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Improving Wyoming's Attorney-Client Privilege

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IMPROVING WYOMING'S ATTORNEY-CLIENT PRIVILEGE

*John M. Burman** and *Cameron T. Pestinger†*

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I. INTRODUCTION

Most lawyers and some clients believe that information about the client is confidential. While they are correct, and confidentiality is an integral part of the relationship between attorneys and clients, three bodies of law give confidentiality its effect. First, attorneys owe each client a broad ethical duty of confidentiality.¹ Second, the attorney-client privilege protects certain communications between attorneys and clients, preventing later disclosure in adversarial proceedings.² Third, the work product doctrine protects some information prepared in anticipation of litigation.³ The differences between the three is best understood by knowing which of the concepts can be used to prevent admission of the material in court. As this article indicates, the fact that something is ethically confidential does not mean it is inadmissible in court. Rather, information must be either work-product or fall under the attorney-client privilege to prevent its admissibility. While this article focuses on the second body of law, the attorney-client privilege, it is important to understand all three confidentiality concepts. Otherwise, lawyers will face confusion regarding which confidentiality concept should apply at which time.

First, this article outlines the three confidentiality concepts.⁴ Then, it highlights problems with Wyoming's current attorney-client privilege statute and

¹ WYO. RULES OF PROF'L CONDUCT r. 1.6 (2014).

² WYO. STAT. ANN. § 1-12-101(a)(i) (2017).

³ See WYO. R. CIV. P. 26(b)(3).

⁴ See *infra* notes 7–75 and accompanying text.

suggests ways to improve it.⁵ Finally, the article proposes a new attorney-client privilege statute for Wyoming.⁶

II. THE CONFIDENTIALITY CONCEPTS

As noted above, three distinct bodies of law govern the treatment of confidential information arising from the attorney-client relationship.⁷ This part explains these bodies of law, referring to each as a *confidentiality concept*.

A. *The First Confidentiality Concept: The Ethical Duty of Confidentiality*

1. *The General Duty of Confidentiality*

Rule 1.6 of Wyoming's Rules of Professional Conduct contains the general ethical duty of confidentiality. It states, "[a] lawyer shall not reveal confidential information relating to the representation of clients unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out representation or the disclosure is permitted by paragraph (b)."⁸ Rule 1.6(b) permits or requires disclosure in certain contexts, discussed below.⁹

2. *The Duty's Broad Scope*

As the language quoted above indicates, the ethical duty of confidentiality applies to all confidential information the attorney learns about the representation.¹⁰ How or when the attorney learns the information is immaterial; the obligation still exists.¹¹ An important limitation regarding the scope of this duty, however, is Wyoming's use of the word *confidential* before *information*.¹²

The Rules define *confidential information* as "information provided by the client or relating to the client which is not otherwise available to the public."¹³ The Model Rules of Professional Conduct, and most states relying on their own versions of these rules, do not use the word *confidential*. Rather, the duty of confidentiality often applies to all information regarding the representation.¹⁴

⁵ See *infra* notes 76–194 and accompanying text.

⁶ See Part IV [hereinafter Proposed Statute].

⁷ See *supra* notes 1–3 and accompanying text.

⁸ WYO. RULES OF PROF'L CONDUCT r. 1.6(a) (2014).

⁹ See *infra* notes 22–44 and accompanying text.

¹⁰ See *supra* note 8 and accompanying text.

¹¹ See *infra* notes 17–21 and accompanying text.

¹² See *supra* note 8 and accompanying text.

¹³ WYO. RULES OF PROF'L CONDUCT r. 1.0(b).

¹⁴ *E.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 1980) ("A lawyer shall not reveal information relating to the representation of a client . . .").

As a practical matter, Wyoming's use of confidential means that an attorney who has entered an appearance for a client may disclose that.¹⁵ The reason is that most court files are public.¹⁶

3. *When the Duty Arises*

Most of the duties flowing from the attorney-client relationship attach only after the client has requested the attorney to render legal services and the attorney has agreed to do so.¹⁷ But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the attorney agrees to consider whether an attorney-client relationship shall be established.¹⁸

Even when no attorney-client relationship ensues, an attorney who has had discussions with prospective clients must not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.¹⁹

4. *The Duty Never Ends*

A lawyer is never free of the ethical duty of confidentiality.²⁰ Even after the attorney-client relationship has ended, attorneys must maintain confidentiality.²¹

5. *Exceptions to the Duty of Confidentiality*

Rule 1.6(a) permits disclosure of confidential client information if one of three conditions is met.²² First, if the client gives informed consent. Second, if the disclosure is impliedly authorized to carry out the representation. And third, if paragraph (b) of Rule 1.6 authorizes disclosure. Each are discussed below.²³

If a client gives an attorney their informed consent, the attorney may reveal client information.²⁴ *Informed consent* is defined as “the agreement by a person

¹⁵ See *infra* note 16 and accompanying text.

¹⁶ Some court files, such as juvenile court files, are private.

¹⁷ See *infra* notes 18, 92–96 and accompanying text.

¹⁸ While the ethical duty arises when a lawyer decides whether to form a lawyer-client relationship, it is not clear whether the other two confidentiality concepts arise then. See MODEL RULES OF PROF'L CONDUCT r. 1.6; WYO. STAT. ANN. § 1-12-101 (2017). One reason for the proposed statute is to clarify that the privilege will arise at the time a lawyer contemplates representation.

¹⁹ WYO. RULES OF PROF'L CONDUCT r. 1.18(b) (2014).

²⁰ *Id.* r. 1.9(c), 1.6 cmt. 20.

