

5.03. Attorney (CPLR 4503)

(a) 1. Confidential communication privileged.

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

2. Personal representatives.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement

between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

(B) For purposes of this paragraph, “personal representative” shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate’s court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly

provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; “beneficiary” shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate’s court procedure act and “estate” shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate’s court procedure act.

(b) Wills and revocable trusts.

In any action involving the probate, validity or construction of a will or, after the grantor’s death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

Note

This rule is reproduced verbatim from CPLR 4503 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4503:1-C4503:7).

CPLR 4503 (a) (1) codifies the attorney-client privilege as recognized under the common law (*see Hurlburt v Hurlburt*, 128 NY 420, 424 [1891] [describing the predecessor statute as a “mere re-enactment of the common law”]).

CPLR 4503 (a) (2) abolishes the “fiduciary exception” to the privilege regarding communications between counsel and a personal representative of a decedent’s estate.

CPLR 4503 (b) creates a statutory exception to the privilege where the confidential communication between a deceased client and the client’s attorney involves the preparation, execution, or revocation of any will of that client or other relevant instrument.

The Court of Appeals has long viewed the attorney-client privilege as premised on the rationale that “one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment” (*Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). Such disclosure enables the attorney to act more effectively and expeditiously, thereby “ultimately promoting the administration of justice” (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 592 [1989]).

For the privilege to apply, an attorney-client relationship must exist, and such relationship “arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services” (*Priest*, 51 NY2d at 68-69). Once such relationship is established, the privilege will encompass a confidential communication made between the client and attorney, which was made for the purpose of obtaining or providing legal assistance to the client (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]; *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]). Communications that relate solely to nonlegal personal or business matters fall outside the privilege (*Spectrum Sys.* at 378 [“The communication itself must be primarily or predominantly of a legal character”]).

Confidentiality of the communication is the pillar of the attorney-client privilege (*see United States v Tellier*, 255 F2d 441, 447 [2d Cir 1958] [“It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential”]). This key element of the privilege requires that, at the time of the communication between the client and the attorney, it was made in confidence and with the intent and reasonable expectation that the communication would not be disclosed to persons outside the attorney-client relationship (*see People v Osorio*, 75 NY2d 80, 84 [1989]; *People v Harris*, 57 NY2d 335, 343 [1982] [“Generally, communications made in the presence of third parties, whose presence is known to the (client), are not privileged”]; *Baumann v Steingester*, 213 NY 328, 331-333 [1915]). The element of confidentiality also requires that confidentiality be maintained (*see Osorio*, 75 NY2d at 84).

An exception to the general rule that the presence of a third party precludes a finding of confidentiality is the judicially recognized “common interest exception” (*see generally Ambac*, 27 NY3d at 625-630). Under this exception, where two or more clients separately retain counsel to advise them on matters of common legal interest, confidential communications that are revealed to one another for the purpose of furthering a common legal interest retain their confidential status (*id.* at 625).

The privilege may extend to confidential communications between the agents of the client and agents of the attorney, provided they are assisting in the legal representation involved (*Rossi*, 73 NY2d at 592-593 [corporate staff

attorney]; *Osorio*, 75 NY2d at 84 [an interpreter acting as “agent of either attorney or client to facilitate communication”]; *Matter of Putnam*, 257 NY 140, 143-144 [1931] [clerical staff]). Communications between the attorney and a consultant retained by the attorney to assist the attorney in providing legal services to the clients and not for testifying, e.g., an accountant, economist, or investment banker, may also be protected by the privilege (*see United States v Kovel*, 296 F2d 918, 921-922 [2d Cir 1961]; *compare Gottwald v Sebert*, 161 AD3d 679, 680 [1st Dept 2018] [“The communications between her counsel and press agents do not reflect a discussion of legal strategy relevant to the pending litigation but, rather, a discussion of a public relations strategy, and are not protected under the attorney-client privilege”]).

