

WASHINGTON PRACTICE SERIES™

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EVIDENCE LAW AND PRACTICE

Fifth Edition

By

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Member of the Washington Bar

Rules 405 to 615

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PRIVILEGES

§ 501.23

Other lawsuits by former clients have resulted in waivers as well.¹²

The client likewise waives the privilege by claiming ineffective assistance of counsel, at least to the extent necessary for others to respond to allegations of inadequate representation.¹³

If the attorney commences an action against the client, as for example to collect a fee, the client waives the privilege by asserting a counterclaim against the attorney.¹⁴ The client may also waive the privilege by asserting affirmative defenses that call into question the nature and quality of the attorney's work.¹⁵

An attorney or client does not waive the privilege by simply asserting the existence of a valid claim or defense in communications with oppos-

Bieter Co. v. Blomquist, 156 F.R.D. 173 (D. Minn. 1994) (when client sued attorney for malpractice, privilege was waived as to defendant attorney and another attorney who was not named as a defendant but who represented the plaintiff on related matters).

In-house communications

When a client sues a law firm for malpractice, the privilege is clearly waived as to communications between the client and the attorney allegedly at fault. A second issue, however, is whether any privilege attaches to *in-house* communications among attorneys in the firm, as they discuss possible defenses against the malpractice action. The short answer is yes, but the firm's fiduciary duty to the client may trump the privilege and require disclosure of in-house communications that took place while the firm was still representing the client. Privilege issues quickly become intertwined with ethical issues. See *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wash. App. 309, 111 P.3d 866 (Div. 1 2005).

The *VersusLaw* case is discussed in Fucile, Mark J., *Keeping Counsel: The Attorney-Client Privilege Within Law Firms*, Wash. St. Bar News, January 2006, 32-33.

See also Chambliss, Elizabeth, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721-1767 (2005).

¹²Other lawsuits

State v. McDonald, 96 Wash. App. 311, 979 P.2d 857 (Div. 1 1999), *aff'd*, 143 Wash. 2d 506, 22 P.3d 791 (2001) (defendant's conversations with standby public defender were initially

privileged, but defendant waived privilege by filing civil suit against public defender in federal court).

¹³Ineffective assistance of counsel

State v. Cloud, 95 Wash. App. 606, 976 P.2d 649 (Div. 1 1999) (but claim of ineffective assistance did not entitle former defense attorney to intervene in later proceeding, to protect his personal and professional reputation).

¹⁴A counterclaim

Pappas v. Holloway, 114 Wash. 2d 198, 787 P.2d 30 (1990) (in an action in which an attorney sued to collect a fee for representing the client in an earlier case, and the client counterclaimed for malpractice, the client's counterclaim waived the privilege both as to the attorney who was allegedly negligent and as to other attorneys who had represented the client in the earlier case; the court also held that the communications sought to be discovered were not protected by the work-product rule).

¹⁵Affirmative defenses

Stern v. Daniel, 47 Wash. 96, 91 P. 552 (1907) ("[A]s between the attorney and client the rule of privilege will not be enforced where the client charges mismanagement of his cause by the attorney, as was the case here, and where it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney, or when it would be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights.").

ing counsel. If a waiver resulted from such communications, the privilege would be rendered useless and attorneys would be unable to represent clients effectively.¹⁶

In a criminal case, a plea of insanity waives the attorney-client privilege (and the physician-patient privilege)¹⁷ as to statements made to a psychiatrist who is retained by the attorney as part of the defense team.¹⁸ A plea of diminished capacity likewise waives any such privilege.¹⁹

Deliberate disclosures during discovery. The privilege is waived if the client deliberately testifies as to privileged matters during a deposition,²⁰ or if the client deliberately provides privileged materials in response to other requests for discovery.²¹

Inadvertent disclosures. A much-debated question is whether the

¹⁶**Asserting valid claim or defense**

Seattle Northwest Securities Corp. v. SDG Holding Co., Inc., 61 Wash. App. 725, 812 P.2d 488 (Div. 1 1991) (no waiver found).

¹⁷**And physician-patient**

See § 501.58.

¹⁸**Plea of insanity**

State v. Pawlyk, 115 Wash. 2d 457, 800 P.2d 338 (1990) (in prosecution for murder in which the defendant pleaded insanity, the prosecution was allowed to subpoena a defense psychiatrist as a witness, even though the psychiatrist had been privately retained by defense counsel and had been retained as a consultant rather than as a potential witness; the court rejected a defense argument that the attorney-client privilege applied because the psychiatrist was part of the defense team; the court cited the time-honored rule that "when a defendant pleads mental irresponsibility, every act of his life is admissible").

State v. Bonds, 98 Wash. 2d 1, 653 P.2d 1024 (1982) (prosecution was properly allowed to call a court-appointed psychiatrist who had testified on defendant's behalf in an earlier proceeding).

State v. Jones, 99 Wash. 2d 735, 664 P.2d 1216 (1983) (similar).

¹⁹**Diminished capacity**

State v. Hamlet, 83 Wash. App. 350, 921 P.2d 560 (Div. 1 1996), aff'd, 133 Wash. 2d 314, 944 P.2d 1026 (1997)

(in prosecution for assault in which defendant pleaded diminished capacity, State was properly allowed to call as a witness a psychiatrist who had been retained as a consultant by the defense; the appellate court also affirmed the trial court's decision to allow the psychiatrist to reveal to the jury that he had originally been retained by the defendant, though the appellate court did express some doubt about the wisdom of this practice).

In affirming the Court of Appeals in *Hamlet*, the Supreme Court seemingly offered something for everyone, holding: (1) the psychiatrist's testimony was not barred by the attorney-client privilege; but (2) some of the psychiatrist's testimony was unfairly prejudicial to the defendant and should have been excluded under Rule 403, but (3) the error was harmless because it was unlikely to have affected the outcome at trial.

²⁰**Deliberately testifies**

A client waived the privilege by testifying as to privileged matters during a deposition in *Hulse v. Arrow Trucking Co.*, 161 N.C. App. 306, 587 S.E.2d 898 (2003) (client waived privilege as to handwritten responses to interrogatories, faxed to client's attorney, when client testified during deposition that his handwritten answers were more accurate than the typewritten answers prepared by his attorney).

²¹**Deliberately provides materials**

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