

A defendant is on trial for the crime of obstructing justice by concealing records that were subpoenaed in a government investigation. The government calls the defendant's attorney to testify that after concealing the records, the defendant contacted the attorney and asked him how to comply with the regulations regarding the transfer of records to a safe-deposit box in Mexico.

Is the attorney's testimony privileged?

- A. No, provided the attorney knew the advice was sought for an illegal purpose.
- B. No, whether or not the attorney knew the advice was sought for an illegal purpose.
- C. Yes, because an attorney is required to keep the confidences of his clients.
- D. Yes, because it relates to conduct outside the jurisdiction of the United States.

**Explanation:**

**Common exceptions to attorney-client privilege**

<b>Exception</b>	<b>Use of attorney-client communication</b>	<b>Disclosure compelled by</b>
<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

**Communications** between an **attorney and client** are **privileged** and protected from disclosure, discovery, or admission in a legal proceeding if they were:

made to **obtain or provide legal assistance** for the client *and* intended to be and kept **confidential**.

The client holds this privilege, and the attorney cannot disclose (eg, testify to) the confidential communication unless the client **waives** the privilege. However, when a client **seeks legal assistance in furtherance of an ongoing or future crime** or fraud, this privilege does not apply.

Here, the defendant is charged with obstructing justice by willfully concealing subpoenaed records. She asked her attorney how to transfer the records to a safe-deposit box in Mexico in furtherance of that *ongoing* crime. Therefore, the attorney's testimony regarding his communication with the defendant is not privileged—whether or not the attorney knew the assistance was sought for the illegal purpose of concealing the records **(Choice A)**.

**(Choice C)** An attorney is required to keep communications with the client confidential, but not when the crime-fraud exception applies.

**(Choice D)** The attorney's testimony relates to conduct *within* the jurisdiction of the United States—ie, the defendant's inquiry on how to comply with transfer regulations.

**Educational objective:**

Confidential attorney-client communications are privileged and therefore protected from disclosure, discovery, or admission. However, this protection does not apply if the client was seeking legal advice in furtherance of an ongoing or future crime or fraud.

**References**

Fed. R. Evid. 501 (federal common law privileges).

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