

PRIVILEGES

A. IN GENERAL.

Most privileges follow the same pattern. They protect the content of confidential communications made in the course of a privileged relationship. The communication may not be admitted into evidence if the privilege is properly asserted by the person who made the communication. In most states, the exact scope of the privileges and any exceptions are defined by statute. Privileges are disfavored because they prevent the jury from hearing relevant evidence, and are therefore strictly construed.

1. Only Confidential Communications Are Privileged

For most privileges, only confidential communications are protected. A communication must satisfy two tests to qualify as confidential.

- (1) *Intended to be confidential.* The person making the communication must have intended when it was made that it be kept confidential. Statements intended to be transmitted to others (such as information intended to be included on a tax return) or made in public places, are not privileged.
- (2) *Confidential in fact* The communication must have been confidential in fact and not overheard by third persons. But illegally obtained communications remain privileged. If a Panama law firm's records get hacked and released on wikileaks revealing communication between a client and his lawyer about off-shore tax frauds, the documents are not admissible when the IRS prosecutes him.

2. Privilege for Electronic Communication

E-mails, texts, cell-phone calls, Instagrams, and other forms of electronic communication are easily intercepted, so legitimate questions can be raised as to whether they are secure enough to be privileged. Courts have generally concluded that electronic communication poses no significantly greater risk of disclosure than many other forms of communication, so a person communicating electronically has enough of an expectation of confidentiality to support a claim of privilege.

3. Agents

General principles of agency apply to privileged relationships. Statements by agents of the person holding the privilege, and statements to agents of the professional qualify as privileged.

4. Crime/fraud exception

As a general rule, communications designed to further a fraud or criminal enterprise are not privileged. Thus, if a criminal defendant consults his lawyer about a past tax return on which he cheated, the conversation is privileged. However, if the client travels to Panama to consult a lawyer about setting up an off-shore shell company to hide assets and avoid taxes, he is consulting about a future crime or fraud, and it is not privileged.

5. Procedure for Claiming Privilege

Claims of privilege are to be made on a question-by-question or document-by-document basis. Blanket claims are disfavored. The privilege is usually asserted in advance of trial during discovery, because it must be objected to at the earliest opportunity or the claim is waived.

The privilege may be asserted only by the person who holds it, or an attorney on the holder's behalf. The professional to whom the confidential communication was made (other than a lawyer) is neither required nor authorized to assert the privilege on behalf of the holder. *See Watters v. Dinn*, 633 N.E.2d 280 (Ind. Ct. App. 1994) (hospital not required to protect patient's physician-patient privilege). The privilege may be asserted in advance of trial with notice to the parties. If a privilege is claimed during trial, the court must permit it to be asserted outside the hearing of the jury. It is usually reversible error to force a witness to claim a privilege in open court.

6. Waiver By Disclosure

(A) *In general*. Privileges are waived if the holder of the privilege voluntarily and intentionally discloses (or consents to someone else disclosing) any significant part of the privileged matter. Thus, if the holder introduces evidence at trial concerning the content or details of a privileged communication, or turns it over in discovery, the privilege is waived. However, merely testifying that one consulted an attorney or saw a doctor is not a waiver where no details of the specific communications are disclosed. If privileged matter is inadvertently disclosed, usually in discovery, it is not a waiver as long as the party acts promptly to get the documents back.

(B) *Exceptions*. Disclosures do not waive the privilege if they are compelled by court order or made in the course of another privileged relationship. A spouse can tell the other spouse what he told his attorney without waiving the attorney-client privilege.

(C) *Scope of waiver*. When part of a privileged communication is intentionally disclosed in a court proceeding (including discovery), the privilege for related communications on the same subject is waived if the two communications should in fairness be considered together.

(D) *Waiver by pleadings*. A privilege is usually waived when the holder makes claims in a lawsuit or asserts defenses that cover the privileged matter. The most common example is a personal injury case, in which the plaintiff waives the physician-patient privilege as to the injuries alleged.

(E) *Waiver By Failing to Object*. If the holder of a privilege is present in court and fails to assert the privilege, or fails to object to a discovery request, it is a waiver.

B. ATTORNEY-CLIENT PRIVILEGE

1. Rule

Confidential communications made by clients to attorneys (and their staff) in the course of their professional relationship are privileged. The privilege is held by the client and only the client may waive it. Corporate clients may assert the privilege to protect statements made by

employees. The privilege survives the client's death and may be asserted by the representative of the estate.

2. Scope of Professional Relationship

The attorney must have been consulted for legitimate professional reasons, although it is not necessary that a suit be pending or the attorney be actually employed. Careful analysis is required when an attorney wears multiple hats -- think Tom Hagen in *The Godfather*, who is simultaneously the lawyer for the Corleone family, Don Corleone's *consigliere*, and the family's adopted son. When he is being asked his advice on whether the family should compromise or go to war with the Tattaglias, is he being asked for his legal advice, as his father's political adviser, or as part of trying to reach a family consensus? Only in the first instance is the communication

3. Corporate Clients

(A) *In general.* The attorney-client privilege is available to corporate clients. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the U. S. Supreme Court interpreted the federal privilege as protecting the communications of any employee who communicates with an attorney on behalf of the corporation if the communication concerns corporate (not personal) matters within the scope of the employee's duties.

