MRE 501
Privilege; General Rule

Privilege is governed by the common law, except as modified by statute or court rule.

History
501 New eff. Mar 1, 1978

I. Explanation and Practice Tips

§501.1

Under MRE 501, privileges are governed by statutes, the common law, and court rules. Privilege rules preclude evidence regardless of whether it is unfairly prejudicial. The rules are based on public policy reasons for protecting certain interests and relationships.

Privileges are not ironclad and may yield to overriding considerations, especially those involving constitutional rights. *Davis v Alaska*, 415 US 308 (1974); *see also People v Stanaway*, 446 Mich 643, 521 NW2d 557 (1994) (various statutory privileges must yield to right of confrontation), *cert denied,* 513 US 1121 (1995); *People v Rohn*, 98 Mich App 593, 296 NW2d 315 (1980) (statutory privilege for presentencing reports yields to right of confrontation), *overruled on other grounds by People v Perry*, 460 Mich 55, 594 NW2d 477 (1999). A court should make privilege determinations outside the presence of the jury so that it may consider the substance of the proposed testimony.

Because the law of privilege is continually evolving, new privileges may be created. However, "[e]videntiary privileges in litigation are not favored," *Herbert v Lando*, 441 US 153, 175 (1979), because "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v Nixon*, 418 US 683, 710 (1974). Thus privileges should be narrowly defined and the exceptions to them broadly construed. *People v Warren*, 462 Mich 415, 615 NW2d 691 (2000); *People v Fisher*, 442 Mich 560, 574, 503 NW2d 50 (1993). For example, in *Fisher,* a case addressing the use of a spousal statement in a presentence report, the supreme court held that the marital communications privilege is testimonial only, which means that the spouse must testify for it to apply. *Id.* at 575. Accordingly, if a third party comes to possess, either directly or inadvertently, information that would be protected by the privilege from disclosure in court, the statutory privilege does not bar presentation of that evidence if it is otherwise admissible or if the rules of evidence do not apply.

Evidentiary privilege should be distinguished from the privileges or immunities asserted as defenses to certain torts. For example, legislative privilege renders communications in legislative proceedings immune from defamation actions. However, these communications are not necessarily privileged for evidentiary purposes and may be used in other actions, such as for intentional interference with contracts or conspiracy in restraint of trade. *Domestic Linen Supply & Laundry Co v Stone*, 111 Mich App 827, 837–838, 314 NW2d 773 (1981).

Practice Tip:

- *If a privilege does not apply, the information may still be protected from disclosure by another exclusionary rule. For example, a communication from an attorney may not be privileged, but it might be protected by the attorney work-product doctrine.*

A privilege is no longer available if waived, which, ordinarily, requires "'an intentional, voluntary act and cannot arise by implication,' or 'the voluntary relinquishment of a known right.'" *Franzel v Kerr Mfg Co*, 234 Mich App 600, 616, 600 NW2d 66 (1999) (quoting *Sterling v Keidan*, 162 Mich App 88, 95–96, 412 NW2d 255 (1987)). As a result, inadvertent disclosure does not waive a privilege, nor is a privilege deemed abrogated simply because a third party has obtained the same information from an independent source. *Leibel v GMC*, 250 Mich App 229, 241, 646 NW2d 179 (2002). However, in *Sterling,* 162 Mich App at 96, it was recognized that an "omission to speak or act" can work a waiver. There comes a point when inaction must be recognized as tantamount to acquiescence.

