AMERICAN BANKRUPTCY INSTITUTE

42nd Annual Alexander L. Paskay Memorial Bankruptcy Seminar

Ethics and Privilege Issues: The Truth, the Whole Truth [Subject to Any and All Applicable Privileges] and Nothing but the Truth

Hon. Robert E. Grossman,
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PLENARY SESSION

2018

42nd Annual ABI/Stetson Alexander L. Paskay Bankruptcy Seminary
January 18-19, 2018
Tampa, Florida

Ethics Panel: The truth, the whole truth [subject to any and all applicable privileges], and nothing but the truth.
Friday, January 19, 2018
1:30 p.m. – 3 p.m.

Leyza F. Blanco
Jacob A. Brown
David S. Jennis
Robert F. Elgidely
Hon. Robert E. Grossman (moderator)

I. Best Practices for Advising Corporate and Individual Clients on the Attorney Client Privilege.

See handout attached to these materials containing an Attorney-Client Privilege Flow Chart, a 50 State Survey on Attorney Client Privilege, and a discussion of the Co-client Exception.

II. The Attorneys Duty to Protect Attorney Client Privileged Communications and Information.

A. Key Differences Between Florida and ABA Model Rules.

Florida Rule of Professional Conduct 4-1.6 governs the general ethical duty of an attorney not to disclose Attorney-Client Privileged Communications and Information ("ACPCI"). ABA Model Rule 1.6 covers the same ethical duty. Below is a summary of some key differences and the full text of both rules.

1. Florida requires that an attorney "must" reveal ACPCI to the extent that attorney reasonably believes it necessary to "prevent the client from committing a crime" or "to prevent a death or substantial bodily harm to another." The Model Rule is permissive, an attorney "may" reveal protected information to prevent a crime or bodily harm, but is not required to.

2. The Florida Rule allows, when a tribunal requires an attorney to reveal ACPCI, for that attorney to exhaust all appellate remedies before revealing any ACPCI. The Model Rule simply states that an attorney may reveal APCPI to comply with the law or a court order.

3. The Florida Rule allows an attorney to disclose a client's ACPCI if done in furtherance of the client's interests unless the client specifically directs that the ACPCI is not to be disclosed. The Model Rule instead requires that a lawyer shall not disclose ACPCI unless the "disclosure is impliedly authorized in order to carry out the representation."

B. Florida Rule of Professional Conduct 4-1.6 Confidentiality of Information

(a) Consent Required to Reveal Information.

A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

(b) When Lawyer Must Reveal Information.

A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information.

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct; or

(6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies.

When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information.

A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure.

When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

C. ABA Model Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the

revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

D. ACPCI Florida Case Law

1. Things Not to Do

The Florida Bar v. Wolding, 579 So.2d 736 (Fla. 1991). An attorney who shared office space with a title company became the subject of a disciplinary proceeding based on office practices, which included storing law office files in unlocked file cabinets in areas shared by both offices and maintaining an office with acoustical problems that permitted eavesdropping on confidential communications. Although the referee found the respondent guilty of violating Rule Reg. Fla. Bar 4-1.6 based on an implied duty to take reasonable steps to protect client confidences, the Supreme Court rejected the referee's findings because no actual disclosure of confidential client information was shown to have occurred.

2. Disqualification of Counsel to Prevent Disclosure of Privileged Information

Nissan Motor Corp. in USA v. Orozco, 595 So.2d 240 (Fla. 4th DCA 1992), rev. den. 605 So.2d 1265, involved an attempt to disqualify a firm based on a former attorney at the firm having previously represented an adverse party. The court rejected the applicability of the irrefutable presumption standard in favor of an analysis based on Rule Reg. Fla. Bar 4-1.10 (imputed disqualification). Accordingly, the court held that a law "firm is not prohibited from representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless the matter is the same ... and any lawyer remaining in the ... firm has information protected by rules 4-1.6 and 4-1.9(b)." 595 So.2d at 243. Under this standard, actual knowledge of protected information must be demonstrated as a prerequisite to disqualification.

3. ACPCI Crime Exception

United States v. Del Carpio-Cotrina, 733 F.Supp. 95 (S.D. Fla. 1990), involved an attorney's failure to advise the court that his client had jumped bond and did not intend to appear for trial. In evaluating the actions of the attorney, the federal court considered Rule Reg. Fla. Bar 4-1.6, the confidentiality rule adopted by Florida, which protected all information relating to the representation, whatever its source. The court held that an attorney who has a firm factual basis for believing a client would not appear for trial must inform the court to avoid assisting a criminal or fraudulent act by the client (Rule 4-3.3(a)(2)) and to prevent a client from committing a crime (Rule 4-1.6(b)). In so ruling the court commented that a lawyer is not required to take affirmative steps to discover client fraud or future crimes, and that imposing a duty to investigate the client is incompatible with the fiduciary nature of the attorney-client relationship. "The actual knowledge [of future crimes or fraud by the client] standard is necessary to prevent unnecessary

disclosure of client confidences and to protect the fiduciary nature of the attorney-client relationship." 733 F.Supp. at 99.

E. ACPCI Bankruptcy Cases

In re Duque, 134 B.R. 679 (S.D. Fla. 1991) ("*Duque")*. A chapter 7 trustee subpoenaed the debtor's past criminal law attorneys for information as to the location of funds in furtherance of post-judgment collection discovery. The District Court discussed the attorneys' obligations to protect their client's ACPCI and stated that "by vigorously invoking the attorney-client and other privileges in response to the challenged subpoenas, appellants [the criminal law attorneys that previously represented the debtor] have fulfilled their ethical obligations." *Duque* at 688. The Court ultimately vacated the Bankruptcy Court's order denying the motion to quash the trustee's subpoenas and remanded the matter with instruction to the Bankruptcy Court to balance the needs of the trustee and the unavailability of the information from any other source with the inherent danger of subpoenaing criminal counsel regarding a client.

