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Privileges and Other Policy Exclusions

1. The court should apply

At trial, the defendant called the plaintiff's physician to testify to confidential statements made to him by the plaintiff in furtherance of medical treatment for the injuries allegedly caused by the defendant. The plaintiff objects, claiming a physician-patient privilege. The plaintiff sued the defendant for damages for physical injuries allegedly caused by the defendant's violation of the federal civil rights law. The incident occurred wholly within a particular state but the case was tried in federal court. The state code says, "The common-law privileges are preserved intact in this state."

- State law and recognize the claim of privilege
- Federal law and recognize the claim of privilege
- State law and reject the claim of privilege
- **Federal law and reject the claim of privilege**

Note:

The Federal Rules of Evidence (FRE) have no specific privilege provisions. Under FRE 501, the privilege of a witness or person shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

The physician-patient privilege is a statutory privilege, which has not been adopted in all jurisdictions. However, in a substantial number of jurisdictions, a physician (and, in some jurisdictions, a dentist or nurse) is foreclosed from divulging in judicial proceedings information that he acquired while attending a patient in a professional capacity, which information was necessary to enable the physician to act in his professional capacity. Federal courts, however, currently do not recognize a physician-patient privilege.

D is correct. As a general rule, whether a privilege applies in a case brought in federal court is governed by the federal common law as it has been interpreted by the courts of the United States in the light of reason and experience. Because this case arose out of a violation of the federal civil rights law, the court should apply the federal law in determining the propriety of the physician-patient privilege. Although most states recognize doctor-patient privilege, the federal courts do not.

A is incorrect. Because the suit has been brought in federal court, based on a violation of a federal civil rights law, the federal law should be the applicable standard for determining whether the privilege applies, which it does not.

B is incorrect. This answer is partially correct in that federal law should apply to this case. However, federal courts do not recognize the physician-patient privilege, and therefore, the plaintiff's assertion of that privilege should not be recognized.

C is incorrect. As stated above, because the suit is in federal court and based on a violation of a federal civil rights law, federal law is the applicable standard, which is why the assertion of the privilege should be rejected.

2. The testimony of the attorney is

The defendant is on trial for the crime of obstructing justice by concealing records subpoenaed May 1, in a government investigation. The government calls an attorney to testify that on May 3, the defendant asked him how to comply with the regulations regarding the transfer of records to a safe-deposit box in Mexico.

- Privileged, because it relates to conduct outside the jurisdiction of the United States
- Privileged, because an attorney is required to keep the confidences of his clients
- Not privileged, provided the attorney knew of the concededly illegal purpose for which the advice was sought
- **Not privileged, whether or not the attorney knew of the concededly illegal purpose for which the advice was sought**

Note:

The Federal Rules of Evidence (FRE) have no specific privilege provisions. Under FRE 501, the privilege of a witness or person shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. Federal courts currently recognize the attorney-client privilege.

The attorney-client privilege is a common-law privilege, although in some jurisdictions it has been codified by statute. Essentially, communications between an attorney and client, made during professional consultation, are privileged from disclosure. A client has a privilege to refuse to disclose and to prevent others from disclosing, confidential communications between herself (or her representative) and her attorney (or her attorney's representative). There is no privilege if the services of the attorney were sought or obtained as an aid in the planning or actual commission of something that the client knew, or should have known, was a crime or fraud.

D is correct. The attorney-client privilege covers confidential communications made during a legal consultation between an attorney and client. However, if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud, the privilege does not apply. There is no requirement that the attorney must be aware of the illegal purposes. Because the defendant sought the lawyer's advice to aid in the plan to commit the crime of obstructing justice, there is no valid assertion of the attorney-client privilege.

A is incorrect. The location of the illegal conduct is irrelevant for the determination of whether the attorney-client privilege applies. The fact that the defendant was seeking to transfer records to a safe-deposit box that was located in Mexico has no effect on whether the privilege may be asserted.

B is incorrect. It is true that an attorney is required to keep the confidences of his clients. However, the attorney-client privilege does not apply when a client is seeking the attorney's legal services for purposes of illegal activity.

C is incorrect. This answer reaches the correct answer with the wrong reasoning. The attorney-client privilege may be inapplicable regardless of whether the attorney was aware of the client's illegal purpose behind seeking his advice. The attorney's ignorance of his client's purpose here is therefore irrelevant.

3. The audioteape is most likely to be subject to subpoena if

In a suit by a plaintiff against a defendant, the plaintiff sought to subpoena an audiotape on which the defendant had narrated his version of the dispute for his attorney. Counsel for the defendant moves to quash the subpoena on the ground of privilege.

- **The defendant played the audiotape for his father to get his reactions**
- The lawsuit involved alleged criminal behavior by the defendant
- The defendant has been deposed and there is good reason to believe that the audiotape may contain inconsistent statements
- The defendant is deceased and thus unavailable to give testimony in person

Note:

Testimonial privileges, which permit one to refuse to disclose and prohibit others from disclosing certain sorts of confidential information in judicial proceedings, have two basic reasons for their existence: (i) practicality; and (ii) society's desire to encourage certain relationships by ensuring their confidentiality, even at the high price of losing valuable information.

