal claims of the action." *Metropolitan Life, supra*, at 52-53. Thus, when a party specifically asserts reliance upon counsel's advice as part of his or her claim or defense; voluntarily testifies about portions of the attorney-client communication; or otherwise places the relationship at issue, the party waives the right to confidentiality. Relevance is not enough, however, *Woodbury Knoll, supra*, 305 Conn. at 781. . Instead, the Supreme Court tacitly acknowledged a three part test: "[1] demonstration of legitimate

need for privileged documents, [2] showing of relevance and materiality, and [3] proof by party seeking documents that information contained within cannot be secured elsewhere.” *Metropolitan Life*, 249 Conn. at 53-54. Thus, the “at issue” exception applies only where the contents of the legal advice are integral to the outcome of the claims in the action, such as when a party “specifically pleads reliance on an attorney’s advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship.” *Cox v. Burdick*, 98 Conn. App. 167, 172 (2006).

While the privilege continues after the death of the client, in a controversy between parties asserting claims to the deceased’s estate, neither party can claim the privilege against the other. *Doyle v. Reeves*, 112 Conn. 521, 525 (1931).

Finally, inadvertent disclosure will not waive the privilege, *Harp v. King*, 266 Conn. 747, 768-70 (2003); but reliance upon such a rule requires judicial examination of multiple factors, including the promptness of rectification, the number of inadvertent disclosures, and intent. It is, thus, not a doctrine upon which to causally rely.

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

The United States Supreme Court noted in 2011 that there is a common law exception to the privilege in circumstances where a trustee obtains legal advice related to the exercise of fiduciary duties (in which case the trustee cannot withhold attorney-client communications from the beneficiary of the trust), *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). Connecticut has not rejected efforts to invoke a fiduciary exception. *Heisenger v. Cleary*, 2014 WL 4413515, at *2 (Conn. Super. Ct. July 29, 2014); *Hubbell v. Ratcliffe*, 2010 WL 4885631 (Conn. Super. Ct. Nov. 8, 2010).

A nonparty attorney served with a subpoena may directly appeal on an interlocutory basis a discovery order compelling disclosure of material the attorney considers to be subject to the attorney-client privilege. *Woodbury Knoll, LLC v. Shipman and Goodwin, LLP, supra*, 305 Conn. at 769.

While appellate authority remains to be developed, Connecticut trial courts and the Code of Evidence state that the attorney-client privilege applies not just to existing attorney-client relationships, but also to those with prospective clients. Code of Evidence, § 5-2, Commentary; *Adisa Veliju, PPA v. Tejada*, 2017 WL 5923394*2 (Conn. Super. Ct. Sept. 27, 2017).