



2018

§5.12 Communication

Christopher B. Mueller
University of Colorado Law School

Laird Kirkpatrick
George Washington University Law School, lkirkpatrick@law.gwu.edu

Liesa Richter
University of Oklahoma College of Law

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

Mueller, Christopher B. and Kirkpatrick, Laird C. and Richter, Liesa, §5.12 Communication (2018). C. Mueller, L. Kirkpatrick, & L. Richter, Evidence §5.12 (6th ed. Wolters Kluwer 2018); GWU Law School Public Law Research Paper No. 2018-61; GWU Legal Studies Research Paper No. 2018-61. Available at SSRN: <https://ssrn.com/abstract=3276982>

This Chapter is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

§5.12 Communication

The attorney-client privilege applies only to confidential communications. “Communications” are usually made orally or in writing¹ although expressive nonverbal conduct such as nodding, pointing, reenactment of a past event, or similar behavior intended as a substitute for words can also be a communication.² Conduct by the client that is not communicative is outside the privilege.³ Silence or nondisclosure by the client is privileged only if it constitutes a statement or tends to reveal the scope of a protected communication.⁴

Observations by attorney

One cannot invoke the privilege to keep the attorney from testifying to observations about the client’s appearance, dress, physical condition, demeanor, or conduct, at least where such matters would be generally observable by others.⁵ Thus a lawyer may have to disclose that her client came to a meeting in an inebriated condition (because anyone who saw the client could observe this fact), but need not disclose (indeed cannot ethically disclose) that the client rolled up his sleeve and displayed a knife wound from a fight that led the client to seek legal representation (because ordinary observers would not see the wound, and because rolling up the sleeve in such circumstances is essentially a confidential communication). Courts often require lawyers to testify about the client’s mental condition or competency, however, at least to the extent that it does not reveal the client’s confidential communications.⁶

§5.12 1. *United States v. Spector*, 793 F.2d 932, 938 (8th Cir. 1986) (defendant’s recorded statements, made at lawyer’s direction to assist in defense, were privileged), *cert. denied*, 479 U.S. 1031.

2. Restatement (Third) of the Law Governing Lawyers §69 and cmt. e (privileged communication is “any expression” through which privileged person “undertakes to convey information to another privileged person and any document or other record that embodies such expression”; the privilege extends to “nonverbal communicative acts intended to convey information”). *See generally* Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 Iowa L. Rev. 811 (1981).

3. *In re Grand Jury Proceedings*, 13 F.3d 1293, 1296 (9th Cir. 1994) (privilege does not apply to attorney’s observation of client’s expenditures on European trip; such information does not involve confidential communications).

4. *United States v. White*, 950 F.2d 426, 430 n.2 (7th Cir. 1991) (nondisclosure of assets by bankruptcy client to attorney was not privileged; nondisclosure was not communication but “lack” thereof); *United States v. Andrus*, 775 F.2d 825, 852 (7th Cir. 1985). *But see* *United States v. Marable*, 574 F.2d 224, 231 (5th Cir. 1978).

5. *See In re Walsh*, 623 F.2d 489, 494 (7th Cir. 1980) (lawyer’s observations of client’s appearance, including complexion, demeanor, and dress, were not privileged), *cert. denied*, 449 U.S. 994.

6. *See* §5.20, *infra*. *See also* *United States v. Nelson*, 732 F.3d 504, 519 (5th Cir. 2013) (lawyer’s trial testimony that she and client read stipulated factual basis for plea together, discussed it at length, and that client “understood” and

The identification of a client's photograph or handwriting is not privileged⁷ nor is identification of a client's clothing, jewelry, briefcase, or other physical items in the possession of the client, except (as noted above) where the client shows such items to the lawyer as a means of communicating or explaining to the lawyer some point that is relevant to the legal services that the client is seeking.⁸ The privilege generally does apply to knowledge that the attorney acquires in investigating and thus confirming or refuting what the client has told him: If the client tells the lawyer in a privileged communication that there was blood on the floor of the living room of the client's house and the lawyer goes and looks and sees the blood, this confirming knowledge is within the privilege.⁹