The Federal Rules of Evidence (FRE) have no specific privilege provisions. FRE 501 provides that the privilege of a witness or person shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. Federal courts currently recognize, among others, the attorney-client privilege. The attorney-client privilege is a common law privilege, although in some jurisdictions it has been codified by statute. Essentially, communications between an attorney and client, made during professional consultation, are privileged from disclosure. A client has a privilege to refuse to disclose, and to prevent others from disclosing, confidential communications between herself (or her representative) and her attorney (or her attorney's representative).

The attorney-client privilege requires that the attorney-client relationship exist at the time of communications. The client, or her representative, must be seeking the professional services of the attorney at the crucial time. Communications made in the known presence and hearing of a stranger or other unprotected third party are not protected. Thus, if the client discloses the content of the communication to a third person not associated with the lawyer-client relationship (e.g., a friend), the privilege is lost. The privilege will not apply if the client sought or obtained the services of the attorney in order to enable or aid someone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. The attorney-client privilege also applies indefinitely. Termination of the attorney-client relationship does not terminate the privilege. It even survives the client's death.

A is correct. This is the most likely basis for subjecting the audiotape to a subpoena because, had the defendant played it for his father, he would have waived the privilege. This is because a client breaks the attorney-client privilege if he discloses the content of a communication (here, the audiotape) to a third person not associated with the protected relationship (here, the defendant's father).

B is incorrect. Even if the lawsuit alleged criminal behavior by the defendant, the protections of the attorney-client privilege would remain in effect. Only if the communication contains ongoing criminal activity or a plan to commit a future crime or fraud will the crime-fraud exception break the attorney-client privilege.

C is incorrect. A determination of whether the attorney-client privilege applies is not dependent on or in any way related to whether there are inconsistent statements on the audiotape.

D is incorrect. Even if the defendant were deceased, this would not sever the attorney-client privilege, which, unless otherwise broken, extends beyond the death of the client.

4. The defendant's motion to prevent the nurse's testifying is likely to be

A defendant was prosecuted in federal court for making threats against the President of the United States. The defendant was a voluntary patient in a private psychiatric hospital and told a nurse, shortly before the President came to town, that the defendant planned to shoot the President. The nurse reported the threat to FBI agents.

- Successful, because the statement was made in a medical setting
- Successful, because the nurse violated a confidence in reporting the statement
- **Unsuccessful, because the statement was not within any privilege**
- Unsuccessful, because the defendant had not been committed involuntarily by court order

Note:

C is correct. Although federal courts do recognize a psychiatrist-patient privilege, the defendant's statement to the nurse that he planned to shoot the President was not confidential and was not made to obtain treatment. Therefore, the statement is unprivileged and the nurse should be allowed to testify about the statement.

A is incorrect. Although the statement was made in a medical setting, the privilege only covers confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment. Not every statement in a medical setting is privileged, and the defendant's statement to the nurse was not a confidential communication made in the course of diagnosis or treatment.

B is incorrect. Whether or not the statement was made in confidence is not the legal standard to determine its admissibility. The statement was not subject to the privilege.

D is incorrect. Whether the defendant was there voluntarily or committed involuntarily has no relevance to the determination of whether the privilege applies.

5. Which of the following statements is most clearly correct in the federal courts?

A defendant was charged with the sale of narcotics. The federal prosecutor arranged with the defendant's wife for her to testify against her husband in exchange for leniency in her case. At trial, the prosecution calls the wife, who had been granted immunity from prosecution, to testify, among other things, that she saw her husband sell an ounce of heroin.

- The defendant's wife cannot be called as a witness over her husband's objection
- The defendant's wife can be called as a witness but cannot testify, over the defendant's objection, that she saw him sell heroin
- **The defendant's wife can refuse to be a witness against her husband**
- The defendant's wife can be required to be a witness and to testify that she saw her husband sell heroin

Note:

C is correct. The wife's proposed testimony could lead to her invoking the adverse spousal privilege, a privilege against testifying against her husband. That privilege, however, only exists at the wife's discretion. The witness spouse, in this case the defendant's wife, alone has a privilege to refuse to testify adversely against her husband; she may be neither compelled to testify nor foreclosed from testifying. The choice is hers.

A is incorrect. The adverse spousal privilege is the wife's, and the determination of whether to testify or not is her decision to make. The defendant cannot object and force his wife not to testify.

B is incorrect. The defendant's wife can testify, if she wishes, that she saw her husband sell heroin. Her testimony about her firsthand knowledge of the sale does not require that the wife disclose any privileged marital communication from her husband. She will testify as to what she saw.

D is incorrect. The adverse spousal privilege still exists. If the wife wishes not to testify against her husband, she cannot be compelled, in federal court, to do so.