(B) *Who may assert?* The privilege probably may be asserted by any management level agent of the corporation, by the corporation's in-house counsel, or by outside attorneys, but not by lower-level employees or individual directors without proof of specific authorization.

(C) *Waiver.* The privilege may be waived by resolution of the board of directors, by any executive authorized to act for the corporation in important matters, or by the corporation's attorney. If an ordinary employee makes a privileged statement to an attorney and then voluntarily discloses it, that is probably not a waiver because the employee does not hold the privilege. The privilege also may be waived if it is not treated as confidential within the corporation itself, e.g., by being widely circulated.

(D) *In-house counsel.* An ongoing issue is the extent to which communications between corporate officers and in-house counsel are privileged. Because of in-house counsel's mixed legal/business role, most states generally treat routine communications to in-house counsel and reports prepared by him or her as non-privileged business matters, unless the corporation proves that the attorney was acting in a legal capacity, rather than a business capacity, at the time.

4. When Privilege Does Not Apply

(A) Physical evidence and pre-existing documents do not become privileged when a client turns them over to an attorney.

(B) If an attorney was acting for two parties, there is no privilege in a subsequent lawsuit between them, e.g., no privilege in a dispute among heirs to a will drafted by attorney.

(C) There is no privilege in lawsuits or other disputes between client and attorney, such as a lawsuit over fees, nor if the client alleges incompetent representation in a post-conviction criminal proceeding.

(D) The privilege does not usually apply to fee arrangements, the fact of representation, or the identity of the client, because these are not factual communications by the client.

(E) Communications intended to be made public are not privileged.

(F) Communications that further an ongoing or future crime or fraud are not privileged.

(G) Conversations over a jail telephone system that was monitored by jail staff are not confidential, so are not privileged.

5. Work-Product Doctrine

The work-product doctrine is primarily a rule of pretrial procedure that shields an attorney's opinions, tactical decisions, and investigation from discovery. It also can be applied at trial, e.g., preventing a defendant from calling a former deputy prosecutor and ask whether he had previously expressed the opinion that there was not enough evidence to bring a charge.

C. MARITAL PRIVILEGE

1. Rule

Confidential communications between spouses are privileged. The marital privilege covers both verbal communications and communicative acts, but does not protect ordinary conduct in the spouse's presence. This is not a family privilege, so the presence of children nullifies confidentiality. Unless a state law extends it, the privilege only applies if there is a legally valid marriage. There is no privilege for so-called common-law marriages, engaged couples, or domestic partners.

2. Acts and Nonverbal Information

At common law, the privilege covered all kinds of acts which would not have been done in the presence of another person but for confidence that the spouse will keep it secret, such as hiding a murder weapon or asking a spouse to try to get the blood out of a shirt. More recent cases, however, have tended to limit the privilege to communicative acts intended to convey a message, and information gained by reason of the intimacy of the marital relationship. This area is not clearly defined.

3. Exceptions

(A) *Communications addressed to others.* Communications intended to be transmitted to a third person or made in the presence of a third person are not privileged. *See Russell v. State*, 743 N.E.2d 269, 272 (Ind. 2001) (request that wife make false statement to police not privileged).

(B) *Communications deleterious to marriage.* If the act or communication has nothing to do with or is directly deleterious to the marriage, such as threatening to kill the other spouse, it is not privileged. However, just because a threat accompanies a traditionally protected statement does not defeat the privilege, such as confessing a crime to a spouse and threatening her if she told anyone.

(C) *Lawsuits between spouses.* The privilege does not apply in civil suits between spouses, such as divorce, custody and protective orders.

(D) *Safety of children.* In most states, this privilege is not applicable in trials resulting from reports of child abuse or involving crimes against children.

(E) *Communications in furtherance of crimes.* Communications to a spouse that seek the spouse's assistance in committing a future crime are not privileged.

D. RELIGIOUS PRIVILEGE

Confidential communications made to a priest, minister, or other religious advisor are generally privileged. The privilege for religious communications covers both formal confessions made as part of church ritual and confidential communications made to clerics in their professional roles as spiritual advisers or counselors.

E. PHYSICIAN-PATIENT PRIVILEGE

Confidential communications from a patient to a physician made in the course of medical consultation or treatment are privileged in some states, but not all. The privilege covers both statements by the patient and information learned by the physician as a result of medical examination and testing and is generally read broadly to protect the privacy of the relationship between patient and physician. The privilege covers only information reasonably necessary to secure treatment or diagnosis.

There are exceptions.

