

A woman sued a car manufacturer alleging that she was seriously injured when a defect in her car's engine caused it to seize while the car was in motion. The manufacturer's chief engineer prepared a report on the engine's production history and failure rate at the request of the manufacturer's attorney in preparation for trial. The report was then delivered to the attorney. The woman demands that the report be produced during discovery.

Will production of the report be required?

- A. No, because it is a privileged attorney-client communication.
- B. No, because the report contains hearsay.
- C. No, because the report is self-serving.
- D. Yes, because business reports are not privileged.

## Explanation:

### Common-law privileges

<b>Attorney-client</b>	Communications between attorney & client made to obtain or provide legal assistance for client  Client holds privilege forever—even after client is no longer represented or dies
<b>Work product</b>	Materials prepared by or for attorney in preparation for litigation
<b>Spousal</b>	Marital communications – communications between spouses <i>during</i> marriage  Both spouses hold privilege—even after marriage has ended Spousal immunity – shields spouse from testifying against criminal defendant-spouse about events that occurred <i>before or during</i> marriage
<b>Psychotherapist-patient</b>	Witness-spouse holds privilege until marriage ends Communications between psychotherapist (or clinical social worker) & patient made for diagnosis or treatment for mental or emotional condition  Patient holds privilege & psychotherapist must assert in patient's absence
<b>Religious</b>	Communications between clergy member & penitent  Penitent holds privilege & clergy member must assert in penitent's absence

\*Federal courts apply common law privileges except in diversity cases where state rules apply.

During discovery, a party may request **production** of information that relates to any issue in the lawsuit (eg, the identity of witnesses). But the opposing party is **not required to produce** privileged information, like communications protected by the **attorney-client privilege**. This privilege applies to:

**communications** between a client and an attorney that

were made for the purpose of obtaining or providing legal assistance for the client *and*

were intended to be and kept **confidential**.

Here, the manufacturer's chief engineer prepared and delivered a report at the request of the manufacturer's attorney (communication). The woman then demanded production of that report during discovery. But the report is privileged because it was created in preparation for trial (to obtain legal assistance) and there is no indication that it was shared with anyone other than the manufacturer's attorney (confidential). Therefore, production is not required.

**(Choice B)** The report *may* contain hearsay—ie, out-of-court statements offered to prove the truth of the matter asserted therein. But this would only affect the report's *admissibility* at trial—not immunize it from *production*.

**(Choice C)** The report may be self-serving if it only contains information that is helpful to the manufacturer's defense. But since a party may request *any* information that relates to the lawsuit, the fact that the report may be self-serving is not a basis for withholding it from production.

**(Choice D)** Business reports made for the purpose of securing legal advice *are* privileged if they were (1) intended to be and kept confidential and (2) communicated between a member of the company and its legal counsel.

**Educational objective:**

The attorney-client privilege applies to (1) communications between a client and an attorney that (2) were made to obtain or provide legal assistance for the client and (3) were intended to be and kept confidential. As a result, such communications need not be produced during discovery or at trial.