

Rule 501. Privileges

Privileges **[as they now exist or may be modified by law] not codified in these rules** shall **[be] remain** unaffected by the adoption of these rules.

Comment

Pa.R.E. 501 is similar to F.R.E. 501 in that **[this rule] these rules do[es]** not modify existing law **with regard to a claim of privilege, except as provided by Pa.R.E. 502.**

[This is an entirely new rule.]

Rule 502. Attorney-Client Privilege; Exceptions; Waiver

(a) Definitions Applicable to This Rule.

(1) “Attorney” means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any State or country.

(2) “Representative of the attorney” means a person engaged, or reasonably believed by the client to be engaged, by the attorney to assist the attorney in rendering professional legal services.

(3) “Client” means a person, public agency, corporation, association, or other organization or entity, either public or private for whom an attorney renders professional legal services, or that consults an attorney with a view to obtaining professional legal services.

(4) “Representative of the client” means one:

(A) having recognized authority to:

i. obtain professional legal services on behalf of the client; or

ii. act on legal advice rendered on behalf of the client; or

(B) who makes or receives a confidential communication for the purpose of effectuating legal representation for the client while acting in the scope of employment for the client.

(5) “Confidential communication” means a communication made to obtain or effectuate professional legal services for the client and that a client would reasonably intend to be disclosed only to persons engaged in obtaining, providing, or effectuating those services.

(b) Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication or other information that would disclose a confidential communication:

(1) between the client or a representative of the client and the client's attorney or a representative of the attorney;

(2) between the attorney and a representative of the attorney;

(3) between representatives of the client or between the client and a representative of the client; or

(4) by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein.

(5) Reserved.

(c) Who May Claim the Privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization whether or not in existence. The person who was the attorney or the representative of the attorney at the time of the communication may claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) if the services or advice of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud;

(2) as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction *inter vivos*;

(3) as to a communication relevant to an issue of breach of duty by an attorney to the client or by the client to the attorney;

(4) as to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;

(5) as to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness; or

(6) as to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by or to any of them by or to an attorney retained or consulted in common, when offered in an action between or among any of the clients.

(7) Reserved.

(e) Waiver

(1) Intentional Disclosure. The privilege is waived if the client intentionally discloses or consents to the disclosure of the subject matter of the confidential communication. The waiver extends to undisclosed confidential communications concerning the same subject matter if the communications ought in fairness to be considered together.

(2) Inadvertent Disclosure. The privilege is not waived if the disclosure of the confidential communication is inadvertent and the client and attorney took reasonable steps to prevent disclosure and to rectify the inadvertent disclosure.

(3) Failure to Assert Privilege. The privilege is waived if the client or attorney fails to object to the disclosure of the confidential communication in a legal proceeding.

Comment

Pa.R.E. 502 differs from F.R.E. 502 in that the federal attorney-client privilege is governed by the common law as interpreted by the United States' courts. The Attorney-Client Privilege in Pennsylvania is governed by 42 Pa.C.S. §§ 5916 and 5928, as interpreted by the Pennsylvania courts. The application of the privilege may also be governed by other statutes. See, e.g., 65 P.S. § 67.102 (express exclusion for privileged documents in Right To Know Law).

Pa.R.E. 502 consolidates these statutes and interpretations in a form consistent with the Pennsylvania Rules of Evidence. This codification is intended to assist the attorney and client in predicting with some degree of certainty whether particular discussions will be protected because an uncertain privilege is little better than no privilege at all. *Levy v.*

Senate of Pennsylvania, 65 A.3d 361, 371 (Pa. 2013) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

The guiding principle in the drafting of this Rule was to preserve the Pennsylvania law with regard to the attorney-client privilege. The structure and language of the Rule is based on Uniform Rules of Evidence 502 (2005) and 510 (2005) and F.R.E. 502.

This Rule is not intended to modify the work-product doctrine. Codification of the work-product doctrine can be found in the rules of procedure. See, e.g., Pa.R.Crim.P. 573(G) (work product in criminal proceedings); *Commonwealth v. Kennedy*, 876 A.2d 939, 946 (Pa. 2005) (in the context of pre-trial discovery in criminal matters, the substance of work product doctrine contained in Pa.R.Crim.P. 573(G)); see also *Gillard v. AIG Insurance Co.*, 15 A.3d 44, 59 n. 16 (Pa. 2011) (attorney-client privilege and work-product doctrine are not coterminous).