Sobel v. Sells (In re Gordon Properties), 505 B.R. 703 (Bankr. E.D. Va. 2013) ("*Gordon Properties*"). Counsel for a Home Owner's Association ("HOA") got discharged after a change in leadership in the HOA and was then hired by the disgruntled ex-board members who were not reelected. This is after several state court lawsuits and bankruptcy proceedings involving the HOA and the entity litigating against the HOA. The Court, in analyzing Rule 1.6(a) and 1.9(c) of the Virginia Rules of Professional Conduct held that the law firm that previously represented the HOA could not just switch sides without consent because:

> The confidentiality rules protect both the former client from the obvious threats of divulging confidential information or using it to the former client's disadvantage, and the new client from the lawyer's inability or hesitancy to develop favorable information because of the lawyer's duty to protect the former client's confidential information.

Gordon Properties at 707-708 (citations omitted).

F. Comment to Florida Rule 4-1.6

In terms of the duty to preserve a client's ACPCI, the applicable comments in Florida Rule 4-1.6 to paragraph (e) provide:

Acting Competently to Preserve Confidentiality

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 4-1.1, 4-5.1 and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited

to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, for example state and federal laws that govern data privacy or that impose notification requirements on the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see the comment to rule 4-5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

III. Maintaining Attorney – Client Privilege when Using Technology and Electronic Communications

A. Professional Ethics of the Florida Bar Opinion 06-2 Dealing With an Attorneys Ethical Duties When Sending and Receiving Electronic Documents in Representing a Client (Fla. Eth. Op. 06-2 (Fla. St. Bar Assn.), 2006 WL 5865322)

Metadata is information about information. Metadata is defined as information describing the history, tracking, or management of an electronic document. Metadata may reveal confidential information including information:

a. about the author of a document
b. can show changes made to a document during drafting
c. additions and deletions to the final version of a document
d. comments by viewers of the document

A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who

inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt.

B. Use of Electronic Devices

A lawyer who chooses to use "Devices" that contain "Storage Media" MUST take reasonable steps to ensure client confidentiality is maintained and the Device is sanitized before disposition. Florida Ethics Opinion 10-2 (September 24, 2010). A Device contains Storage Media if it contains a hard drive or other data storage media.

Storage Media is any media that stores digital representations of documents. Devices that contain Storage Media include: computers, printers, copiers, scanners, cell phones, PDA's (personal digital assistants), flash drives, memory sticks, facsimile machines and other electronic or digital devices. Attorney's duties to maintain confidentiality include:

> a. Identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality;
> b. Inventory of the Devices that contain Hard Drives or other Storage Media;
> c. Supervision of non-lawyers to obtain adequate assurances that confidentiality will be maintained; and
> d. Responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at intake of the Device and confirmation or certification of the sanitization at the disposition of the Device. Florida Ethics Opinion 10-2 (September 24, 2010).

Moreover, these duties extend to the duty to use care when using Devices in public places. When using Devices in public places, attorneys have a duty to inquire whether use of such Devices would preserve confidentiality under the Florida Rules of Professional Conduct. These public places include airports where confidentiality may be impacted by border searches of laptop computers and other electronic devices conducted by the TSA when traveling. There should be safeguards in place to ensure confidential information.

Some helpful tips include: a) ship your device so as to avoid such searches; b) use a loaner from a local office to avoid traveling with devices that may be subject of a search; c) use a blank burner device when traveling d) erase client data before traveling then download data after arrival at your destination; e) log out of applications that may contain confidential information so that a password is required to open such applications; f) do not store passwords on any device; g) clear browsers and power devices off before going through security.

If asked for the password to a device, promptly advise the agent that you are an attorney and that the device contains confidential and privileged information and ask for a supervisor prior to assenting to access. If necessary, provide the password for the device but not for data stored remotely.

C. Social Media

Social media also creates a potential risk of disclosing privileged or confidential information. The use of social media presents a unique opportunity for the inadvertent disclosure of confidential information and the identity of present or former clients. Consistent with the duties of confidentiality in Florida Rule of Professional Conduct 4-1.6(a), ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about them on websites. Users of social media are accustomed to casually commenting on day-to-day activities, including work-related activities. Lawyers must be especially careful to avoid posting any information that could conceivably violate confidentiality obligations. This includes the casual use of geo-tagging in social media posts or photos that may inadvertently reveal confidential information, such as the identity of your client and your geographic location when conducting client business.

In *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013) ("*Hunter*"), the Virginia Supreme Court held that confidentiality obligations have limits when weighed against a lawyer's First Amendment protections. Virginia's Supreme Court found that a lawyer's blog posts were commercial speech and that the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients' consent where (1) the information related to closed cases and (2) the information was publicly available from court records and, therefore, the lawyer was free, like any other citizen, to disclose what actually transpired in the courtroom.

Notwithstanding the decision in *Hunter*, there are other examples of attorneys who have faced allegations of ethical misconduct for posting client information online. In *In re Skinner*, 740 S.E.2d 171 (Ga. 2013), the Georgia Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under that Georgia's rules) where a lawyer admitted to disclosing information online about a former client in response to negative reviews on consumer websites. It is important to maintain awareness of potential issues to avoid ethical lapses when using of social media.

