

Chapter 25

PRIVILEGES

QUICK VIEW

Definitions: A privilege is the right of a person to refuse to disclose (or to compel others to refuse to disclose) certain information that would otherwise be obtainable. For public policy reasons, the law has determined to permit certain kinds of information to remain secret. For example, confidential communications between attorney and client, or physician and patient, or with a member of the clergy, or between spouses have been deemed “privileged” by the Legislature. Similarly, a person may not be compelled to divulge information that would incriminate that person, and a journalist may not be compelled to reveal confidential sources. In addition, some kinds of information — such as tax returns, trade secrets and the like — are so inherently confidential that the courts have erected barriers to their disclosure.

Scope of Chapter: Rules and techniques applicable to all privileges. Specific rules and techniques applicable to the following privileges: lawyer-client, work product, joint-defense, self critical analysis, self incrimination, trade secrets, physician-patient, mental health communications, spousal communications, communications to clergy, news media sources, and litigation settlement and mediations.

Purposes and Policies: Privileges arise in a variety of contexts, and are based on different policy goals. Some of the main public policies regarding privileges are to:

- Encourage people to seek professional advice, and freely disclose information to the adviser, without fear the facts will be made public.
- Encourage open communications between husband and wife, thereby preserving the sanctity of marriage.
- Prevent competitors from gaining access to the crux of the a business operation or method of gaining success.
- Prevent excessive or brutal persuasion of witnesses to force testimony or statements that may or may not be true.

I. GENERAL CONCEPTS

A. Overview

1. DEFINITIONS; PURPOSES

§25:01 Privileges Defined

Certain kinds of confidential communications are deemed “privileged” for evidence and discovery purposes. Each rule has its own requirements and peculiarities. However, all privileges have a number of features in common:

- A privilege is a right to exclude particular material from discovery and from trial.
- Each privilege has at least one holder. [See §25:06.] The holder has standing to invoke the privilege, and the sole right to waive the privilege.
- The holder (and others with standing to claim a privilege for the holder) may invoke an applicable privilege both to refuse to disclose and to prohibit others from disclosing potential evidence. [For asserting privilege, see §25:40 *ff.*]
- Each privilege has a public policy goal. (For example, the attorney-client privilege exists to encourage clients to be open with their attorneys, without fear of disclosure by the attorney of personal or possibly harmful information.) The cost of pursuing these policy goals is the potential exclusion from discovery and trial of otherwise discoverable and admissible evidence. To that extent, privileges obstruct liberal discovery and the search for truth.
- To limit truth concealment as much as possible, privileges are construed narrowly.
- Privileges can mandate conduct. That is, some privileges (e.g., the attorney-client, physician-patient, and clergyman privileges) impose, or enable the holder to impose, a legal obligation on others (a) not to disclose privileged information, and (b) to assert the privilege (i.e., refuse to testify or produce evidence) on the holder’s behalf.

Matter of Warrington (State of New York), 303 NY 129, 135, 100 NE2d 170 (1951).]

Communications are not privileged purely because of their confidentiality, but may be kept secret only if premised upon a public policy expressed by statute or in furtherance of an overriding public concern of constitutional dimension. [*Perry v. Fiumano*, 61 AD2d 512, 516, 403 NYS2d 382 (4th Dept 1978); *Pickard & Anderson v. Young Men’s Christian Association*, 119 AD2d 976, 500 NYS2d 874 (4th Dept 1986).]

§25:03 Construed Narrowly

The public policy of protecting certain relationships is made at the cost of losing otherwise admissible and presumably reliable evidence in the search for truth. Since this results in roadblocks along the path to truth, logic suggests that privileges should be construed narrowly.

And narrow construction is the approach with respect to the attorney-client privilege. [*Doe v. Poe*, 244 AD2d 450, 664 NYS2d 120 (2d Dept 1997); *Arnold Constable Corp. v. Chase Manhattan Mortgage and Realty Trust*, 59 AD2d 666, 389 NYS2d 285 (1st Dept 1977).]

However, the physician-patient privilege is to be given a broad and liberal construction to carry out its policy. [*People v. Sinski*, 88 NY2d 487, 492, 646 NYS2d 651 (1996).] Accordingly, the statutes that limit the privilege are narrowly construed, and claims that there is a general public interest exception to the privilege are rejected. [*People v. Sinski*, 88 NY2d 487, 492, 646 NYS2d 651 (1996).]

§25:04 Statutory Absolute Privileges

The statutorily created privileges are generally absolute. Thus, the following privileges are enforceable unless there are specific statutory exceptions, or extraordinary circumstances, or the holder waives the privilege:

- The privilege against self-incrimination. [CPLR

- The social worker privilege. [CPLR 4508; see §25:220 *ff.*]
- The rape crisis counselor privilege. [CPLR 4510; see §25:230 *ff.*]

Similarly, the attorney work product privilege is absolute. [CPLR 3101(c); see §25:130.] However, the material created for litigation privilege is qualified. It is enforced only in the absence of a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. [CPLR 3101(d)(2)]

§25:05 Common Law Qualified Privileges

Some qualified privileges have been created by the courts, relying on their power to make protective orders that deny, limit, condition or regulate the use of any disclosure device. [CPLR 3103(a).]

However, courts are hesitant to do this, and generally defer to the Legislature for the creation of any new evidentiary privilege. [*Lamitie v. Emerson Electric Co. - White Rodgers Div.*, 142 AD2d 293, 298-299, 535 NYS2d 650 (3d Dept 1988) (rejecting a request to create a “critical self-analysis privilege”).]