Practice Tip:

- *A witness who is exempted from testifying on the ground of privilege is considered unavailable under MRE 804(a)(1). Accordingly, a prior statement by the witness concerning the subject may be admissible if it fits within a hearsay exception listed under MRE 804(b) and is not itself protected under a rule of privilege.*

In *Howe v Detroit Free Press, Inc*, 440 Mich 203, 487 NW2d 374 (1992), plaintiffs asserted the statutory privilege that protects the contents of probation reports from disclosure to the public, MCL 791.229. The statute does not contain a good cause or other express provision for waiver. Nevertheless, the court found authority for the proposition that a privilege may be waived implicitly by conduct that would make insistence on the privilege by the holder unfair. The court applied the balancing analysis enunciated in *Greater Newburyport Clamshell Alliance v Public Serv Co*, 838 F2d 13 (1st Cir 1988), which gave the following guidelines: First, the party seeking discovery should demonstrate that the material is relevant to the case. Second, that party should show why it would be unreasonably difficult to obtain the information elsewhere or that redundant information would be helpful. The party does not have to prove that the information is absolutely unavailable from other sources.

II. Annotations

A. Accountant-Client Privilege

1. In General

§501.2

Michigan recognizes an accountant-client privilege, which is set forth in MCL 339.732:

> (1) Except by written permission of the client or the heir, successor, or personal representative of the client to whom the information pertains, a licensee, or a person employed by a licensee, shall not disclose or divulge and shall not be required to disclose or divulge information relative to and in connection with an

examination or audit of, or report on, books, records, or accounts that the licensee or a person employed by the licensee was employed to make. Except as otherwise provided in this section, the information derived from or as the result of professional service rendered by a certified public accountant is confidential and privileged.

(2) Subsection (1) does not prohibit any of the following:

(a) A certified public accountant, whose professional competence has been challenged in a court of law or before an administrative agency, from disclosing information otherwise confidential and privileged as part of a defense in the court action or administrative hearing.

(b) The disclosure of information required to be disclosed in the course of practice monitoring programs and ethical investigations conducted by a licensed certified public accountant. In such cases, the information disclosed to another licensed certified public accountant in the course of practice monitoring programs and ethical investigations is confidential and privileged to the same degree and in the same manner as provided for in subsection (1).

(c) A licensee, or a person employed by a licensee, from disclosing information otherwise privileged and confidential to appropriate law enforcement or governmental agencies when the licensee, or person employed by the licensee, has knowledge that forms a reasonable basis to believe that a client has committed a violation of federal or state law or a local governmental ordinance.

(3) Documents or records in the possession of the department pertaining to a review, an investigation, or disciplinary actions under this article are exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, unless the records or documents are used for either or both of the following purposes:

(a) As evidence in a contested case held by the department.

(b) As a basis for formal action by the department and until the action is resolved by a final order issued by the board.

2. Cases

§501.3

People v Paasche, 207 Mich App 698, 525 NW2d 914 (1994). The purpose behind the accountant-client privilege is to protect from disclosure the substance of information conveyed by the client to the accountant. Thus as set forth in MCL 339.732(2)(c), the privilege does not apply when the advice that the client sought refers to ongoing or future wrongdoing.

Practice Tip:

- *Many federal courts have declined to recognize the accountant-client privilege. Thus the privilege may not apply in federal court.*

People v Simon, 174 Mich App 649, 436 NW2d 695 (1989). The privilege did not extend to defendant's accountant where the accountant was not a certified public accountant (CPA) or the employee of a CPA.

People v Safiedine, 163 Mich App 25, 414 NW2d 143 (1987). In a tax fraud case, the testimony of defendant's accountant was not privileged. The privilege protects the substance of the information conveyed to the accountant, not the existence of the professional relationship, the accountant's general procedures, or identification of the accountant's signature or the accounting firm's stamp.

B. Attorney-Client Privilege

1. In General

§501.4

Swidler & Berlin v United States, 524 US 399 (1998). The attorney-client privilege survives even after the client dies. While the exception to the rule for testamentary disclosure furthers the deceased client's intent, disclosure for other purposes, such as that proposed in a posthumous criminal investigation are contrary to the purpose of the rule and may well discourage a client from confiding in an attorney for fear that the information will later be divulged.

People v Waclawski, 286 Mich App 634, 780 NW2d 321 (2009). The privilege applies to confidential communications that a client makes to an attorney acting as a legal adviser and for the purpose of obtaining legal advice. The purpose of the privilege is to allow clients to confide in their attorneys secure in the knowledge that the communications will not be disclosed.