The use of social media is a developing area in the law. Facebook is quickly closing in on 2 billion users, up from 1.59 billion a year earlier. As of December 2016, there were 1.74 billion mobile active users up by 21% from the prior year. Twitter has approximately 330 million monthly active users, Snapchat has 150 million daily active users, Instagram another 800 million monthly active users. This exponential growth in social media exposes lawyers and judges to new ethical challenges in their law practice.

For example, pursuant to the Supreme Court of Florida's Judicial Ethics Opinion 09-20 (November 17, 2009), judges may not add lawyers who may appear before them as "friends" on a social networking site or permit those lawyers to add the judge as their "friend." The listing as a "friend" was found to reasonably convey to others the impression that such an attorney holds a special position to influence the judge. This Judicial Ethics Opinion applies to any social networking site which requires the member of the site to approve the listing of a "friend" or contact if:

> 1. that person is a lawyer who appears before the judge; and
> 2. identification of the lawyer as the judge's "friend" is thereafter displayed to the public or the judge's or lawyer's other "friends" on the judge's or the lawyer's page. Judicial Ethics Opinion 09-20 (November 17, 2009).

Recently, the Supreme Court of Florida accepted certiorari in *Law Offices of Herssein & Herssein PA v. United Services Automobile Association*, Case Number 2017 WL 3611661 (Fla. 3d DCA, Aug. 23, 2017) ("*Herssein*"), which held that "[a]n assumption that all Facebook 'friends' rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking." The *Herssein* court further held that:

> To be sure, some of a member's Facebook `friends' are undoubtedly friends in the classic sense of person for whom the member feels particular affection and loyalty…
> The point is, however, many are not. A random name drawn from a list of Facebook "friends" probably belongs to casual friend; an acquaintance; an old classmate; a person with whom the member shares a common hobby; a "friend of a friend;" or even a local celebrity like a coach. An assumption that all Facebook "friends" rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking. *Herssein* at *4.

The court in *Herssein* agreed with the Fifth District Court of Appeal's 2014 decision in *Chace v. Loisel*, which held that a Facebook friendship "does not necessarily signify the existence of a close relationship." *Chace v. Loisel*, 170 So.3d 802, 803–04 (Fla. 5th DCA 2014) ("*Chase*"). In *Chace*, the Fifth District held that, in a dissolution of marriage case, a judge who sent the wife a Facebook friend request during the proceedings, which the wife rejected, made an ex-parte communication and was required to recuse himself. In so ruling, however, the Fifth District noted, "[w]e have serious reservations about the court's rationale in *Domville*." *Id*. Defining the word "friend" on Facebook as a "term of art," the Fifth District explained:

> A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. A Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have. Domville's logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the legal community knows each other, this requirement is unworkable and unnecessary. Requiring disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow. *Id*.

Both the Third District Court of Appeal and the Fifth District Court of Appeal acknowledged a conflict with the Fourth District Court of Appeal's 2012 decision in *Domville v. State of Florida*, 103 So.3d 184 (Fla. 4th DCA 2012) which held that a Facebook friendship

between a judge and an attorney violated the judicial canon requiring judges to avoid the appearance of impropriety.

The use of social media sites also raises concerns regarding communication with represented parties. An attorney may not send a Facebook friend request or LinkedIn invitations to opposing parties known to be represented by counsel to gain access to their Facebook content.

The law is uncertain on these issues and many questions remain. Are "followers" less or more than "friends." Will social media platforms such as Twitter, Instagram and LinkedIn be viewed differently than Facebook since they have "followers" and "connections" rather than "friends,"

IV. Mediation Privilege

A. Mediation Privilege under Florida Law

The mediation privilege is codified in Florida Statutes Sections 44.401-44.406, also known as the Mediation and Confidentiality and Privilege Act, provides that all mediation communications shall be confidential. Florida Statutes Section 44.405 states that a mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. Violations of the section are remedied under Florida Statutes 44.406. Any mediation participant who knowingly and willfully discloses a mediation communication in violation of Florida Statutes 44.405, shall be subject to remedies such as equitable relief, compensatory damages, payment of attorney's fees, mediator's fees, and costs incurred in the mediation proceeding and reasonable attorney's fees and costs incurred in the application for remedies.

Moreover, if the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, mediator's fees. It is important to note that there is no confidentiality or privilege attached to a signed written agreement reached during a mediation unless the parties agree otherwise. In addition, there is no confidentiality or privilege for mediation communications: a) willfully used to plan or commit crimes or threaten violence; b) requiring mandatory reporting; c) offered to report, prove, or disprove professional malpractice or misconduct; or d) offered for the limited purpose of establishing or refuting grounds for voiding or reforming a settlement agreement reached during mediation. A party that discloses or makes a representation about a privileged mediation communication waives that privilege but only to the extent necessary for the other party to respond to the disclosure or representation.

B. Mediation Privilege under Federal Law

Rule 501 of the Federal Rules of Evidence governs the creation of federal privileges by common law as interpreted by United States courts unless the United States Constitution, a federal statute or rules prescribed by the Supreme Court provide otherwise. Surprisingly, there is no specific federal mediation privilege. The creation of new privileges is governed by the following factors set forth in *Jaffee v. Redmond*, 518 U.S. 1 (1996): 1) whether

the asserted privilege is rooted in the imperative need for confidence and trust; 2) whether the privilege would serve public ends; 3) whether the evidentiary detriment caused by the exercise of the privilege is modest; and 4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states.

