

A man was charged with embezzling a large sum of money from a company account and consulted with an attorney. After the attorney agreed to take the case, her legal assistant called the man to discuss a fee arrangement and asked the man to make a large payment to place into escrow, which he did. The attorney then retained a forensic accountant to review financial statements released by the prosecution during discovery. In doing so, the forensic accountant met with the man and privately discussed the statements in the attorney's office.

The prosecution subpoenaed both the legal assistant and the forensic accountant to testify at trial. Each has refused to answer any questions concerning their respective conversations with the man, citing the attorney-client privilege.

The prosecution has moved for an order requiring testimony from both the legal assistant and the forensic accountant.

How should the court rule on the prosecution's motion?

- A. Deny the motion as to both witnesses.
- B. Grant the motion as to the forensic accountant but deny it as to the legal assistant.
- C. Grant the motion as to the legal assistant but deny it as to the forensic accountant.
- D. Grant the motion as to both witnesses.

Explanation:

The **attorney-client privilege** protects **communications** that are:

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

This privilege **extends to the attorney's agents** (eg, consultant, legal assistant) but does not protect communications that are **merely incidental** to legal representation (eg, communications about legal fees).

Here, the forensic accountant was hired to help with the man's legal representation and therefore qualifies as the attorney's agent. Since his private conversation with the man about the financial statements released during discovery was essential to the man's legal representation, the conversation is protected by this privilege. The court should therefore *deny* the prosecution's motion seeking testimony from the forensic accountant **(Choices B & D)**.

The attorney's legal assistant also qualifies as the attorney's agent. But since her presumably private conversation with the man only concerned the attorney's fees, it was merely incidental to the man's legal representation. The court should therefore *grant* the prosecution's motion seeking testimony from the legal assistant **(Choice A)**.

Educational objective:

The attorney-client privilege protects communications made for the purpose of obtaining or providing legal advice or representation that are intended to be (and kept) confidential. This privilege extends to the attorney's agents but does not protect communications that are merely incidental to legal representation.

References

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

