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

§501.1 MRE 501 leaves privileges to be governed by statutes, the common law, and court rules. Most exclusionary rules are designed to preclude unfairly prejudicial evidence. Rules of privilege, however, preclude evidence, whatever its nature; the rules are based on public policy reasons for protecting certain interests and relationships.

A witness who is exempted from testifying about a subject 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.

The law of privilege is not ironclad. A privilege may have to 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 Freeman*, 406 Mich 514, 280 NW2d 446 (1979) (doctor-patient privilege yields to right of confrontation); *People v Wadkins*, 101 Mich App 272, 300 NW2d 542 (1980) (right of defendant to present witnesses on his or her behalf may override spousal privilege); *People v Rohn*, 98 Mich App 593, 296 NW2d 315 (1980) (statutory privilege for presentencing reports yields to right of confrontation). In *Wadkins,* the court of appeals suggested that if an asserted privilege conflicts with a constitutional right, the court should weigh the probable significance of the testimony in the case at hand, the nature and underlying policy of the privilege involved, and the possibility of obtaining similar nonprivileged testimony. The court should make its determination outside the hearing of the jury so it may hear and consider the substance of the proposed testimony.

Because the law of privilege is continually evolving, new privileges may be created. For example, several jurisdictions have held that there is a privilege for communications between parent and child; several others have denied these communications privileged status. Michigan is among the states that do not recognize a parent-child testimonial privilege. *People v Dixon*, 161 Mich App 388, 411 NW2d 760 (1987). Excellent discussions of the issue and authority on both sides appear in *In re Grand*

Jury Proceedings, 103 F3d 1140 (3d Cir 1997), *cert denied sub nom Roe v United States*, 520 US 1253 (1997), and in *In re Agosto*, 553 F Supp 1298 (D Nev 1983).

Evidentiary privilege should be distinguished from the privileges or immunities asserted as defenses to certain torts. For example, legislative privilege renders many communications in legislative proceedings immune from action for defamation. Yet these communications are not necessarily privileged for all evidentiary purposes. They may be used as evidence 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).

A privilege is no longer available if truly 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. See, e.g., *Harmony Gold USA v FASA Corp*, 169 FRD 113 (ND Ill 1966), and *Baxter Travenol Labs, Inc v Abbott Labs*, 117 FRD 119 (ND Ill 1987), in which belated claims of privilege were held to be ineffective.

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.

For discussion of specific privileges recognized in Michigan, see "Cases Interpreting MRE 501." When assessing the applicability of a privilege, you should remember that 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,* the supreme court held that the marital communications privilege is testimonial only, which means that it applies only to testimony sought in open court. *Id.* at 575. The privilege does not apply in other situations. 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. In *Fisher,* the supreme court found no error in the nontestimonial use of a spouse's state-

ments. The information, to which the wife could not have testified, had found its way into a presentence report.

II. Practice Suggestions

§501.2 Freedom of Information Acts

While not an evidentiary matter, state and federal Freedom of Information Acts (FOIA) might play a role in acquiring information for use at trial. The attorney should consider these acts for available sources of information and for the restrictions placed on disclosure. The Michigan FOIA is found at MCL 15.231 et seq., and the federal FOIA appears at 5 USC 552.

III. Prior Michigan Law

§501.3 MRE 501 carries forward prior Michigan law with respect to privileges, whether that law is by common law or statute. Prior law in connection with specific privileges is discussed in "Cases Interpreting MRE 501."

IV. Federal Rule

§501.4 FRE 501, like the Michigan rule, defers to common law as modified by statute and court rule on matters of privilege. When a federal civil action addresses an element governed by state law, the state law of privilege prevails.

FRE 501reads as follows:

> **Rule 501. Privilege in General**
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> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
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> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

V. Cases Interpreting MRE 501

A. Accountant-Client Privilege

1. In General

§501.5

MCL 339.732 reads as follows:

> (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

§501.6

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 the information conveyed by the client to the accountant. This purpose ceases to operate when the advice that the client sought refers to ongoing or future wrongdoing. [*Note:* Since the 2005 amendments to MCL 339.732, the accountant-client privilege also does not apply when the accountant has a reasonable basis to believe that the client *has* violated a law in the past.]

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

§501.7

Swidler & Berlin v United States, 524 US 399 (1998). The United States Supreme Court held that the attorney-client privilege survives even after the client dies. In *Swidler & Berlin,* the Court stated that the privilege has been consistently

accepted by an overwhelming majority of courts as continuing beyond the client's death. While the exception to the rule for testamentary disclosure furthers the deceased client's intent, disclosure for other purposes, such as that proposed in this case, 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.

Atlanta Int'l Ins Co v Bell, 438 Mich 512, 475 NW2d 294 (1991). There is no attorney-client relationship between an attorney hired by an insurer to defend its insured and the insurer. The fact that the insurer pays the attorney directly rather than reimbursing the insured does not change the fact that the attorney represents the client and owes a duty only to the client. By signing the insurance contract, the insured consents to a waiver of confidentiality with regard to the insurance contract and agrees to cooperate in the defense of a claim.

Alderman v People, 4 Mich 414 (1857). The privilege attaches to communications a party makes to an attorney acting as the party's legal adviser for the purpose of obtaining the attorney's legal opinion on a right or obligation.

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.

Kubiak v Hurr, 143 Mich App 465, 372 NW2d 341 (1985). 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.

Parker v Associates Disc Corp, 44 Mich App 302, 205 NW2d 300 (1973). The purpose of the privilege is to facilitate communications between the client and legal counsel.

2. Attorney-Client Relationship

§501.8

Atlanta Int'l Ins Co v Bell, 438 Mich 512, 475 NW2d 294 (1991). There is no attorney-client relationship between an insurer and an attorney the insurer hires to defend its insured. The attorney represents and owes a duty only to the insured, even if the insurer pays the attorney directly.

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

§501.9

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.