Bankruptcy courts apply these standards in determining the existence of a federal mediation privilege. For example, in *RDM Sports Group Inc.*, 277 B.R. 415 (Bankr. N. D. Ga. 2001), the bankruptcy court found that the mediation privilege protected the turnover of documents related to a settlement reached in mediation noting that the encouragement of settlement negotiations and alternative dispute resolution is a compelling interest sufficient to justify recognition of a mediation privilege. However, other bankruptcy courts have declined to recognize the existence of a federal mediation privilege. *See, In re Lake Lotawana v. Cmty. Improvement Dist.,* 563 B.R. 909 (Bankr. W.D. Mo. 2016) *citing Carman v. McDonnell Douglas Corp.,* 114 F.3d 790, 793 (8th Cir. 1997). Awareness of the court's interpretation of the mediation privilege prior to participation in a mediation is important to protect information which is intended to be shared at a mediation since some courts may recognize a mediation privilege yet find that it is not absolute setting factors upon which the privilege may be inapplicable. *See, In re Teligent Inc.,* 640 F. 3d 53, (2nd Cir. 2011).

This uncertainty has been addressed in some bankruptcy courts through the enactment of local rules which provide that mediation communications are confidential and/or privileged. For example, Local Rule 9019-2(F) of the Local Rules for the U.S. Bankruptcy Court for the Southern District of Florida provides that "[c]onduct or statements made in the ordinary course of mediation proceedings constitute 'conduct or statements made in compromise negotiations' within the meaning of Rule 408 of the Federal Rules of Evidence and no evidence inadmissible under Fed. R. Evid. 408, shall be admitted or otherwise disclosed to the court." Similarly, the U.S. Bankruptcy Court for the District of Delaware adopted Local Rule 9019-5(d)(i) which provides that "[t]he mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. These local rules eliminate any uncertainty as the confidentiality and privilege associated with mediation communications and help encourage participation in mediation.

C. **Duty of Confidentiality of Mediators**

The Florida Rules for Certified and Court–Appointed Mediators apply to all proceedings before all panels and committees for the conduct of certified mediators and non-certified mediators appointed to mediate a case pursuant to court rules. *See* Rule 10.700 of the Rules for Certified and Court-Appointed Mediators. Rule 10.360 provides that a mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties. It is important to note that a non-certified mediator not appointed to mediate a case pursuant to court rules is not bound by Rule 10.360 and the duty of confidentiality set forth therein. Thus, if a mediation involves such a mediator or dispute being resolved without the court-appointment of a mediator, the parties and counsel should be aware that a duty of confidentiality may not apply and the parties may be required to

execute confidentiality agreements prior to the start of mediation to protect disclosure of communications shared in the mediation process.

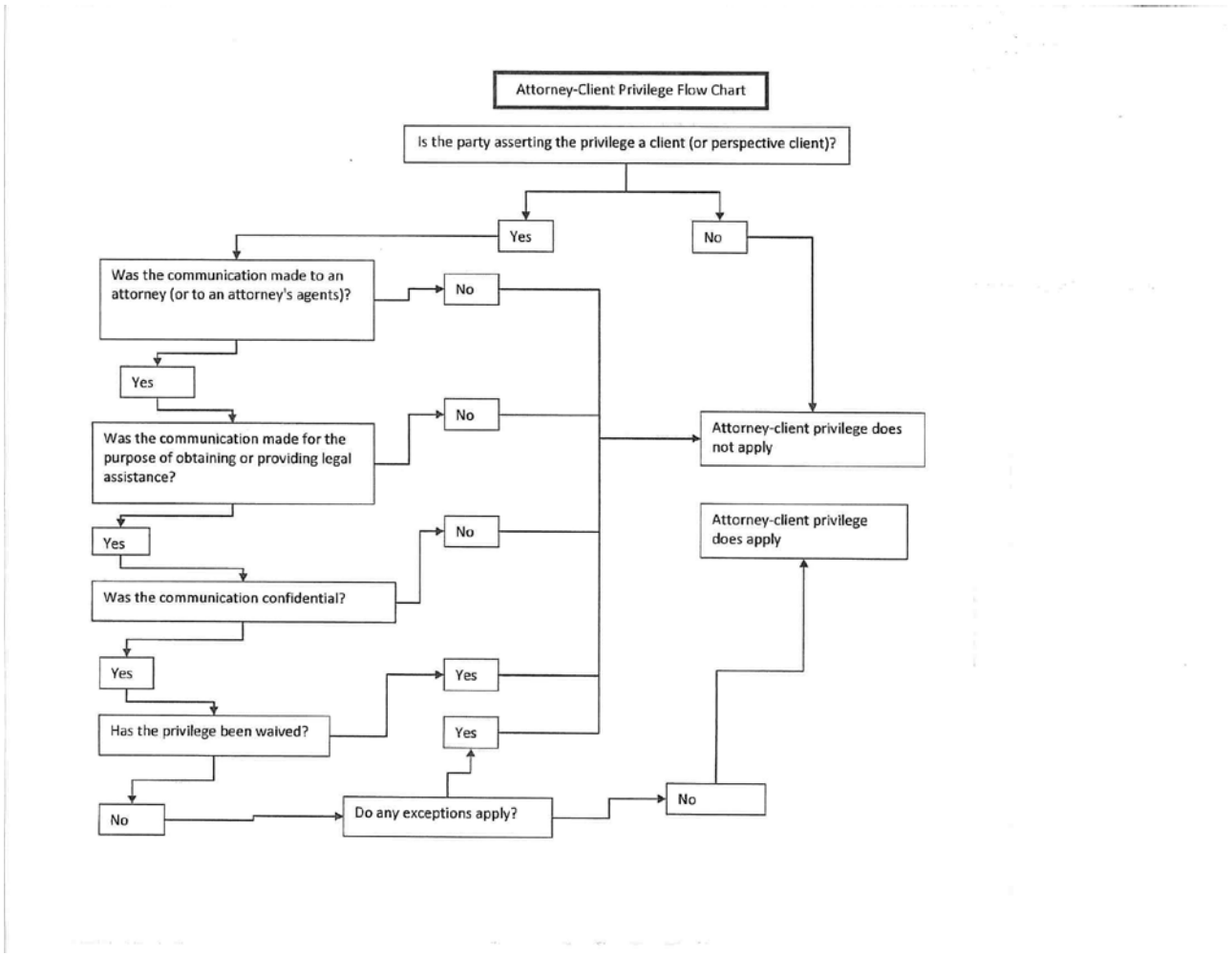
If in doubt as to the applicability of the duty of confidentiality or privilege associated with a mediation, the Mediator Ethics Advisory Committee in Florida ("MEAC") provides written advisory opinions to mediators in relation to ethical questions arising from the Standards of Professional Conduct. Mediations in bankruptcy courts have been the subject of at least 2 MEAC opinions in respect to the disclosure by the mediator of a party's failure to negotiate in good faith or willful failure to appear at mediation.

