

**INGHAM COUNTY BAR ASSOCIATION
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**ATTORNEY-CLIENT PRIVILEGE AND ETHICAL DUTIES OF CONFIDENTIALITY:
CURRENT ISSUES AND PRACTICAL CONCERNS**

PANELISTS

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Overview of Attorney-Client Privilege and Confidentiality

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Privilege Concerns and Issues in Civil Practice

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Ethical Issues Relating to Duty of Confidentiality

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Criminal Practice – Privilege and Confidentiality

OVERVIEW OF ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY

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1. Difference between attorney-client privilege and ethical duty of confidentiality

A. Common law attorney-client privilege:

“The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents. The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice.” *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618-619 (1998)

B. Duty of confidentiality – MRPC 1.6

2. Elements and Issues:

A. Communications between a client and an attorney

- Pre-engagement communications – prospective clients
- Individual vs. entity clients

“Where an attorney’s client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication.” *Reed, supra*.

- Joint representation

Privileged if (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived *In the Matter of Bevill, Bresler & Schulman Asset Management Corporation*, 805 F2d 120, 126 (CA3 1986).

- Government agencies
- Trustees and receivers

B. Which are confidential

- Reasonable expectation of confidentiality
- Subjective intent of client which must be objectively reasonable
 - Presence of others
 - Setting of communication
 - Nature of communication
 - Steps to preserve confidentiality
- Communications made for the purpose of disclosure to third parties are not privileged. *Yates v Keane*, 184 Mich App 80, 83 (1990).
- Documents prepared and disclosed to third persons are not “confidential communications.” Preliminary drafts containing information which has not been disclosed to third parties are generally protected by the privilege. *In re Grand Jury Subpoena*, 731 F2d 1032, 1037 (CA2 1984);

C. Which are made for the purpose of obtaining legal advice

- Privilege attaches to communications by a client to (1) an attorney acting as a legal advisor and (2) made for the purpose of obtaining legal advice.
 - Non-legal services – presumption that attorney is acting as legal advisor
- Privilege applies to attorney’s opinions, conclusions and recommendations communicated to client. *Hubka v Pennfield Twp*, 197 Mich App 117, 121-122 (1992)
- Facts vs. communications
 - While confidential communications between attorney and client are protected, the privilege does not extend to facts included in such communications. *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 451-452 (1995).
 - The facts known by the client are not privileged, even if the source for that factual knowledge is communications from the attorney. *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 450 (1995).

- Billing and time records
 - “Attorney billing statements and time records are protected by the attorney-client privilege only to the extent that they reveal litigation strategy and/or the nature of services performed.” *United States v Keystone Sanitation Co*, 885 F Supp 672, 675 (MD Pa 1994)

3. Waiver

A. Duty to assert privilege on behalf of client

- The attorney-client privilege is personal to the client, and only the client can waive it. *Schaibly v Vinton*, 338 Mich 191; 61 NW2d 122 (1953); *Leibel v General Motors Corporation*, 250 Mich App 229, 240; 646 NW2d 179 (2002); *Ravary v Reed*, 163 Mich App 447, 453; 415 NW2d 240 (1987)(quoting *Passmore v Passmore’s Estate*, 50 Mich 626, 627; 16 NW 170 (1883))
- An attorney is obligated to assert privilege on behalf of current and former clients. *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 539; 599 NW2d 493 (1999); *Fisher v United States*, 425 US 391, 402 n 8; 96 S Ct 1569; 48 L Ed2d 39 (1976).
- MRPC 1.6(b) prohibits an attorney from knowingly revealing a client confidence or secret except if authorized by Rule 1.6(c). MRPC 1.9 prohibits disclosure of information relating to a former representation except as permitted or required by MRPC 1.6 or 3.3.

B. Express waiver

- An express or “true” waiver requires an intentional and voluntary relinquishment of the privilege by the client. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 616; 600 NW2d 66 (1999). This can occur through intentional disclosure of communications to a third party. *Oakland Co Prosecutor v Dep’t of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997).
- Intended but unauthorized disclosure - Majority rule: voluntary disclosure by attorney is binding on client
- Voluntary uses – disclosure to experts and witnesses

