

Attorney-Client Privilege and Attorney Work Product Issues in Discovery

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Attorney Client Privilege and Work Product: Similar but Different

- Attorney Client Privilege - applies to confidential communications between an Attorney and Client:
 - Absolute Privilege
 - Court cannot order disclosure without a waiver
 - Applies to all confidential communications unless waived
 - Belongs to the Client
 - Waiver must be by words or actions of the client, *not* the attorney
 - Attorney has a duty to assert on behalf of client

Attorney Client Privilege and Work Product: Similar but Different

- Attorney Work Product
 - A Qualified Immunity, not an absolute privilege
 - May be released upon showing that:
 - Party seeking the information has substantial need of the materials in preparation of the case and
 - Party is unable without undue hardship to obtain the equivalent of the information by other means.
 - *But-* the Court may not permit disclosure of mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party (with one exception).
 - Protects “materials prepared in anticipation of litigation”
 - By counsel consultant, surety, indemnitor, insurer or agent
 - Work Product does not protect materials prepared in the regular course of business

What is the Purpose of Protecting the Attorney Client Privilege and Attorney Work Product?

- Attorney Client Privilege: the belief that only “full and frank” communications between attorney and client allow the attorney to provide the best counsel...benefits out-weighing the risks of truth-finding posed by barring full disclosure in court... *In re Death of Miller*, 357 NC at 329.
- Work Product: “discovery was hardly intended to enable a learned profession to perform its functions wither without wits or on wits borrowed from the adversary.” *Hickman v. Taylor*, 329 US 495, 516 (1947).

Attorney-Client Privilege: Elements

1. The relationship of attorney and client existed when the communication was made;
2. The communication was made in confidence;
3. The communication concerns a matter about which the attorney is being professionally consulted;
4. The communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated; and
5. The client has not waived the privilege.

(The burden is on the party asserting the privilege to demonstrate each of its essential elements.)

In re Investigation of Death of Miller, 357 N.C. 316, 335-36 (2003)

Attorney-Client Privilege: General Requirements

- ▶ Communication
- ▶ Between a client
- ▶ And a lawyer
- ▶ That is confidential
- ▶ And concerns legal advice for a proper purpose



In re Death of Miller, 357 NC 316, 584 SE2d 772 (2003)

- ▶ Dr. Eric Miller died from arsenic poisoning;
 - ▶ Shortly before his death, Miller was bowling with co-workers of his wife, Ann Miller;
 - ▶ Bowling party included Mr. Willard, who was romantically involved with Mrs. Miller;
 - ▶ While bowling, Miller took a drink of beer that he described as “tasting funny”
 - ▶ Miller later hospitalized and died:
 - ▶ Upon Miller’s death, Mrs. Miller directed that the body be cremated;
 - ▶ Mr. Willard hired an attorney, met with him, then committed suicide before being interviewed by police;
 - ▶ According to Mrs. Willard, attorney advised Mr. Willard that he could be charged with the attempted murder of Dr. Miller;
 - ▶ District Attorney sought an order from the Superior Court compelling Willard’s attorney to disclose his conversation with Willard.
- ▶ *ISSUE: Can the Court order disclosure by the attorney of conversations with a deceased client?*

Disclosure of Confidential Matters When Necessary to a Proper Administration of Justice

GS 8-53. Communications between physician and patient.

* * *

Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin.