In MEAC 2012-005, the committee opined that a mediator does not breach any ethical duties by, in his or her opening statement, reporting to the court a party's willful failure to attend the mediation conference or to participate in the mediation process in good faith, when the mediator is required to do so pursuant to Local Rule 9019-2(d)(2) of the United States Bankruptcy Court for the Middle District of Florida.

In MEAC 2014-10, the committee was similarly asked the same question with regard to the mediator reporting requirement in Local Rule 9019-2(C)(4) for the United States Bankruptcy Court for the Southern District of Florida. The committee in this instance declined to respond to the questions regarding the application of the mediation privilege set forth in Florida Statutes 44.05 and its application in a federal bankruptcy proceeding pending in the Southern District of Florida. The MEAC 2014-10 opinion concludes that when mediating a case referred to mediation by a court with ultimate authority over a case, the mediator is accountable to the court in a manner consisted with the Florida Rules for Certified Mediators and Court-Appointed Mediators (Rules 10.500 and 10.520). The committee found that if parties wish to proceed after being informed of the federal court's requirements for mediator disclosure in the mediator's orientation session, there is no violation of mediator ethics.

These advisory opinions highlight the tension between mediation privileges as recognized under state/federal laws and local court rules and procedures. It is important to know the rules and requirements of the courts relating to mediations conducted in respect to cases before them to understand the extent of the protection and privilege of mediation communications.

V. Who Holds the Privilege when a Trustee is Appointed?


Attorney-Client Privilege Flow Chart
Is the party asserting the privilege a client (or perspective client)?
Yes
No
Was the communication made to an attorney (or to an attorney's agents)?
No
Yes
Was the communication made for the purpose of obtaining or providing legal assistance?
No
Yes
Was the communication confidential?
No
Yes
Has the privilege been waived?
Yes
No
Do any exceptions apply?
Yes
No
Attorney-client privilege does not apply
Attorney-client privilege does apply

50 State Survey					
State	Source of Attorney-Client Privilege	Source of State Work Product Doctrine	Opinion and Ordinary Work Product Protected?	Waiver of Privilege	Upjohn "Subject Matter Test" or Control Group Test?
Alabama	ALA. R. EVID. 502	ALA. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	ALA. R. EVID. 510	*Upjohn* "Subject Matter Test" ALA. R. EVID. 502(a)(2)
Alaska	ALASKA R. EVID. 503	Alaska R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Alaska R. Evid. 510	Upjohn "Subject Matter Test" ALASKA R. EVID. 503(a)(2)
Arizona	Ariz. Rev. Stat. § 12-2234	Ariz. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Ariz. R. Evid. 502	*Upjohn* "Subject Matter Test" ARIZ. REV. STAT. § 12-2234(B)
Arkansas	Ark. R. Evid. 502	Ark. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Ark. R. Evid. 502	*Upjohn* "Subject Matter Test" *See Corteau v. St. Paul Fire & Marine Ins. Co.* , 821 S.W.2d 45 (Ark. 1991)
California	CAL.EVID.CODE § 954	Cal. Civ. Proc. Code § 2018.030	Yes, both opinion and ordinary work product protected	Cal. Evid. Code § 912	*Upjohn* "Subject Matter Test" *D.I. Chadbourne, Inc. v. Super. Ct.* , 388 P.2d 700 (Cal. 1964) (en banc); *see also Costco Wholesale Corp. v. Superior Court* , 219 P.3d 736 (Cal. 2009)
Colorado	Colo. Rev. Stat. § 13-90-107	C.R.C.P. 26	Yes, both opinion and ordinary work product protected	Colo. Rev. Stat. Ann. § 13-90-107	*Upjohn* " Subject Matter Test" *Denver Post Corp. v. Univ. of Colo.* , 739 P.2d 874 (Colo. Ct. App. 1987)

