

In a suit against the defendant, the plaintiff sought to subpoena an audiotape on which the defendant had narrated his version of the dispute for his attorney. Counsel for the defendant moves to quash the subpoena on the ground of privilege.

In which of the following circumstances is the audiotape most likely to be subject to subpoena?

- A. The defendant has been deposed and there is good reason to believe that the audiotape may contain inconsistent statements.
- B. The defendant is deceased and thus unavailable to give testimony in person.
- C. The defendant played the audiotape for his father to get his reactions.
- D. The lawsuit involved alleged criminal behavior by the defendant.

## Explanation:

### Waiving attorney-client privilege

**Waiver** Only client can waive privilege by:

- voluntarily disclosing information to third party
- voluntarily giving up privilege (eg, contractually)
- failing to timely claim privilege (eg, after inadvertent disclosure)
- failing to object to another's disclosure of confidential information

**No waiver** Privilege *not* waived by:

- client's death
- termination of attorney-client relationship

A [subpoena](#) can be quashed if it requests information protected from disclosure by a [privilege](#). For example, the **attorney-client privilege** protects **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**. This privilege remains intact *unless* the **client waives** it—eg, by **voluntarily disclosing** the information to a third party.

Here, the defendant's audiotaped version of the dispute is privileged because he gave it to his attorney to obtain legal advice and presumably intended that it be kept confidential. But the defendant would waive this privilege if he voluntarily played the audiotape for his father, thereby disclosing its contents to a third party. And in such circumstances, the audiotape would likely be subject to subpoena.

**(Choice A)** Good reason to believe that an item might contain statements inconsistent with a witness's sworn testimony is not a basis to overcome a valid claim of privilege.

**(Choice B)** A defendant's availability has no impact on the ability to subpoena privileged information. Therefore, the defendant's audiotaped narration remains privileged even after his death.

**(Choice D)** Attorney-client communications made to further an *ongoing* or *future* crime are not privileged. But here, the lawsuit concerns a *past* dispute. So even if the lawsuit involved the defendant's alleged criminal behavior, his audiotaped narration of that dispute for his attorney is privileged.

### Educational objective:

The attorney-client privilege protects communications made to obtain or provide legal assistance for the client when they are intended to be and kept confidential. But a client can waive the privilege by voluntarily disclosing protected information to a third party.

### References

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

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