Any resident or presiding judge in the district, either at the trial or prior thereto,... may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

Court Ordered Disclosure

- ▶ Privileges in which judge can order disclosure notwithstanding the privilege:
 - ▶ Physician-Patient Privilege (GS 8-53)
 - ▶ Psychologist-Patient Privilege (GS 8-53.3)
 - ▶ School Counselor Privilege (GS 8-53.4)
 - ▶ Marital and Family Therapy Privilege (GS 8-53.5)
 - ▶ Social Worker Privilege (GS 8-53.7)
 - ▶ Professional Counselor Privilege (GS 8-53.8)
 - ▶ Optometrist-Patient Privilege (GS 8-53.9)

- ▶ Privileges in which judge is not granted statutory authority to order disclosure of privileged information:
 - ▶ Clergy-Communicant Privilege (GS 8-53.6)
 - ▶ Information obtained during marital counseling by a licensed physician, licensed psychologist, licensed psychological associate, licensed clinical social worker, or licensed marriage and family therapist with respect to testimony in alimony or divorce actions (GS 8-53.6)
 - ▶ Attorney-Client Privilege

In re Death of Miller (cont'd)

- ▶ Holdings:
 - ▶ The Attorney Client Privilege survives the death of the client;
 - ▶ NC GS 32-27 does not empower an executor or executrix to waive a decedent's Attorney-Client Privilege;
 - ▶ Unlike "statutory" privileges, there is no provision for Attorney Client privileged communications to be ordered disclosed "when necessary for a proper administration of justice."
 - ▶ *BUT---*

In re Death of Miller (cont'd)

Elements of Attorney Client Privilege

1. The relationship of attorney and client existed when the communication was made;
2. The communication was made in confidence;
3. The communication concerns a matter about which the attorney is being professionally consulted;
4. The communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated; and
5. The client has not waived the privilege.

► *Note:* Elements 3 and 4 *may not apply* when the conversations relate only to a third party and not to the culpability of the client...

Confidentiality of Communication v. Culpability of a Third Party

Confidential:

1. When disclosure might subject the client to criminal liability;
2. When disclosure might subject the client or client's estate to civil liability;
3. When disclosure might harm the client's loved one or his reputation.

SUMMARY OF HOLDING:

When a client is deceased, the court may conduct an *in camera* review to determine if any of the communications are outside the scope of the privilege. If they relate to a third party, communications may be released only upon a clear and convincing showing that disclosure will not: (1) expose client's estate to civil liability or (2) likely result in additional harm to loved ones or reputation.

In re Death of Miller: Epilogue

- ▶ After an *in camera* review, Willard's communications with his attorney about Mrs. Miller were found to be outside the attorney client privilege;
- ▶ In 2005, Ann Miller Kontz pled guilty to second degree murder and conspiracy to commit first degree murder in connection with the death of her former husband.
- ▶ She was sentenced to a minimum of 25 years in prison.
- ▶ Sounds like an episode of Dateline or 48 Hours?
<http://www.dailymotion.com/video/x3sejcc>

Communications Outside the Privilege

- A communication is not confidential when made in the presence of another person whose presence is not essential to the communication. *State v. Van Latingham*, 283 N.C. 589, 602 (1973) (wife); *State v. Murvin*, 304 N.C. 523, 531 (1981) (aunt and friend).
- A communication is not confidential when the client intends that his or her communications be conveyed to a third party.
 - *State v. McIntosh*, 336 N.C. 517, 524 (1994) (the defendant's statement to his lawyer that he wanted to surrender to law enforcement was not privileged because the defendant intended statement to be conveyed to third party);
 - *State v. Watkins*, 195 N.C. App. 215, 223 (2009) (a conversation between a defendant and his lawyer was not privileged when the defendant told his lawyer to convey the information to a prosecutor to show what testimony the defendant could offer against his co-defendants).

Attorney-Client Relationship

- Existence of an attorney-client relationship is an essential element;
- The identity of a client by his or her attorney is not barred by the privilege. *State v. Tate*, 294 NC 189, 239 SE2d 821 (1978).
- The privilege applies to communication between the attorney and the client, including those made in the presence of those acting as the attorney's or client's agents.
- Court appointed counsel has a statutory duty to disclose that the client is no longer indigent. GS 7A-450(d).