Connecticut	Conn. Code Evid. 5-1 (Common Law)	Conn. Practice Book 13-3	Yes, both opinion and ordinary work product protected	CT R SUPER CT CIV § 13-33	Not Yet Decided *See Blumenthal v. Kimber Mfg., Inc.* , 826 A.2d 1088 (Conn. 2003) (reserving "for another day the question of whether to engraft a limitation as to which particular employees constitute the corporate client.").
Delaware	Del R. Evid. 502	Del. Super. Ct. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Del R. Evid. 510	Upjohn "Subject Matter Test" Del R. Evid. 502(a)(1) – (b)
Florida	Fla. Stat. § 90.502	Fla. R. Civ. P. 1.280	Yes, both opinion and ordinary work product protected	Fla. Stat. § 90.507 Fla. R. Civ. P. 1.285	*Upjohn* "Subject Matter Test" *S. Bell Tel. & Tel. Co. v. Deason* , 632 So. 2d 1377 (Fla. 1994)
Georgia	Ga. Code § 24-5-501	Ga. Code § 9-11-26	Yes, both opinion and ordinary work product protected	Common Law	Upjohn "Subject Matter Test" Marriott Corp. v. American Acadamy of Psychotherapists, Inc., 277 S.E.2d 785 (Ga.Ct.App. 1981).
Hawaii	Haw. Rev. Stat. § 626-1, Rule 503	Haw. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Haw. Rev. Stat. § 626-1, Rule 511	Control Group Test HAW. R. EVID. 503(a)(2)
Idaho	Idaho Code § 9-203	I.R.C.P. 26	Yes, both opinion and ordinary work product protected	Common Law	*Upjohn* "Subject Matter Test" Kirk v. Ford Motor Co., 116 P.3d 27 (Idaho 2005); Id. Evid. R. 502(a)(2)
Illinois	IL R S CT Rule 201	IL R S CT Rule 201	No, only opinion work product is protected	IL R EVID Rule 502	Control Group Test *Consol. Coal Co. v. Bucyrus-Erie Co.* , 432 N.E.2d 250 (Ill. 1982)

Indiana	Ind. Code § 34-46-3-1	Ind. R. Trial P. 26	Yes, both opinion and ordinary work product protected	Common Law	*Upjohn* "Subject Matter Test" In re Witham Memorial Hospital, 706 N.E.2d 1087, 1091 (Ind.Ct.App. 1999)
Iowa	Iowa Code§ 622.10	Iowa R. Civ. P. 1.503	yes, both opinion and ordinary work product protected	Iowa R. Civ. P. 5.502	*Upjohn* "Subject Matter Test" *See Keefe v. Bernard* , 774 N.W.2d 663, 672 (Iowa 2009).
Kansas	Kan. Stat. § 60-426	Kan. Stat. § 60-226	Yes, both opinion and ordinary work product protected	Kan. Stat. § 60-426a	Upjohn "Subject Matter Test" Stauffer Communications, Inc. v. Bd. Of County Comr's, 2001 WL 34117818 (Kan.Dist.Ct. 2001).
Kentucky	KRE 503	Ky. R. Civ. P. 26.02	Yes, both opinion and ordinary work product protected	KRE 509	*Upjohn* "Subject Matter Test" KY. R. EVID. 503(a)(2)
Louisiana	La. Code Evid. Art. 506	La. Code Civ. Proc. Art. 1424	Yes, both opinion and ordinary work product protected	La. Code Evid. Art. 502	*Upjohn* "Subject Matter Test" LA. CODE EVID. ANN. ART. 506(A)(2)
Maine	Me. R. Evid. 502	Me. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Me. R. Evid. 510 Me. R. Civ. P. 26	Control Group Test ME. R. EVID. 502(a)(2)

Maryland	Md. Code Ann., Cts. & Jud. Proc. § 9-108	Md. Rules 2-402	Yes, both opinion and ordinary work product protected	Common Law	Not Yet Decided *See E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.* , 718 A.2d 1129, 1141 (Md. 1998) (when discussing the control group test and the subject matter test, the Court stated: "we decline to adopt a particular set of criteria for the application of the privilege in the corporate context until we are required to do so.").
Mass.	Ma. R. EVID. § 502	Mass. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Ma. R. EVID. § 523	*Upjohn "Subject Matter Test" National Employment Servs. Corp. v. Liberty Mut. Ins. Co.* , No. 93-2528- G, 1994 WL 878920 at *1 (Mass. Super. Ct. Dec. 12, 1994)
Michigan	MRE 501 (Common Law)	Mich. Ct. R. 2.302	Yes, both opinion and ordinary work product protected	Common Law	Upjohn "Subject Matter Test" *Leibel v. Gen. Motors Corp.* , 250 Mich. App. 229, 236 (2002).
Minnesota	Minn. Stat. § 595.02	Minn. R. Civ. P. 26.02	Yes, both opinion and ordinary work product protected	Common Law	Not Yet Decided* **But see Leer v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.* , 308 N.W.2d 305 (Minn. 1981).
Mississippi	Miss.R.Evid. 502	Miss. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Miss.R.Evid. 502	*Upjohn* "Subject Matter Test" MISS. R. EVID. 502(a)(2)