Certain details about the attorney-client relationship are not protected by the privilege. In *Matter of Priest v Hennessy*, the Court held that fee arrangements between attorney and client, including the amount of the retainer and the identity of a person paying the fee, do not ordinarily constitute a confidential communication and thus are not privileged in the usual case (51 NY2d at 69; *see also Eisc Trading Corp. v Somerset Mar.*, 212 AD2d 451 [1st Dept 1995] [time records and billing statements are not within attorney-client privilege if devoid of detailed information regarding the nature of services]). In *Matter of Jacqueline F.* (47 NY2d 215, 220-222 [1979]), the Court explained that while it is “generally stated” that a client’s identity (including the client’s whereabouts) is not privileged, “the rule in New York is not so broad as to state categorically that the privilege never attaches to a client’s identity.” *Jacqueline F.* noted, for example, that a client’s identity “must be disclosed where the question of identity arises during the course of litigation” and “absent other circumstances, an attorney cannot be compelled to reveal a client’s identity where the latter is not a party to a pending litigation” (*id.* at 220; CPLR 3118). Other circumstances in which disclosure of the client’s identity may be compelled include: “where an ‘attorney’s assertion of the privilege is a cover for co-operation in wrongdoing’ ”(*id.*); where there exists a legitimate “fear of reprisal” should the whereabouts of the client be disclosed (*id.* at 222); and where the client, as in *Jacqueline F.*, leaves the jurisdiction in an attempt to thwart the mandate of a court ordering the client to return custody of a child to her parents.

CPLR 4503 (a) permits the privilege to be invoked in any judicial, administrative, or legislative proceeding. Unless the client has waived the privilege, the attorney, the attorney’s employees, the client, the client’s agents, and an eavesdropper cannot be compelled in any such proceeding to disclose a privileged communication.

In addition to the exception to the privilege set forth in CPLR 4503 (b), New York courts have created exceptions. They include:

- crime-fraud exception (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003] [privilege “may

not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct”]);

- fiduciary exception (*NAMA Holdings, LLC v Greenberg Traurig LLP*, 133 AD3d 46, 52 [1st Dept 2015] [“In the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a ‘fiduciary exception’ to the privilege that otherwise attaches to communications between management and corporate counsel”]);
- attorney-client dispute exception (*see Matter of Glines v Estate of Baird*, 16 AD2d 743, 743-744 [4th Dept 1962] [“(T)he rule as to privileged communications does not apply when litigation arises between an attorney and client to the extent that their communications are relevant to the issue”]; *People v Mendoza*, 240 AD2d 316, 316 [1st Dept 1997] [defendant waived the attorney-privilege “by volunteering his claim that counsel, among other things, had coerced him to testify falsely at the suppression hearing”]); and
- public policy exception (*Priest*, 51 NY2d at 69 [“(E)ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure”]).

As CPLR 4503 (a) recognizes, the client may waive the privilege (*see generally* Barker & Alexander, Evidence in New York State and Federal Courts § 5:10 [2d ed]). Waiver involves a loss of the privilege which occurs subsequent to the privilege having attached to the communication involved (*Harris*, 57 NY2d at 343 n 1). A waiver may occur in a myriad of situations. Waiver will be present, for example:

- when the client gives authority to an agent to waive the privilege (*People v Casas*, 84 NY2d 718, 722 [1995]);
- when the client discloses the communication to another person (*People v Patrick*, 182 NY 131, 175 [1905]);
- when the client is a defendant in a criminal case and places his sanity in issue, the privilege is waived as to communications between the defendant and a psychiatrist retained by the attorney, and the psychiatrist may accordingly testify for the prosecution that he determined that the defendant was sane (*People v Edney*, 39 NY2d 620, 625 [1976]).

The Appellate Division departments have uniformly held that an inadvertent disclosure does not automatically result in a waiver of the privilege. Rather, the party making the disclosure may avoid a finding of waiver by showing:

(1) the party had no intention to disclose the matter and took reasonable steps to prevent any disclosure;

(2) the party promptly took reasonable steps to rectify its mistake upon discovery of the disclosure; and

(3) the party in possession of the matter will not be prejudiced if it cannot use the matter (*see e.g. New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 172 [1st Dept 2002]; *AFA Protective Sys., Inc. v City of New York*, 13 AD3d 564, 565 [2d Dept 2004]; *McGlynn v Grinberg*, 172 AD2d 960, 961 [3d Dept 1991]; *Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 399-400 [4th Dept 1987]).

A corollary to the attorney-client privilege is an attorney's ethical obligation, in the absence of a client's consent or waiver or certain exceptions, to "not knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.6 [a]).