Pa.R.E. 502(a)(1) is consistent with prior Pennsylvania law. See e.g., *Triffin v. Desalvo*, 643 A.2d 118 (Pa. Super. 1994) (a person's reasonable belief that layperson was an attorney sufficient to provide privilege); *Joyner v. SEPTA*, 736 A.2d 35 (Pa. Cmwlth. 1999) (holding that person failed to establish reasonableness of belief that he was communicating with his attorney sufficient to raise privilege when voicemail was inadvertently left with opposing attorney).

Pa.R.E. 502(a)(2) is consistent with prior Pennsylvania law. See *Commonwealth v. Hutchinson*, 434 A.2d 740, 744 (Pa. Super. 1981) (investigator is agent of attorney for purposes of privilege); *Commonwealth v. Mrozek*, 657 A.2d 997, 999-1000 (Pa. Super. 1995) (attorney's secretary was agent of attorney for purposes of privilege).

Pa.R.E. 502(a)(3) is consistent with prior Pennsylvania law. See *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011) (client was an insurance corporation); *Maleski v. Corporate Life Insurance Co.*, 641 A.2d 1, 3 (Pa. Cmwlth. 1994) (privilege attaches to communications made by corporate as well as individual clients); *Commonwealth v. Mrozek*, 657 A.2d 997, 998-99 (Pa. Super. 1995) (client for purposes of privilege include a person seeking legal services); *Heavens v. Pennsylvania Department of Environmental Protection*, 65 A.3d 1069, 1076 (Pa. Cmwlth. 2013) (privilege extends to agency setting where attorneys are working in their professional capacity); *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 224 (Pa. 2014) (discussing the commonality of the citizenry and a Commonwealth agency as "client" in the context of a criminal investigation by the Office of Attorney General).

Pa.R.E. 502(a)(4) is consistent with prior Pennsylvania law. See *National Railroad Passenger Corp. v. Fowler*, 788 A.2d 1053, 1064-1065 (Pa. Cmwlth. 2001) (discussing agents or employees of client authorized to act on behalf of client); see also, e.g., 20 Pa.C.S. § 5521(a) (duty of guardian of person); § 5602(a)(20) (power of attorney to

pursue litigation). Recognition of authority under this definition based solely on a familial, intimate, or other relationship with the client has yet to be addressed by statute or common law.

Pa.R.E. 502(a)(5) is consistent with prior Pennsylvania law. See *Trib Total Media, Inc. v. Highlands School Dist.*, 3 A.3d 695, 701 (Pa. Cmwlth. 2010) (requiring that communications be intended to be confidential); *Gillard v. AIG Insurance Co.*, 15 A.3d 44, 59 (Pa. 2011) (confidential communications for the purpose of obtaining or providing professional legal advice); see also *Okum v. Unemployment Compensation Review Board*, 465 A.2d 1324, 1325 (Pa. Cmwlth. 1983) (discussion of administrative matters between administrative head of agency's legal division and deputy general counsel not confidential communications).

Pa.R.E. 502(b) is consistent with Pennsylvania law. See 42 Pa.C.S. §§ 5916, 5928 (“[C]ounsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same unless in either case this privilege is waived upon the trial by the client.”); *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 372 (Pa. 2013) (“[A]ttorney-client privilege may apply in cases where divulging the client’s identity would disclose either the legal advice given or the confidential communications provided.”).

Pa.R.E. 502(b)(1) is consistent with prior Pennsylvania law. See *Gillard v. AIG Insurance Co.*, 15 A.3d 44, 59 (Pa. 2011) (“[P]rivilege operates in a two-way fashion to protect confidential client-to-attorney or attorney to client communications made for the purpose of obtaining or providing professional legal advice.”); *Commonwealth v. Hutchinson*, 434 A.2d 740, 744 (Pa. Super. 1981) (privilege attaches to statements made to an attorney or his agents); *National Railroad Passenger Corp. v. Fowler*, 788 A.2d 1053, 1064-1065 (Pa. Cmwlth. 2001) (privilege extends to authorized agents or employees of client).

Pa.R.E. 502(b)(2) is consistent with prior Pennsylvania law. See *Commonwealth v. Noll*, 662 A.2d 1123, 1126 (Pa. Super. 1995) (privilege allows disclosure to an agent assisting attorney in giving legal advice to client; communications between attorney and retained expert subject to privilege); *Commonwealth v. DuPont*, 730 A.2d 970 (Pa. Super. 1999) (conversation between attorney and consultant requires confidential communications made in connection with providing legal service to be privileged). See also 221 Pa. Code § 103 (inadmissibility of confidential communication made to or by appointed interpreter).