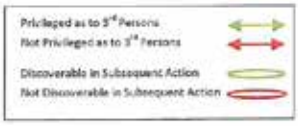
Missouri	Mo. Stat. § 491.060	Mo. Sup. Ct. R. 56.01	Yes, both opinion and ordinary work product protected	Common Law	Upjohn "Subject Matter Test" DeLaporte v. Robey Bldg. Supply, Inc., 812 S.W.2d 526 (Mo.Ct.App. 1991).
Montana	Mont. Code § 26-1-803	M. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Mont. R. Evid. § Rule 503	Upjohn "Subject Matter Test" State, ex rel., United States Fidelity and Guaranty Co. v. The Montana Second Judicial Dist. Court, 783 P.2d 911 (Mont. 1989); MONT. CODE ANN. §26-1-803
Nebraska	Neb. Rev. Stat. § 27-503	Neb. Ct. R. Disc. § 6-326	Yes, both opinion and ordinary work product protected	Neb. Rev. Stat. § 27-511	"Subject Matter Test" Neb. Rev. Stat. §27-503(1)(a)
Nevada	Nev. Rev. Stat. § 49.095	Nev. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Nev. Rev. Stat. § 49.385	*Upjohn* "Subject Matter Test" *Wardleigh v. Second Judicial Dist. Ct.* , 111 Nev. 345 (1995)
N.H.	N.H. R. EVID. 502	N.H. Super. Ct. R. CIV 21	Yes, both opinion and ordinary work product protected	N.H. R. Evid. 510	Control Group Test N.H. R. EVID. 502(a)(2)
New Jersey	N.J. Stat. § 2A:84A-20	N.J. Ct. R. 4:10-2	Yes, both opinion and ordinary work product protected	N.J. Stat. § 2A:84A-29	Upjohn "Subject Matter Test" Edison Corp v. Secaucus Town, 17 N.J.Tax 178, 185 (N.J.Tax 1998).
New Mexico	N.M. R. Evid. 11-503	NMRA, Rule 1-026	Yes, both opinion and ordinary work product protected	N.M. R. Evid. 11-511	"Subject Matter Test" N.M. R. Evid. 11-503(A)(1)(a)

New York	N.Y. C.P.L.R. 4503	N.Y. C.P.L.R. 3101	Yes, both opinion and ordinary work product protected	N.Y. C.P.L.R. 4503	Not Yet Decided
N.C.	N.C. Gen. Stat. EV 8C-1, 501 (Common Law)	N.C. Gen. Stat. 1A-1, 26	Yes, both opinion and ordinary work product protected	Common Law	Upjohn "Subject Matter Test" Evans v. United Services Auto. Ass'n, 541 S.E.2d 782, 791 (N.C.Ct.Apps. 2001).
N.D.	N.D. R. Ev. 502	N.D. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	N.D. R. Ev. 510	*Upjohn* "Subject Matter Test" N.D. R. EVID. 502(a)(2)
Ohio	Ohio Rev. Code § 2317.02	Ohio Civ. R. 26	Yes, both opinion and ordinary work product protected	Common Law	Upjohn "Subject Matter Test" State ex rel. Leslie v. Ohio Housing Finance Agency, 824 N.E.2d 990 (Ohio 2005).
Oklahoma	12 Okla. Stat. § 2502	12 Okla. Stat. § 3226	Yes, both opinion and ordinary work product protected	12 Okla. Stat. § 2511	Control Group Test 12 OKL. ST. ANN. § 2502(4)
Oregon	Or. Rev. Stat. § 40.225	ORCP 36	Yes, both opinion and ordinary work product protected	Or. Rev. Stat. § 40.280	*Upjohn* "Subject Matter Test" OR. REV. STAT. ANN. § 40.225 R. 503(1)(d)
Pa.	42 Pa. Cons. Stat. § 5928	Pa.R.C.P. No. 4003.3	No, only opinion work product is protected	Common Law	Upjohn "Subject Matter Test" National Railroad Passenger Corp. v. Fowler, 788 A.2d 1052 (Pa.Commw.Ct. 2001).
R.I.	Common Law State v. von Bulow, 475 A.2d 995, 1004 (R.I. 1984)	Super. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Common Law	Not Yet Decided

S.C.	SCRE 501	SCRCP 26	Yes, both opinion and ordinary work product protected	Common Law	Not Yet Decided
S.D.	S.D. Codified Laws § 19-19-502	S.D. Codified Laws § 15-6-26(b)	Yes, both opinion and ordinary work product protected	S.D. Codified Laws § 19-19-510	Control Group Test S.D. CODIFIED LAWS § 19-13- 2(2)
Tenn.	Tenn. Code Ann. § 23-3-105	Tenn. R. Civ. P. 26.02	Yes, both opinion and ordinary work product protected	Tenn. R. Evid. 502	Not Yet Decided
Texas	TEX.R. EVID. 503	Tex. R. Civ. P. 192.5	Yes, both opinion and ordinary work product protected	TEX. R. EVID. 511	*Upjohn* "Subject Matter Test" TEX. R. CIV. EVID. 503(a)(2)(B)
Utah	Utah R. Evid. 504	Utah R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Utah R. Evid. 510	*Upjohn* "Subject Matter Test" UTAH R. EVID. 504(a)(4)
Vermont	Vt. R. Evid. 502	Vt. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Vt. R. Evid. 510	*Upjohn* "Subject Matter Test" VT. R. EVID. 502(a)(2)(B); *see also Baisley v. Missisquoi Cemetery Ass'n* , 708 A.2d 924 (Vt.1998)
Virginia	Va. Sup. Ct. R. 2:502	Va. Sup. Ct. R. 4:1	Yes, both opinion and ordinary work product protected	Va. Code Ann. § 8.01-420.7	Upjohn "Subject Matter Test" Virginia Elec. and Power Co. v. Westmoreland – LG&E Partners, 526 S.E.2d 750 (Va. 2000).

Wash.	WASH. REV. CODE ANN. 5.60.060	Wash. Super. Ct. Civ. R. 26	Yes, both opinion and ordinary work product protected	Common Law	Upjohn "Subject Matter Test" Wright by Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984).
W. Va.	W. Va. R. Evid. 501	WV R FRCP Rule 26	Yes, both opinion and ordinary work product protected	W. Va. R. Evid. 502	Not Yet Decided
Wisconsin	Wis. Stat. Ann. § 905.03	Wis. Stat. Ann. § 804.01	yes, both opinion and ordinary work product protected	Wis. Stat. Ann. § 905.11	Upjohn "Subject Matter Test" Herget v. Northwestern Mut. Life Ins. Co., 487 N.W.2d 660 (Wisc.Ct.App. 1992)
Wyoming	Wyo. Stat. Ann. § 1-12-101	Wyo. R. Civ. P. 26	Yes, both opinion and ordinary work product protected	Common Law	Not Yet Decided

CO-CLIENT EXCEPTION



APPLIES WHERE:

One lawyer represents **two or more persons** in the **same matter**

RULE:

Communications by one client in presence of the other are privileged as to third persons.