The only communications protected by the privilege are those made by the client, the client's representative, the lawyer, or the lawyer's representative.¹⁰ Communications from third parties to the lawyer are not within the attorney-client privilege even if they are later transmitted to the client.¹¹

The attorney-client privilege does not prevent compelled disclosure either during discovery or at trial of relevant facts known to the client. Only the communications to the attorney are privileged, not the facts as the client knows them.¹² Similarly the privilege does not protect facts as known by the lawyer, when that knowledge does not rest on confidential communications from the client, although such independent knowledge is often within work product protection. Courts are understandably cautious about ordering a lawyer to testify, however, not only because doing so would have a disruptive effect on the work of the lawyer and his relationship with the client, but because of the likelihood that any information he could provide is within either privilege or work product protection.¹³

"agreed" with it violated privilege; error harmless).

7. *In re Grand Jury Proceedings*, 791 F.2d 663, 665 (8th Cir. 1986) (attorney compelled to authenticate signatures and photographs of client before grand jury; appearance and handwriting are not confidential communications; they were not exposed on "assumption that others would not learn of them").

8. *See, e.g., In re January 1976 Grand Jury (Gensen)*, 534 F.2d 719, 728-729 (7th Cir. 1976) (privilege inapplicable to money that client transfers to attorney) (suspected proceeds of bank robbery).

9. *Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir. 1985) (privilege applies to location of incriminating receipts examined by attorney, but it was lost when attorney removed receipts), *cert. denied*, 475 U.S. 1088. *See also* §5.21, *infra*, discussing privilege in connection with objects that client delivers to lawyer.

10. *See* proposed-but-rejected FRE 503(b); URE 502(b) (1999).

11. *See, e.g., In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (privilege does not apply "when an attorney conveys to his client facts acquired from other persons or sources").

12. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (privilege "only protects disclosure of communications," not "disclosure of the underlying facts" by those who communicated with attorney).

13. *See Southern Film Extruders, Inc. v. Coca-Cola Co.*, 117 F.R.D. 559, 561 (M.D.N.C. 1987) (client entitled to

Writings or other recorded statements

Confidential written communications by the client to the attorney for the purpose of obtaining legal advice are privileged, as are drawings, sketches, or diagrams made by the client to elucidate the legal problem for the attorney. A client cannot, however, cloak preexisting documents with immunity by turning them over to her attorney.¹⁴ If the documents were prepared for business or other purposes, and not a confidential communication to the attorney, they are not privileged.¹⁵ Thus, for example, a client's personal diary is normally not privileged even if turned over to the attorney to inform him about relevant events, although entries making specific reference to attorney-client communications may be within the privilege.¹⁶

Normally the writing must have been created for the primary purpose of communicating with the attorney. Sometimes, however, the client has more than one purpose, and sends an original letter or message to a lawyer and also a copy to someone else, or sends the original to someone else with a copy to the lawyer. In this situation, if the other person is not within the privilege, there is also no protection for whatever went to the lawyer. Conceivably, however, what the lawyer received may be within the attorney-client privilege if what was sent to the other fits some other privilege (such as the privilege for spousal confidences), and if the purpose of sending the matter to the lawyer was to obtain legal services.

If a writing is subject to subpoena, discovery, or search warrant when in the possession of the client, it remains so after transfer to the lawyer.¹⁷ But if the document is privileged in the hands of the client, the attorney-client privilege applies if the client turns it over to the lawyer in confidence

protective order against attempt to take deposition of lawyer, absent showing by discovery seeker showing propriety of inquiry and need for deposition). *But see* United States v. Segal, 811 F.3d 257, 264 (7th Cir. 2016) (district court erred in refusing to allow defendant's attorney to testify about content of drafts of settlement agreement with government on the basis of privilege; testimony would focus on lawyer's personal knowledge of settlement drafts and not on confidential client communications).

14. United States v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) (privilege does not attach to preexisting document transferred to lawyer if it could have been obtained by process from client when he was in possession).

15. *See, e.g.,* RBS Citizens, N.A. v. Husain, 291 F.R.D. 209, 218 (N.D. Ill. 2013) (a document is not privileged if it is "prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested"); Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314, 324 (7th Cir. 1963) (privilege "would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure"), *cert. denied*, 375 U.S. 929.

