

In a federal investigation of a defendant for tax fraud, the grand jury seeks to obtain a letter written January 15 by the defendant to her attorney in which she stated: "Please prepare a deed giving my ranch to the university specified herein. But, in order to get around the tax law, I want it back-dated to December 15."

The attorney refuses to produce the letter on the ground of privilege.

Can the attorney be required to produce the letter?

- A. No, because the statement is protected by the attorney-client privilege.
- B. No, because the statement is protected by the client's privilege against self-incrimination.
- C. Yes, because the attorney-client privilege belongs to the client and can be claimed only by her.
- D. Yes, because the statement was in furtherance of crime or fraud.

## 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

[Common law privileges](#) apply in all stages of a federal legal proceeding, including grand jury proceedings. Consequently, when a grand jury subpoenas a person to testify or produce documents, that person may assert a privilege to protect confidential communications from disclosure, discovery, or admission. This includes the **attorney-client privilege**, which protects **communications** that are:

**made** for the **purpose** of **obtaining** or providing **legal assistance** for the client *and* intended to be and **kept confidential**.

But certain **exceptions** require otherwise privileged attorney-client communications to be disclosed. For example, a communication **made in furtherance of** an ongoing or **future crime or fraud is not privileged**. Therefore, the defendant's request that her attorney *fraudulently* back-date a deed "in order to get around the tax law" is not protected by the attorney-client privilege, and the attorney can be required to produce the letter **(Choice A)**.

**(Choice B)** The Fifth Amendment protects the right against self-incrimination by allowing a person to refuse to produce information that incriminates him/her. But here, the *attorney* has no such ground for refusing to produce the *client's* letter.

**(Choice C)** The attorney-client privilege belongs to the client, who may prevent the attorney from disclosing protected information. However, the defendant's letter here is not protected by the attorney-client privilege because it was written to further a crime (tax fraud).

**Educational objective:**

Attorney-client communications are not privileged if made to further an ongoing or future crime or fraud and can be disclosed by the attorney without the client's (ie, privilege-holder's) consent.

**References**

Fed. R. Evid. 1101 (applicability of the rules of evidence).

Fed. R. Evid. 501 (common law privilege).

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