Concerning Matter about Which the Attorney Was Consulted

The communication must relate to the matter for which the attorney was employed or consulted. *State v. Murvin*, 304 N.C. 523, 531 (1981) (the privilege did not apply to an affidavit when the defendant employed the attorney to represent her on receiving stolen goods charged and the affidavit had been prepared because the defendant was a witness to unrelated murder).

Communication Made to Give/Seek Legal Advice for Proper Purpose

The communication must be made in seeking or giving legal advice for a proper purpose.

- The privilege does not cover advice being sought for a contemplated violation of law.
- A lawyer may reveal information otherwise subject to privilege to the extent lawyer reasonably believes necessary to prevent commission of a crime by client. N.C. REV. R. PROF. CONDUCT, 1.6(b)(2) (2015)

Who “Owns” the Privilege?

The privilege belongs to the client. When an attorney is called as a witness in any criminal or civil proceeding to testify about a client or is otherwise ordered to reveal information relating to the client's representation, the attorney must assert all non-frivolous claims of the privilege on the client's behalf, absent the client's informed consent to reveal the information. N.C. REV. R. PROF. CONDUCT, 1.6, Comment 14 (2015).

Privilege is Shield Not a Sword

- When client sues his attorney or otherwise alleges that the attorney provided incompetent representation, the client may not assert the privilege concerning the matter in issue. N.C. REV. R. PROF. CONDUCT, 1.6(b)(6) (2015);
- By asserting ineffective assistance of counsel, a defendant waives both attorney-client and work product privileges, but only concerning matters relevant to allegations of ineffective assistance of counsel. *State v. Taylor*, 327 N.C. 147, 152 (1990);
- Statute now provides the scope of a waiver of privilege when a motion for appropriate relief alleges ineffective assistance of counsel. The trial judge has inherent authority to order disclosure. *See also State v. Buckner*, 351 N.C. 401, 407-11 (2000).

Waiver by Claim of Ineffective Assistance

State v. Taylor, 327 NC 147, 393 SE2d 801 (1990)

- ▶ Case pre-dates NC codification of criminal discovery and GS 15A-1415(e)
- ▶ By alleging IAC in his MAR, Defendant waived the benefits of both the attorney-client privilege and the work product privilege
- ▶ Waiver is only with respect to matters relevant to the allegations of ineffective assistance of counsel.
- ▶ Superior Court exceeded its authority in ordering Defendant to provide the State access to “all files relating to these cases.”

NC GS 15A-1415(e): (enacted in 1996, subsequent to *State v. Taylor*)

Where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, he shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

Waiver by Claim of Ineffective Assistance: *State v. Buckner*, 351 NC 401, 527 SE2d 307 (2000)

- ▶ Waiver of privilege by alleging IAC does not extend to the entire file
- ▶ Waiver is with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness.
- ▶ Waiver by claiming IAC extends to both Attorney Client Privilege and Work Product, including notes, observations and mental processes of the attorney relevant to the IAC claim.
 - ▶ *Note that Taylor and Buckner carve out an exception to the Rule previously stated that a court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney...*
- ▶ Extent of the waiver will be linked to the broadness of the claim of IAC;
- ▶ Upon disagreement, court must conduct *in camera* review to determine what is relevant to the claim of IAC;

Work Product

- ▶ Information compiled by the attorney, staff or the client in preparation for the litigation
- ▶ Attorney-Client Privilege is an absolute privilege unless waived; Work Product is a qualified privilege, which
 - ▶ May be ordered disclosed upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means...BUT
 - ▶ The court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

Att'y-Client Privilege and Work Product

Attorney-Client Privilege: <i>Communication between a client and a lawyer that is confidential and concerns legal advice</i>	Work Product: <i>Documents and materials prepared by the lawyer or client in anticipation of litigation</i>
Any receipt of legal services	Only in anticipation of litigation
Communications between client & lawyer	Any documents prepared
Absolute privilege	Qualified for facts about the dispute

Examples of Work Product: Criminal Cases

Work Product:

- ▶ State is not required to disclose written materials drafted by the prosecuting attorney or legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements and closing arguments. NC GS 15A-904(a).
- ▶ State is not required to disclose legal research, records, correspondence, reports, memoranda or trial preparation interview if such documents contain the opinions, theories, strategies or conclusions of the prosecuting attorney or legal staff.
- ▶ Interview notes reflecting prosecutor's theories, mental impressions, strategies and conclusions are protected.