When courts have created privileges, they have made them qualified, holding that the material need not be disclosed absent a strong showing of need on the part of the demanding party. Courts have established privileges for:

- Tax returns.
- Trade secrets. [See §25:170 *ff.*]
- Informants to the police or prosecutors. [See §25:301.]
- Communications to and among public officers. [See §25:300.]
- Parent-child communications. [See §25:260.]

§25:06 Who Controls the Privilege?

A privilege is held or controlled by the person

- The penitent controls the clergy privilege. [See §25:270.]
- The client controls the psychologist, social worker and rape crisis counselor privileges. [See §25:210 *ff.*]
- The communicating spouse controls the spousal privilege. [See §25:240.]
- The witness controls the privilege against self-incrimination. [See §25:153.]

EXCEPTION:

However, it is the journalist – rather than the confidential source -- who controls the “Shield Law” privilege. [See §25:280.]

[§§25:07-25:19 Reserved]

2. CREATION AND DURATION

§25:20 Privileges Arise as a Matter of Law

Privileges exist as a matter of law. Thus, the holder of a privilege need not take any affirmative steps to protect the privilege. And to enforce the privilege, all the holder needs to do is to decline to respond to a question, or request for documents, either at the pre-trial disclosure phase or at trial.

Privileges remain intact unless waived.

IN PRACTICE: LABELING CAN BE BENEFICIAL

Although labeling is not required to preserve a privilege, it is a good practice to label documents with a notation of the privilege. For example, you can label client correspondence as “attorney-client communication” to prompt your client to keep the letters separate from the files that may be discoverable. Similarly, you may choose to stamp strategy outlines with the words “attorney work product” as an additional prompt to keep them away from documents to be produced in discovery. But mere labeling will not make a document privileged. It is the nature of the communication, and not the label, that

1994); see *Rossi v. Blue Cross & Blue Shield*, 73 NY2d 588, 593, 542 NYS2d 508 (1989) (the attorney-client privilege survives the death of the client, but should be restricted to that which is necessary to achieve its purpose); *Randy International, Ltd. v. Automatic Compactor Corp.*, 97 Misc2d 977, 980 (SupCt Queens Co 1979) (a defunct corporation is entitled to the attorney-client privilege, for even if a defunct corporation were to be equated with a deceased individual, the privilege would continue to exist since it is clear that the privilege continues to exist after the death of an individual client); *Estate of Trotta*, 99 Misc2d 278, 416 NYS2d 179 (SurrCt Bronx Co 1979).]

[§§25:22-25:29 Reserved]

3. EFFECT OF PRIVILEGES ON DISCOVERY

§25:30 Privileged Matter Need Not Be Divulged

Upon objection by the holder, privileged matter is not obtainable. [CPLR 3101(b).]

Thus, matter that is privileged need not be divulged, whether sought at the discovery phase, or at trial. [*Levine v. Bornstein*, 13 Misc2d 161, 174 NYS2d 574 (SupCt Kings Co 1958), aff'd, 7 AD2d 995 (2d Dept 1959), aff'd, 6 NY2d 892, 190 NYS2d 702 (1959) (Fifth Amendment privilege); *Buckley v. Vidal*, 50 FRD 271 (SDNY 1970) (attorney-client privilege); *Hughson v. St. Francis Hospital*, 93 AD2d 491, 463 NYS2d 224 (2d Dept 1983) (physician-patient privilege); *Greene v. New England Mutual Life Insurance Co.*, 108 Misc2d 540 (SupCt NY Co 1981) (physician-patient privilege).]

§25:31 Defeating a Qualified Privilege

The court-created qualified privileges are much more case specific than the general and absolute statutory privileges. Thus, a showing that the policy behind the qualified privilege is inapplicable, or that the bal-

- The privilege for material created for litigation yields to a showing of substantial need or undue hardship. [CPLR 3101(d)(2); *O'Connell v. Jones*, 140 AD2d 676, 529 NYS2d 19 (2d Dept 1988) (photo of accident scene taken by plaintiff shortly after fall on ice is discoverable); *DiMichel v. South Buffalo Railway*, 80 NY2d 184, 590 NYS2d 1 (1992) (surveillance tapes of plaintiff taken by defendant are discoverable).]

IN PRACTICE: EMPHASIZE THE EQUITIES

When seeking to overcome a qualified privilege, focus the court's attention on the harm your client will suffer in the absence of disclosure. If possible, show that the information sought is highly material, and not available from any other source. The hardship and unfairness are key factors in the court's determination. Thus, in *O'Connell*, the scene depicted in plaintiff's photograph could not be reproduced. The accumulated snow and ice had long since melted by the time the action was commenced. The photograph, although taken exclusively for the purpose of litigation, was the sole evidence of the scene. Again, in *DiMichel*, the surveillance tape was taken for the sole purpose of litigation. However, the court concluded that it should be made available during discovery because plaintiff would be entitled to challenge its authenticity at trial, and it would be unfair not to give plaintiff an adequate opportunity to examine it for that purpose.

§25:32 Existence of Privilege Does Not Preclude Deposition

A witness cannot avoid being deposed merely because that witness's testimony may include privileged information. The privilege may not be asserted as a blanket protection from all disclosure. Instead, the witness (or the person who controls the privilege) must assert the privilege with respect to particular questions and demands. [