Co-client may not waive privilege as to other co-client's communications.

If document embodies communications from two or more co-clients, all co-clients must agree to waive privilege.

Unless otherwise agreed, communications between lawyer and one client are not confidential as to the other client in subsequent adverse action (regardless if client seeking communications was present).

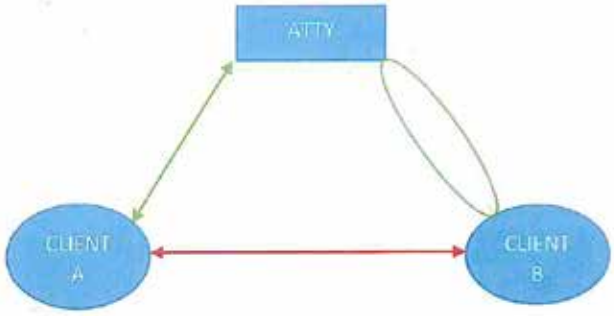


Illustration: Communications between the attorney and either Client A or B (or both) are privileged as to third persons; communications between Client A and B are not.

In a subsequent adverse action, Client A would be entitled to communications between the attorney and Client B even if Client A was not present.

COMMON INTEREST EXCEPTION

APPLIES WHERE:

Two or more clients who (1) share a common interest; (2) are represented by **separate lawyers;** and (3) **agree to exchange information**

RULE:

Communication by a person to attorney for another person who shares a common interest, as well as communications between lawyers for parties sharing a common interest, are privileged as to (1) other members of common interest group and (2) third persons if disclosure is in furtherance of common interest.

Agreement need not be in writing.

Common interest member may not waive privilege as to other member's communications.

Unless otherwise agreed, communications disclosed to members of common interest group are not confidential as to the other members of the common interest group in subsequent adverse action between any of them.

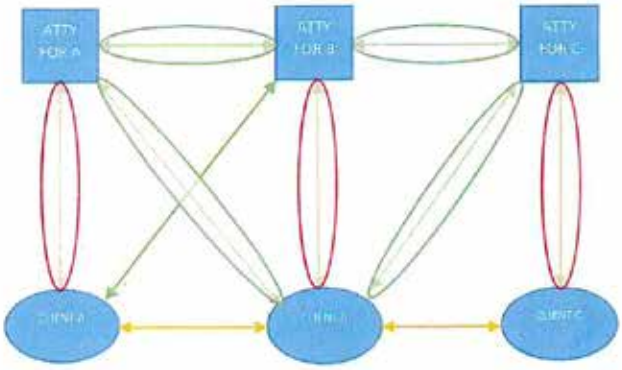
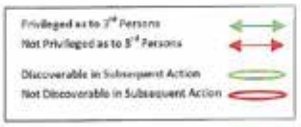


Illustration: If A's attorney shares privileged communications with B's attorney, those communications are privileged as to third persons. Privileged communications between A and its attorney are likewise privileged as to third persons even if B and its attorney are present. Communications between A and B's attorney are likely privileged, as well. But communications strictly between A and B may not be.

In a subsequent adverse action, Client A would be entitled to any communications B (or his attorney) disclosed to A's attorney or to another member of the common interest group.

JOINT DEFENSE AGREEMENT



APPLIES WHERE:

Two or more clients who (1) share a common interest; (2) are represented by **separate lawyers;** and (3) **agree to exchange information**

RULE:

Communication by a person to attorney for another person who shares a common interest, as well as communications between lawyers for parties sharing a common interest, are privileged as third persons if disclosure is in furtherance of common interest.

Agreement only protects communications that were privileged in the first place; it does not create new privilege.

Parties may agree to shield information from one another in subsequent adverse litigation.

Agreement to shield information from one another may be unenforceable in bankruptcy where it frustrates the Trustee's statutory duties, particularly where agreement was entered in contemplation of bankruptcy.

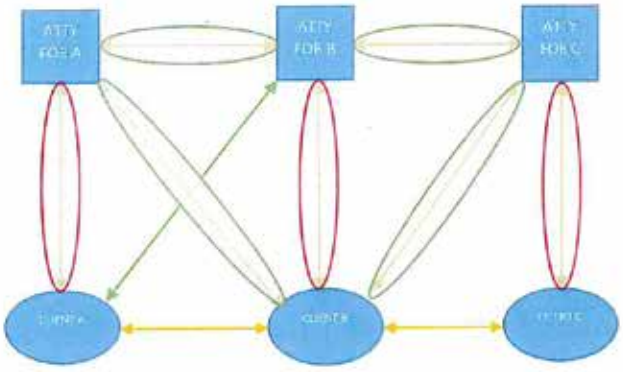


Illustration: If A's attorney shares privileged communications with B's attorney, those communications are privileged as to third persons. Privileged communications between A and its attorney are likewise privileged as to third persons even if B and its attorney are present. Communications between A and B's attorney are privileged, as well. But communications strictly between A and B may not be.

In a subsequent adverse action, Client A would not be entitled to any communications B (or his attorney) disclosed to A's attorney or to another member of the common interest group. But if A filed for bankruptcy, Trustee may be able to obtain information shared with others in spite of written joint defense agreement.