

At the start of the trial of a defendant and a codefendant for robbery, the codefendant and her attorney offered to give the prosecutor information about facts that would strengthen the prosecutor's case against the defendant in exchange for leniency toward the codefendant. The prosecutor refused the offer. Shortly thereafter, the codefendant committed suicide.

During the defendant's trial, the prosecutor called the codefendant's attorney and asked him to relate the information that the codefendant had revealed to the attorney.

Is the attorney's testimony admissible?

- A. No, because the codefendant's communications are protected by the attorney-client privilege.
- B. No, because the plea discussion was initiated by the codefendant rather than by the prosecutor.
- C. Yes, because the codefendant intended to disclose the information.
- D. Yes, because the information the codefendant gave to her attorney revealing her knowledge of the crime would be a statement against the codefendant's penal interest.

## Explanation:

Common law privileges protect confidential communications from disclosure, discovery, or admission in federal legal proceedings.\* One such privilege applies to **attorney-client communications** that are (1) made for the purpose of obtaining or providing **legal assistance** for the client and (2) intended to be and **kept confidential**.

As the holder of the attorney-client privilege, the client can refuse to disclose confidential communications to third parties and prevent the attorney from doing so. The privilege **remains in effect even after** the attorney-client **relationship terminates** or the **client dies** (as seen here). However, the client may **waive the privilege** by:

**voluntarily disclosing** the information **to a third party**

voluntarily giving up the privilege (eg, contractually)

failing to timely claim the privilege (eg, after inadvertent disclosure) *or*

failing to object to another's disclosure of confidential information (eg, at trial).

Here, the codefendant shared facts about the robbery with her attorney. That communication was protected by the attorney-client privilege because it was made to obtain legal assistance and was, at least initially, intended to be kept confidential. And though the codefendant offered those facts to the prosecutor during a plea discussion, she did not *actually* disclose them. Her mere offer—regardless of who initiated the discussion—did not waive the privilege, so the attorney's testimony about those facts is inadmissible **(Choices B & C)**.

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

**(Choice D)** A **statement against interest** is not barred by the rule against hearsay when the declarant is unavailable (eg, deceased). Here, the deceased codefendant's information was likely against her penal interest because it revealed her knowledge of the crime. But it remains barred by the attorney-client privilege.

## Educational objective:

Attorney-client communications are privileged when (1) made to obtain or provide legal assistance for the client and (2) intended to be and kept confidential. Merely offering to share the privileged information does not waive the privilege.

## References

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

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## Waiving attorney-client privilege

### By voluntarily waiving privilege

Discloses to third party



Client

3rd Party

Gives up privilege



Client

### By failing to assert privilege

Inadvertent disclosure



Another's disclosure