When a representative of an attorney is intended to be called by the client as a witness and the witness’s opinion is based on facts or data received from confidential communications, then those communications are no longer intended to remain confidential. Discovery of the witness’s testimony is then limited by procedural rule(s)

and work product protection. See, e.g., Pa.R.C.P. No. 4003.5(a)(4) (discovery of communications between attorney and expert witness not permitted).

Pa.R.E. 502(b)(3) is consistent with prior Pennsylvania law. See *Custom Designs & Manufacturing Co. v. Sherwin-Williams Co.*, 39 A.3d 372, 379 (Pa. Super. 2012) (communications between corporate counsel and employees subject to attorney-client privilege when the purpose is to secure either an opinion of law, legal services, or assistance in a legal matter).

Pa.R.E. 502(b)(4) is consistent with prior Pennsylvania law. When clients have shared interests, such as joint plaintiffs or defendants, it may be desirable for them to share information protected by the attorney-client privilege. Without this provision, the sharing of the information might be treated as a waiver of the privilege. See *In re Condemnation by City of Philadelphia*, 981 A.2d 391, 396-98 (Pa. Cmwlth. 2009) (examining “joint defense” or “common interest” as an extension of privilege); *McCormick on Evidence* § 91.1 (7th ed. 2013) (“When two or more persons, each having an interest in some problem, or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world, that is, with parties claiming adversely to both or either of those within the original charmed circle.”).

Uniform Rule of Evidence 502(b)(5), which extended privilege “among lawyers and their representatives representing the same client,” was not adopted. This precept was considered self-evident, for example, when a client obtains new counsel, and it is likely subsumed by the work-product doctrine.

Pa.R.E. 502(c) is consistent with prior Pennsylvania law. See *Law Office of Douglas T. Harris v. Philadelphia Waterfront Partners*, 957 A.2d 1223, 1230 (Pa. Super. 2008) (“At common law, it was generally recognized that the attorney-client privilege belongs to the client, not the attorney. Yet, also implicit in the common law is the irrefutable notion that an attorney acts as his client’s authorized agent.”) (citations omitted).

It is generally accepted that the privilege will survive the death of the client and may be claimed by the client’s successors. See *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693 (Pa. Super. 1976); *McCormick on Evidence* § 94 (7th ed. 2013). Concerning corporations or other entities the privilege may be claimed by the directors or officers; this authority passes with the succession of management. See *Maleskie by Chronister v. Corporate Life Insurance Co.*, 641 A.2d 1, 3 (Pa. Cmwlth. 1994).

Pa.R.E. 502(d)(1) is consistent with prior Pennsylvania law. See *In re Investigating Grand Jury of Philadelphia County No. 88-00-3503*, 593 A.2d 402, 406 (Pa. 1991) (“The privilege does not protect communications made for the purpose or in the course of the

commission of proposed crime or fraud.”); *Nadler v. Warner Company*, 184 A. 3, 5 (Pa. 1936) (when advice of attorney is sought in aid of a crime or fraud, the communications are not “confidential”).

Pa.R.E. 502(d)(2) is consistent with prior Pennsylvania law. “The accepted theory is that the protection afforded by the privilege will in general survive the death of the client.” McCormick on Evidence § 94 (7th ed. 2013); see also *Commonwealth v. Hutchinson*, 434 A.2d 740, 744 (Pa. Super. 1981) (privilege survives termination of attorney-client relationship). A testamentary exception to the attorney-client privilege may be found within the holding of *Boyd v. Kilmer*, 132 A. 709, 711 (Pa. 1926) where two heirs challenged the propriety of decedent’s conveyance of property to a third party prior to his death. In *Boyd*, the Court held that the decedent’s attorney could disclose prior confidential communications with the decedent-client in support of the deed conveyed by the client. This approach is also consistent with federal case law. See *Glover v. Patten*, 165 U.S. 394, 406-408 (1897) (recognizing testamentary exception).

Pa.R.E. 502(d)(3) is consistent with prior Pennsylvania law. See *Commonwealth v. Chmiel*, 738 A.2d 406, 414 (Pa. 1999) (“[A] party who attacks the competence of his or her counsel cannot rely on the attorney-client privilege to prevent counsel from responding so such attack.”); 42 Pa.C.S. § 9545(d)(3) (“When a claim for relief is based on an allegation of ineffective assistance of counsel as a ground for relief, any privilege concerning counsel’s representation as to that issue shall be automatically terminated.”).