Not Work Product:

- ▶ Materials prepared by non-legal staff or by personnel not employed by the prosecutor's office, such as law enforcement officers.
- ▶ Interview notes reflecting a witness's statements, whether prepared by prosecutor, legal staff or law enforcement.

Examples of Work Product: Criminal Cases

Work Product:

Mental processes of the prosecuting attorney

Not Work Product:

Factual information collected by the State

Examples of Work Product: Civil Cases

Work Product:

- ▶ Communications between counsel and an expert witness, except as noted below. *NC RCP 26(b)(4)e*.
- ▶ Notes and mental impressions of the attorney or legal staff, including highlighting or condensation of discovery provided by opposing party. *Boyce & Isley, PLLC v. Cooper*; 195 NC App 625, 673 SE2d 694 (2009).

Not Work Product

- ▶ Communication between counsel and an expert witness that
 1. Relate to compensation for the expert's study or testimony
 2. Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed.
 3. Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. *NC RCP 26(b)(4)e*.

Disclosure of Attorney Work Product

“only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Rule 26(b)(3).

WHAT DOES THIS MEAN?

WHAT IS THE STANDARD FOR MAKING THIS DETERMINATION?

Disclosure of Attorney Work Product

- ▶ A decision to grant or deny a Motion to Compel Discovery is within the trial court's sound discretion and will not be reversed, absent an abuse of discretion. *Patrick v. Wake County Dept of Human Servs.*, 188 NC App 592, 655 SE2d 920 (2008).
- ▶ Work Product protection should be narrowly construed consistent with its purpose to safeguard the lawyer's work in developing his client's case. *Willis v. Duke Power Co.*, 291 NC 19, 229 SE2d 191 (1976).
- ▶ An order directing the disclosure of claimed Work Product materials will not be reversed unless it appears it was manifestly unsupported by reason and so arbitrary that it could not have been the result of a reasoned decision. *Maldjian v. Bloomquist*, ___ NC App ___, 782 SE2d 80 (2015).
 - ▶ *Practice Pointer*: A good way to demonstrate a reasoned decision is to use an *in camera* review in making the determination.

Tools for Determining Privilege and Work Product

- ▶ *In Camera* Review of materials
- ▶ Use of a Privilege Log

In Camera Review of Materials

- ▶ Mandatory or Discretionary?
- ▶ In a civil case, the trial court *may* require an *in camera* inspection of documents to determine if they are work-product. *Willis v. Duke Power Co.*, 291 NC 19, 36, 229 SE2d 191, 201 (1976);
- ▶ Trial court *must* conduct *in camera* review when there is a dispute as to the scope of a defendant's waiver of the attorney-client privilege... when a defendant has asserted an ineffective assistance of counsel claim. *State v. Taylor*, 327 NC 147, 155, 393 SE2d 801, 807 (1990)
- ▶ *Practice Pointer*: when in doubt, *conduct an in camera review* of the matters in question. *Be sure that the materials are kept under seal.*

The Privilege Log

- ▶ More commonly used in civil cases
- ▶ Rule 26(b)(5): When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must
 - (i) expressly make the claim and
 - (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
- ▶ *Sessions v. Sloane*, ___ NC App ___, 789 SE2d 844 (2016)
 - ▶ Good sample of a Privilege Log
 - ▶ Problem: Defendant submitted privilege log, but did not request *in camera* review of materials. *Held*, the decision not to conduct an *in camera* review, in the absence of a request, lies within the discretion of the trial court. 789 SE2d at 857.