

PRIVILEGE ISSUES FLOW CHART -- How to determine if evidence is privileged

- 1) JUST BEFORE the communication
 - a. Was there a privileged relationship between speaker and listener?
 - b. Did the speaker intend the communication to be kept confidential?
- 2) DURING the communication
 - a. Was it in fact confidential?
 - b. Turning over documents or physical objects usually not covered.
- 3) AFTER the communication, was it kept confidential?
 - a. Disclosure by speaker = waiver
 - b. Disclosure by speaker's agents = waiver
 - c. Disclosure by listener not usually waiver
- 4) AT TIME CASE WAS FILED, does the nature of the lawsuit place the communication in issue?
 - a. Personal injury and the plaintiff's physician-patient privilege
 - b. Divorce/domestic violence and the spousal privilege
 - c. Speaker vs. listener litigation
 1. Malpractice against listener (doctor, lawyer, accountant)
 2. Suit for payment against speaker (patient, client)
- 5) DURING DISCOVERY, was the privilege asserted and information withheld?
- 6) AT TRIAL, was the privilege properly asserted.
 - a. To individual items, not blanket assertion
 - b. By the speaker
 - c. By the speaker's attorney.
 - d. But not by other attorneys.
- 7) AT TIME JUDGE RULES. Is there any kind of exception that removes this type of communication from being privileged?
 - a. Child abuse cases
 - b. Murder cases
 - c. Interests of justice and no other way to get information
 - d. In furtherance of future/ongoing crime or fraud.