Pa.R.E. 502(d)(4) is consistent with prior Pennsylvania law. In *Commonwealth v. Maguigan*, 511 A.2d 1327 (Pa. 1986), an attorney was found in civil contempt for refusing to disclose the whereabouts of an absconded client. The attorney contended that such disclosure was prohibited by the attorney-client privilege. The Court held that privilege did not exist when it aided and abetted defendant’s criminal activity and would cause the attorney to be an accessory to defendant’s continuing criminal conduct. This rule is also consistent with Rule of Professional Conduct 1.6(4), 42 Pa.C.S.

Pa.R.E. 502(d)(5) is self-evident where the attorney voluntarily acts as an attesting witness affirming the document to be true or genuine. In this role, the attorney holds himself out to third parties as having personal knowledge as to the truthfulness or genuineness of the document. See also Pa.R.E. 602 (witness must have personal knowledge of the matter). An attestation under such circumstances lacks any intention of remaining confidential and, therefore, is excepted from the attorney-client privilege. See also *Weiherer v. Werley*, 221 A.2d 133 (Pa. 1966) (discussing ethics of attorney acting as witness for client); Pennsylvania Rule of Professional Conduct 3.7 (same).

Pa.R.E. 502(d)(6) is consistent with prior Pennsylvania law. See *Tracy v. Tracy*, 105 A.2d 122, 125 (Pa. 1954) (privilege does not apply between parties if attorney

represented both in relation to a common business interest; privilege does apply against a common adversary of the parties); *Doll v. Loesel*, 136 A 796, 798 (Pa. 1927) (same).

Uniform Rule of Evidence 502(d)(7) has not been adopted. In Pennsylvania, confidential communications between a public officer or agency and its attorneys have been recognized as privileged without such an exception. See, e.g., *Ario v. Deloitte & Touche, LLP*, 934 A.2d 1290, 1294 (Pa. Cmwlth. 2007) (confidential communications between insurance commissioner and general counsel subject to attorney-client privilege). Non-confidential communications may be the subject of other forms of privilege. See *Van Hine v. Department of State*, 856 A.2d 204, 208 (Pa. Cmwlth. 2004) (discussing “deliberative process privilege”).

Pa.R.E. 502(e)(1) is adapted from Uniform Rule of Evidence 510 and F.R.E. 502(a). This rule is intended to prevent the attorney-client privilege from being used as both “a sword and a shield,” whereby a party attempts to use the privilege as a weapon by selectively disclosing favorable confidential communications to gain a tactical advantage while raising privilege to prevent access to damaging confidential communications. It is consistent with prior Pennsylvania law to the effect intentional waiver of the privilege may be treated as a waiver of other confidential communications on the same subject matter. See *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. 2007), *aff’d by equally divided court*, 992 A.2d 65 (Pa. 2010). This extension is also consistent with Pa.R.E. 106, which states:

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

Pa.R.E. 502(e)(2) is adapted from F.R.E. 502(b) and it is consistent with prior Pennsylvania law. In *Carbis Walker, LLP v. Hill, Barth and King, LLC*, 930 A.2d 573 (Pa. Super. 2007), five factors were used to determine whether an inadvertent disclosure of documents operated to waive the attorney-client privilege: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure given the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its errors. *Id.* at 582 (quoting *Fidelity & Deposit Co. v. McCulloch*, 168 F.R.D. 516, 522 (E.D. Pa. 1996)); see also *Board of Supervisors of Milford Township v. McGogney*, 13 A.3d 569 (Pa. Cmwlth. 2011) (applying factors to conclude inadvertent disclosure of solicitor invoiced did not operate to waive privilege).

Pa.R.E. 502(e)(3) is consistent with more recent Pennsylvania law. Traditionally, the right to waive the attorney-client privilege belonged to the client and only in limited situations when the client’s rights or interests cannot possibly adversely affect could the

attorney waive it. *Commonwealth v. Scott*, 470 A.2d 91, 94 (Pa. 1983); 42 Pa.C.S. §§ 5916 and 5928.

More recently, the concept of implied waiver through the failure of counsel raise privilege is discussed and applied in *Law Office of Douglas T. Harris, Esq. v. Philadelphia Waterfront Partners, L.P.*, 957 A.2d 1223 (Pa. Super. 2008) where it was deemed to be implicit in the common law that an attorney acts as the client's authorized agent and, therefore, was able to waive the attorney-client privilege on behalf of the client. Additionally, the implied waiver of privilege for failure to object is consistent with Pa.R.E. 103(a) (preserving a claim of error by timely objection).

Adopted ____, 2014, effective ____, 2014.

Final Report explaining the ____, 2014 adoption published with the Court's Order at __ Pa.B. __ (____, 2014).