

A plaintiff, the owner of a hardware store, sued her attorney for malpractice after losing a lawsuit involving a defective product that was sold by the hardware store. The plaintiff claims that the attorney negligently handled the defense because he lacked sufficient expertise. At trial, the plaintiff, seeking to establish the attorney's negligence, produced a letter written by the attorney to the plaintiff summarizing a commonly used litigation strategy that the attorney failed to use at trial. In response, the attorney plans to testify to communications that the attorney made in meetings with the plaintiff regarding an alternative defense strategy, which they agreed to pursue. The plaintiff objects to the attorney's testimony, invoking the attorney-client privilege.

Should the court uphold the client's privilege claim?

- A. No, because the attorney's professional relationship with the plaintiff has ended.
- B. No, because the statement is not protected by the attorney-client privilege.
- C. Yes, because only the client, as the holder of the privilege, can waive it.
- D. Yes, because the communications were made for the purpose of obtaining legal assistance and intended to be kept confidential.

## Explanation:

### Common exceptions to attorney-client privilege

Exception	Use of attorney-client communication	Disclosure compelled by
<b>Crime-fraud</b>	Made to further ongoing or future crime/fraud	Party seeking to discover information about crime/fraud
<b>Deceased client</b>	Resolves dispute over deceased client's testamentary intent	Attorney
<b>Self-defense</b>	Used to defend against client's malpractice or ethical claim against attorney	Attorney
<b>Fiduciary</b>	Constitutes legal advice between corporate fiduciaries & corporation's attorney	Stockholders
<b>Joint representation</b>	Made during attorney's prior representation of joint clients	Any joint client in subsequent litigation between joint clients

The **attorney-client privilege** protects confidential communications between an attorney and a client that were made for the purpose of obtaining or providing legal assistance for the client. One exception to this privilege applies to **communications** that are **relevant** to an **ongoing dispute** between the attorney and the client (eg, attorney's compensation, malpractice). In such cases, the **attorney may disclose** confidential communications that are **relevant to the attorney's claim or defense** on the disputed issue without the client's consent.

Here, the attorney plans to testify about confidential communications that he made during meetings with the plaintiff (client) regarding an alternative defense strategy (legal assistance). But since these communications are relevant to establishing the attorney's defense in this ongoing malpractice dispute, the attorney-client privilege does not apply (**Choice D**). Therefore, the court should *deny* the client's privilege claim.

(**Choice A**) The privilege remains in effect even after the attorney-client relationship has ended (as seen here) or the client dies. Therefore, this would not be a basis for denying the plaintiff's privilege claim.

**(Choice C)** The attorney-client privilege can be **waived** by the client directly or by an attorney or other agent acting with the client's authority. But here, the client's waiver is unnecessary since the attorney-client privilege does not apply.

**Educational objective:**

Attorney-client communications are not privileged if they are relevant to an ongoing dispute between the attorney and the client. Therefore, the attorney may disclose these communications without the client's consent.

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