16. Moore v. Tri-City Hosp. Auth., 118 F.R.D. 646, 650 (N.D. Ga. 1988) (privilege applies to diary entries that describe communications from attorneys or are based on such communications).

17. *See* Fisher v. United States, 425 U.S. 391, 403-404 (1976) (courts uniformly hold that "pre-existing documents which could have been obtained by court process from the client" may also be obtained from the attorney "following transfer by the client in order to obtain more informed legal advice").

in the course of seeking legal advice.¹⁸

When an attorney prepares a document in a professional capacity on the client's behalf, courts generally hold that the content of the document is privileged to the extent it reflects confidential client communications.¹⁹ Information on the existence, execution, or delivery of such a document is, however, normally not privileged.²⁰

Similarly the privilege is not applicable to the attorney's work product except where it records or otherwise reveals confidential client communications.²¹ Thus witness lists, time sheets, appointment diaries, phone logs, and accounting records of the attorney are normally outside the privilege, even though they may merit work product protection if prepared in preparation for litigation.²²

Communications from the attorney

Although the privilege was developed to protect confidential disclosures by the client to the attorney, it applies as well to communications from the attorney to the client, at least to the extent that such communications would tend to reveal confidences of the client.²³ Indeed, most courts go further than that, and hold that the privilege extends to legal advice given by the attorney, regardless whether it would reveal a confidential client communication.²⁴ The trend of modern

18. *Fisher v. United States*, 425 U.S. 391, 403-404 (1976) (client would be reluctant to transfer privileged documents to lawyer unless they "are also privileged in the latter's hands" and purposes of privilege "would be defeated" unless it applies).

19. *See United States v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981) (client's will in custody of attorney was privileged and beyond the reach of an IRS subpoena), *cert. denied*, 454 U.S. 862.

20. *United States v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997) (fact that client transferred document to attorney not privileged; fact of delivery was not communication).

21. *See United States v. Willis*, 565 F. Supp. 1186, 1194 (S.D. Iowa 1983) (privilege protects attorney's notes and research materials to extent they reflect confidential communications).

22. *See, e.g., United States v. Amerada Hess Corp.*, 619 F.2d 980, 986-987 (3d Cir. 1980) (list of persons interviewed not privileged); *Gannet v. First Natl. State Bank of New Jersey*, 546 F.2d 1072, 1076 (3d Cir. 1976) (privilege does not attach to attorney's bank records), *cert. denied*, 431 U.S. 954.

23. *See, e.g., In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010) (privilege extends to communications from attorney to client that would reveal confidences of client); *United States v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2016) (although lawyer's communications with private investigator hired to assist client may be privileged, lawyer's recorded conversations with private investigator were not privileged where they revealed no client confidences, either directly or indirectly).

24. *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir. 1990) (communications from attorney to client are privileged if they constitute legal advice).

authority is toward recognition of a two-way privilege covering all confidential communications between the attorney and the client in the course of legal representation.²⁵ Both proposed FRE 503(b) and URE 502(b) adopt the broader view and make the lawyer's communications to the client privileged as well as the client's communications to the lawyer.

The broader rule is justified on grounds of both pragmatism and policy. Because most communications by the attorney are likely to reflect client communications, a two-way privilege furthers judicial efficiency by eliminating the need for case-by-case examination. Also, under the broader rule, attorneys can speak more freely with their clients without concern that their statements might later be subject to compelled disclosure. In short, applying the privilege to what the lawyer says to the client makes eminent sense. After all, the point of the privilege is to protect what ought to be confidential conversations, and it makes little sense to treat one half of such conversations as confidential and private while treating the other half as if the two were talking on a stage with an audience looking on and listening in.

25. *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370-1372 (10th Cir. 1997) (privilege protects communications from attorney to client as well as client to attorney); *United States v. Ramirez*, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979) (states are "divided" on whether communications from attorney to client are privileged, but federal courts generally hold that "communications in both directions" are covered). *Cf. Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (purpose of privilege is "to encourage full and frank communications *between* attorneys and their clients") (emphasis added).