



Attorney-Client Privilege and Related Topics

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Attorney Client Privilege

One Concept
Many Definitions



Policy

By assuring confidentiality, the privilege encourages clients to make "full and frank" disclosures to their attorneys, who are then better able to provide candid advice and effective representation.

Upjohn Co. v. United States, 449 U. S. 383, 389 (1981)

Standard Elements

- The asserted holder of the privilege is (or sought to become) a client; and
- The person to whom the communication was made: is a member of the bar of a court, or his subordinate; and
- in connection with this communication, is acting as an attorney; and
- The communication was for the purpose of securing legal advice

Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962)



Restatement Elements

1. A communication;
2. made between privileged persons;
3. in confidence;
4. for the purpose of seeking, obtaining or providing legal assistance to the client.

Restatement of the Law Governing Lawyers, ¶68

CPLR Definition

“ . . . evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment . . . ”



FRE Definition

“attorney-client privilege’ means the protection that applicable law provides for confidential attorney-client communications.”

FRE § 502(g)(1)



A Source of Some Confusion

Attorney Client Privilege
v.
Confidentiality



Confidentiality – Rule 1.6

- A lawyer shall not knowingly reveal **confidential information**, unless:
 - Client gives informed consent
 - Disclosure is impliedly authorized to advance the best interests of the client and is reasonable or customary
 - Disclosure is otherwise permitted by the Rule

What is “Confidential Information”?

- Information gained **during or relating to** the representation, whatever its **source**, that:
 - Is protected by the attorney-client privilege;
 - Is likely to be embarrassing or detrimental to the client; or
 - Client has requested be kept confidential.



Attorney Work Product

New York State
v.
Federal

FRE Provision

“work-product protection’ means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial”

FRE 502(g)(2)



FRCP Provision

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative”

FRCP 26(b)(3)(A)

Qualified Immunity:

- Materials are otherwise discoverable under Rule 26(b)(2); and
- The party shows that:
 - it has substantial need for the materials to prepare its case; and
 - cannot, without undue hardship, obtain their substantial equivalent by other means

FRCP 26(b)(3)(A)



Even when the showing is made:

Court “must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”

FRCP 26(b)(3)(A)



Compare with New York State

“The Work Product of an attorney **shall not be obtainable.**”

CPLR 3101(c) (emphasis added)



Seigel's view of WP in New York:

“An ill-defined category whose potential for mischief has been avoided only because the judiciary has accorded it narrow scope.”



New York's Work Product:

An item “will not even begin to qualify as ‘work product’ merely upon a showing that a lawyer drew it or did it; **it must be shown to be something that only a lawyer could draw or do.**”

Seigel § 347 (emphasis added)



Materials Prepared for Litigation

“ . . . materials otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party’s representative.”

CPLR 3101(d)(2)



Qualified Immunity:

Materials may be obtained only upon a showing that the party seeking discovery:

- Has a substantial need of the materials in preparation of the case; and
- Is unable without undue hardship to obtain the substantial equivalent of the materials by other means

Even when the showing is made:

“ . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.”

CPLR 3101(d)(2)

Party claiming privilege must:

- Expressly make the claim;
- Describe the nature of the documents, communications, or tangible things not produced or disclosed; and
- Do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

FRCP 26(b)(5)(A)



Claiming Privilege

- Claim at first opportunity, or risk waiving privilege;
- Party claiming the privilege has burden of establishing entitlement to privilege;
- Description should contain sufficient information to assess entitlement to privilege;
- Be prepared to have to submit materials for *in camera* review



Privilege Log

- Date of communication;
- Names of all parties involved in communication;
- Type of communication;
- Subject of communication;
- Basis for claim of privilege (be inclusive);
- Other descriptive information to support claim of privilege, if needed



Other Issues to Consider

- Common Interest Agreements
- *Kovel* Agreements
- Inadvertent Disclosure (FRE 502(b); FRCP 26(b)(5)(B))
- Subject Matter Waiver (FRE 502(a))
- At-Issue Waiver