

A defendant is on trial for tax evasion. The prosecutor, seeking to establish the defendant's income by showing his expenditures, has asked the defendant's attorney to produce records showing only how much the defendant had paid his attorney in fees.

Should the demand for the attorney's fee records be upheld?

- A. No, because the records are protected by the attorney work-product doctrine.
- B. No, because the records are protected by the attorney-client privilege.
- C. Yes, because it calls for relevant information not within the attorney-client privilege.
- D. Yes, because the attorney-client privilege cannot be invoked to conceal evidence of a crime.

## Explanation:

### Attorney-client privileged communications

(FRE 502)

|                       |  |
|-----------------------|--|
| <b>Privileged</b>     | Any communication between attorney & client:<br><br>made to obtain or provide legal assistance for client <i>and</i><br>intended to be & kept confidential   |
| <b>Not privileged</b> | Purely factual information<br>Client's identity (generally)<br>Existence of attorney-client relationship<br>Client's legal fees & other incidentals<br>Attorney's fee records<br>Business advice or opinions |

**FRE** = Federal Rule of Evidence.

**Attorney-client communications** are privileged if they are (1) made for the purpose of obtaining or providing legal assistance for the client and (2) intended to be and kept confidential. As a result, communications that are **merely incidental** to providing **legal assistance** (eg, attorney's fee records) are **not privileged (Choice B)**. These nonprivileged communications are therefore subject to disclosure, discovery, and admission in a legal proceeding so long as they are relevant to the case.

Here, the attorney's fee records are not privileged because they are merely incidental to the attorney's representation. And since they are relevant to the defendant's personal income and expenditures in this tax-evasion case, the demand for the attorney's fee records should be upheld.

**(Choice A)** The [attorney work-product doctrine](#) protects materials prepared by an attorney or client in anticipation of litigation—eg, attorney's impressions, opinions, or research. But the amount a client paid his attorney for legal representation is outside the protection of this doctrine.

**(Choice D)** The attorney-client privilege *can* be invoked to conceal confidential communications regarding a past (not ongoing or planned) crime or fraud. But this privilege does not apply to records regarding attorney fees.

### Educational objective:

Attorney-client communications are privileged if (1) made for the purpose of obtaining or providing legal assistance for the client and (2) intended to be and kept

confidential. Communications that are merely incidental to the client's legal representation do not fall within this privilege.

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