- It is a doctor-patient privilege, not a hospital-patient privilege, so hospital records are not privileged. Statements to nurses employed by hospitals and test results by hospital staff who are not under the direct supervision of a particular doctor, are not within privilege.
- Statements made to a doctor appointed by the court to examine the patient or conducted under R. Civ. P., 35 are not within the privilege.
- Autopsies are not privileged because a dead person is not a patient.
- In most states, chiropractors are considered physicians for privilege purposes, but alternative practitioners are not.
- The traditional rule is that when a plaintiff brings a personal injury action, the plaintiff waives the physician-patient privilege concerning those injuries and any other medical matter causally and historically related to the condition put in issue by the pleadings. Similarly, if a defendant voluntarily raises a defense that puts his mental state at issue, he has waived the physician-patient privilege for evidence related to his condition.
- In many states, the privilege does not apply to cases of child abuse and physicians are required to report them.

F. COUNSELING AND PSYCHOLOGICAL PRIVILEGES

1) *Psychologist-Patient Privilege*. Confidential communications made by a patient to a psychologist, and information acquired by the psychologist from the patient during counseling, are privileged. In some states, the privilege does not apply to homicide cases or cases involving child abuse, or when the testimony is needed because the competency of the patient is material (e.g., testamentary capacity).

2) *Mental health counselors*. Absent a statute, communications to "counselors" who are not certified psychologists do not fall under this privilege. Many states have such statutes, making communications to licensed social workers, clinical social workers, marriage and family therapists, mental health counselors, victim counselors, and school counselors, in their official capacity, privileged. These privileges are usually more limited than the one for psychologists, and does not apply in homicide cases, child abuse and neglect cases, competency proceedings, and sometimes juvenile proceedings.

G. ACCOUNTANT-CLIENT PRIVILEGE

Confidential communications made to an accountant in the course of a professional relationship are privileged in some states, including Indiana. The privilege extends to information learned by the accountant during an audit, but does not cover papers and documents prepared independently of the audit and given to the accountant. Many communications to an accountant are not privileged because they are made with intent that the information be communicated to a third party (e.g., the IRS), so all claims of privilege must be made on a document-by-document or question-by-question basis.

H. OTHER THINGS CALLED PRIVILEGES .

There are lots of other laws protecting various kinds of confidentiality that are called privileges but do not fit into the classic model of a confidential statement made to a professional. They vary state to state, but some common ones are:

1) *Witness Safety Privilege*. Crime victims may withhold their telephone numbers, places of employment, and current addresses if the court finds that a danger to the victim or victim's family exists.

2) *Identity of Informer Privilege*. The State has a privilege to withhold the identity of an informer unless the informer holds relevant information helpful to the defense. The privilege only protects persons who provide tips and other preliminary information to the police. It does not apply if the informant possesses information relevant to guilt or innocence, and it vanishes once the informant's identity is revealed to those whom he fears or if he is listed as a witness. *See Roviato v. United States*, 353 U.S. 53 (1957).

3) Executive Privilege. Governors and the U.S. President have a privilege not to testify in any trial or deposition and to prevent their aides from testifying.

4) Reporter's Privilege. A reporter or other employee of a bona fide news organization has a limited privilege to protect sources and refuse to disclose information gathered in the course of preparing a news story. They also have a limited constitutional privilege against significant intrusion into the news-gathering process that would chill freedom of the press. Reporter's privileges can be overridden if the information is reasonably necessary to the trial and not available from other sources. Whether the privilege extends to bloggers and self-"employed" Internet reporters is doubtful, but the law is headed in that direction.

5) Privilege against self-incrimination.

The Fifth Amendment privilege against self-incrimination is a matter of constitutional criminal law. It is a personal privilege held by a person facing potential criminal prosecution, and a witness cannot refuse to testify on the ground that it would incriminate someone else. The privilege protects a person only from the risk of actual criminal liability and therefore does not apply if the person is granted immunity, if the statute of limitations has run, or if the person has already been tried. Most situations in which the privilege is important arise at times other than during trial -- police investigations, discovery, filling out tax forms -- and it is waived unless asserted at the earliest opportunity.

The privilege may be asserted at any stage of any legal proceeding, whether civil, criminal, administrative, or investigative. Claims made at trial must be made on a question-by-question basis, and the privilege must be invoked outside the hearing of the jury. A witness is under no obligation to explain how an answer would be incriminating, since doing so could very well defeat the purpose of the privilege. Once a witness asserts that answering a question may be incriminating, the court is bound by the witness's statement unless it clearly appears that the witness is mistaken and the evidence could not possibly be incriminating. The test is whether there is any realistic *possibility* of prosecution, not an actual likelihood of such prosecution. For a judge to overrule a claim of privilege, the judge must find that there is no possibility of prosecution, e.g., because the witness has been given immunity, the statute of limitations has run, or the witness has already been tried for the offense.

The privilege is personal and testimonial in nature. It protects the defendant from being forced to testify or provide a statement, but not from providing physical evidence. The defendant may be compelled to try on clothing, provide handwriting or voice exemplars, take a sobriety test, or stand in a lineup. Personal papers are not testimonial, so are not privileged. A corporation is not a person (or wasn't until *Citizens' United*) and cannot assert it.