C. Implied Waiver

- An implied waiver only occurs when there is evidence sufficient to demonstrate an intent to waive or a lack of intent to preserve the privilege. *Co-Jo, Inc v Strand*, 226 Mich App 108, 572 NW2d 251, 253 (1998); *Sterling v Keidan*, 162 Mich App 88 (1987).
- Inadvertent disclosure
 - No waiver occurs by inadvertent disclosure. *Franzel v Kerr Mfg*, 234 Mich App 600, 614 (1999).
 - Waiver through inadvertent disclosure requires a finding of no intent to maintain confidentiality or circumstances evidencing a lack of such intent. *Sterling v Keidan*, 162 Mich App 88, 96 (1987).
- Technology traps
 - Email
 - Metadata

D. “At issue” or “fairness” waiver

- “[A] privilege can be waived through conduct that would make it unfair for the holder to insist on the privilege thereafter.” *Howe v Detroit Free Press, Inc*, 440 Mich 203, 214 (1992).
- Waiver occurs when a client asserts a claim that makes the attorney’s knowledge or communications relevant to a substantive issue. *People v Houston*, 448 Mich 312 (1995).
- A party may impliedly waive his or her privilege by injecting issues into litigation, either as a claim or defense. *City of Farmington Hills v Farmington Hills Police Officers Ass’n*, 79 Mich App 581 (1977); *Kelsey-Hayes Co v Motor Wheel Co*, 155 FRD 170 (WD Mich 1991).

- Michigan follows the flexible balancing analysis from *Greater Newburyport Clamshell Alliance v Public Service Co of New Hampshire*, 838 F2d 13 (CA1 1988). *Howe, supra*.

1. A court should begin its analysis with a presumption in favor of preserving the privilege.
2. The burden of establishing a waiver rests on the party seeking discovery.
3. Discovery, if allowed, should be narrowly limited to those portions of the privileged material that bear directly on the issues at hand.
4. The interests to be balanced include:
 - (a) The rule favoring broad discovery
 - (b) The importance of the issue to the litigation
 - (c) The impact of disclosure on the rationale for the privilege

E. “Self-defense” exception to allegations raised by non-client

Meyerhofer v Empire Fire & Marine Ins Co, 497 F2d 1190 (CA2 1974); *Restatement (Third) of The Law Governing Lawyers* § 64.

F. Scope of waiver

- “Subject matter” waiver – extends to other communications which are related to same matter and Total v partial
- Selective waiver

In re Columbia/HCA Healthcare Corp Billing Practices Litigation, 293 F3d 289 (CA6 2002)

4. Exceptions to privilege

A. Crime-fraud exception

- Privilege does not protect communications intended to further current or future fraudulent or criminal conduct. *People v Paasche*, 207 Mich App 698, 705 (1994).
- Client's intent to further crime or fraud is determinative. Knowledge or ignorance of attorney is irrelevant. *In re Grand Jury Investigation*, 842 F2d 1223 (CA11 1987)
- Communications must be "in furtherance" of current or future wrongdoing

B. Fiduciary actions

- Action between organization and parties to whom it owed fiduciary duties. *Garner v Wolfinbarger*, 430 F2d 1093, 1102-1104 (CA5 1970)

HELPFUL RESOURCES AND LINKS

Rice, *Attorney-Client Privilege in the United States* (West Group 2d ed. 1999)

Rice, *Attorney-client Privilege: State Law* (Rice Publishing 2000).

Gergacz, *Attorney-Corporate Client Privilege* (West Group 3d ed. 2007)

ALI-ABA, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and Work Product Doctrine*, SM090 ALA-ABA 481 (2007)

State Bar of Michigan Task Force on Attorney-Client Privilege, Final Report to Representative Assembly (2007)

available at www.mdmc.org/pdf/attorney-client%20privilege.pdf

American Bar Association, Task Force on the Attorney-Client Privilege, Report (2005)

available at www.abanet.org/buslaw/attorneyclient/home.shtml

Allen, *Responding to Subpoenas to Lawyers and Law Firms* (ICLE, November 2007)

Association of Corporate Counsel, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*

available at www.acc.com/public/article/attyclient/postenron.pdf

American Bar Association, Committee on Pretrial Practice & Discovery, *Protecting the Privilege in e-Discovery*, Vol 14, Number 2 (Winter 2006)

Hill & Johnson, *The Impact of Electronic Data upon an Attorney's Client*, 54 Fed'n Def & Corp Counsel Q 95 (2004)

Bernstein & Harvey, *Ethics and Privilege in the Digital Age*, 39 Trademark Rep 1240 (2003)

Employee E-Mail and the Attorney-Client Privilege

available at www.law.com/jsp/llf/PubArticleLLF.jsp?id=1194343439816