Taylor v Blue Cross & Blue Shield, 205 Mich App 644, 517 NW2d 864 (1994). The privilege attaches to communications a client makes to the attorney acting as a legal advisor and for the purpose of obtaining legal advice.

2. Attorney-Client Relationship

§501.5

Koster v June's Trucking, Inc, 244 Mich App 162, 625 NW2d 82 (2000). There is no attorney-client relationship between an insurer and the attorney retained to represent its insured, and thus the insurer cannot assert any attorney-client privilege.

Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC, 107 Mich App 509, 309 NW2d 645 (1981). An attorney for a corporation has an attorney-client relationship with the corporation, not with its shareholders.

3. Scope

§501.6

People v Nash, 418 Mich 196, 341 NW2d 439 (1983). Admission of a police officer's testimony that incriminating evidence had been seized from defense counsel's office violated defendant's attorney-client privilege.

Franzel v Kerr Mfg Co, 234 Mich App 600, 600 NW2d 66 (1999). The attorney-client privilege applies when privileged material has been inadvertently disclosed absent a waiver of the privilege. During discovery, plaintiff obtained a letter written by defendant's former lawyer to defendant's vice president of human

resources concerning plaintiff. Because the letter was not intentionally presented to plaintiff by defendant or its counsel, there was no waiver of the attorney-client privilege. The trial court therefore improperly admitted the letter into evidence.

McCartney v Attorney Gen, 231 Mich App 722, 587 NW2d 824 (1998). A written memorandum prepared by the attorney general's staff that recounted an employee's discussions with the governor's office regarding recommendations, opinions, and legal advice to the governor's office was subject to the attorney-client privilege and thus was exempt from disclosure under the Freedom of Information Act (FOIA).

People v Whitney, 228 Mich App 230, 578 NW2d 329 (1998). The court, citing *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 425 NW2d 695 (1988), noted that the attorney-client privilege exemption to the Open Meetings Act authorizes closed sessions to discuss written, not oral, legal opinions, provided they are legitimately related to legal matters, not bargaining, economics, or other tangential nonlegal matters. Oral and written legal opinions were discussed in closed session, but the discussion involved nonlegal matters related to the city manager position.

Reed Dairy Farm v Consumers Power Co, 227 Mich App 614, 576 NW2d 709 (1998). The trial court did not abuse its discretion in ruling that plaintiff could compel the deposition of defendant's in-house paralegal. The court noted that where, as here, an attorney's client is an organization, the attorney-client privilege extends to communications between an attorney and agents or employees authorized to speak on its behalf as to the communications. The court found that the paralegal, who merely signed his name to the interrogatories, lacked first-hand knowledge of the answers, was not privy to confidential attorney-client communications, and did not participate in trial strategy or preparation. Therefore although the paralegal was defendant's employee, he was not defendant's agent, authorized to speak on its behalf. Moreover, the court noted that the attorney-client privilege is narrow in scope, limited to confidential communications between employee and counsel, not to facts. The court concluded that the attorney-client privilege could not be used because the information sought was not confidential and involved discovery of essential facts not covered by privilege.

Co-Jo, Inc v Strand, 226 Mich App 108, 572 NW2d 251 (1997). The trial court did not abuse its discretion in excluding, based on attorney-client privilege, defendant's statement made to the insurer's attorney, who was retained to represent the two defendants in a possible action arising out of a fire. Although defendant inadvertently mentioned the statement during his trial testimony, there was no waiver because the statement's content was not divulged and there was no intent to waive the privilege.

Fruehauf Trailer Corp v Hagelthorn, 208 Mich App 447, 528 NW2d 778 (1995). A client may not be compelled to reveal what the client said or wrote to an attorney. However, the client may not refuse to disclose any relevant fact within the client's knowledge merely because he or she incorporated a statement of that fact into communications with the attorney. Corporate employees are bound by the attorney-client privilege not to reveal confidential communications with coun-