²¹ *Id.*

²² *Id.* r. 1.6(a).

²³ See *infra* notes 24–44 and accompanying text.

²⁴ WYO. RULES OF PROF'L CONDUCT r. 1.6(a).

to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”²⁵

The second exception, disclosure impliedly authorized to carry out representation,²⁶ raises an interesting question: When is something impliedly authorized? Unfortunately, the term *impliedly* is not defined. It should, therefore, be given its normal meaning.²⁷ *Impliedly* is defined as something “tacitly understood.”²⁸ An attorney should not generally do something based on a tacit understanding. Rather, they should obtain a written approval from the client before disclosing information.

The third exception applies only if paragraph (b) of Rule 1.6 allows for it. This rule prescribes circumstances in which disclosure is either permitted or required.²⁹ Since each client needs to be fully informed, the client needs to be advised of those situations. These are considered below.³⁰

a. Required Disclosures

An attorney must disclose information when required to do so by law.³¹ In Wyoming, clients need to know of two situations in which attorneys must reveal information. First, all persons in Wyoming, including attorneys, who know or have reason to believe a child is being abused or neglected must notify the appropriate authorities.³² Similarly, any person, including an attorney, who knows

²⁵ *Id.* r. 1.0(f).

²⁶ *Id.* r. 1.6(a).

²⁷ WYO. STAT. ANN. § 8-1-103(a)(i) (2017) (“Words and phrases shall be taken in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law should be understood according to their technical import.”); *see also* *Dorr v. Wyo. Bd. of Cert. Pub. Accountants*, 21 P.3d 735, 743 (Wyo. 2001) (“When a term is not defined within a statutory scheme, we look to the ordinary and usual meaning accorded to the word.”).

²⁸ *Impliedly*, DICTIONARY.COM, <http://www.dictionary.com/browse/impliedly?s=t> (last visited Mar. 12, 2018).

²⁹ *Id.*

³⁰ *See infra* notes 31–44 and accompanying text.

³¹ WYO. RULES OF PROF'L CONDUCT r. 1.6(b)(6).

³² WYO. STAT. ANN. § 14-3-205(a) (2017) (“Any person who knows or has reasonable cause to believe or suspect that a child has been abused or neglected or who observes any child being subjected to conditions or circumstances that would reasonably result in abuse or neglect, shall immediately report it to the child protective agency or local law enforcement agency or cause a report to be made.”).

or has reason to believe that an adult is abused, neglected, or exploited must similarly notify the appropriate authorities.³³

There is one circumstance in which an attorney may have to disclose otherwise confidential information. Because an attorney has an ethical duty of candor to every tribunal before which that attorney appears, the attorney may have to correct any false information that the client or one of the client's witnesses provides to the court.³⁴ While the rule only requires an attorney to take "reasonable remedial actions,"³⁵ such action may include disclosing confidential information.³⁶ Importantly, compliance is an exception to the general ethical duty of confidentiality.³⁷

b. Permitted Disclosures

An attorney may reveal confidential client information under Rule 1.6(b) to prevent the client from committing a crime, or to the extent the attorney reasonably believes necessary to prevent, mitigate, or rectify a client's crime or fraud.³⁸ To prevent, mitigate, or rectify a client's fraud, the client must have used the attorney's services in its furtherance.³⁹ Moreover, the fraud must result in substantial injury to the financial or property interests of another.⁴⁰

Rule 1.6 provides four other exceptions to the ethical duty of confidentiality, each of which allows an attorney to disclose confidential client information. First, an attorney may reveal information to seek legal advice about whether their conduct is ethical.⁴¹ Since such a revelation would be made to another attorney, who would have an independent obligation of confidentiality, the information would not otherwise become known. Second, an attorney may

³³ *Id.* § 35-20-103(a) ("Any person or agency who knows or has reasonable cause to believe that a vulnerable adult is being or has been abused, neglected, exploited, intimidated or abandoned or is committing self neglect shall report the information immediately to a law enforcement agency or the department.").

³⁴ WYO. RULES OF PROF'L CONDUCT r. 3.3(a).

³⁵ *Id.* r. 3.3(a)(3).

³⁶ *Id.* r. 3.3 cmt. 10 ("[T]he advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.").

³⁷ Since lawyers must usually retain client information in confidence, this requirement to disclose information to a tribunal operates as an important exception to the general duty of confidentiality.

³⁸ WYO. RULES OF PROF'L CONDUCT r. 1.6(b)(1)–(3).

³⁹ *Id.* r. 1.6(b)(2)–(3).

⁴⁰ *Id.*

⁴¹ *Id.* r. 1.6(b)(4).

disclose information if the attorney and the now former client become adversaries.⁴² Third, an attorney may reveal information to determine whether conflicts of interest exist because the attorney changes firms.⁴³ Fourth, if a court appoints the attorney as a guardian ad litem, the attorney may disclose information to protect the best interests of the individual.⁴⁴

B. The Second Confidentiality Concept: The Attorney-Client Privilege

The attorney-client privilege protects certain communications between attorneys and clients from later disclosure in adversarial proceedings.⁴⁵ Its scope is, therefore, much narrower than the ethical duty of confidentiality. The Wyoming Rules of Evidence are the source of Wyoming's attorney-client privilege.⁴⁶ The Rules state, "[e]xcept as otherwise required by . . . statute . . . the privilege of a witness . . . shall be governed by the principles of the common law . . ."⁴⁷

In Wyoming, a statute codifies the attorney-client privilege.⁴⁸ It provides,

[a]n attorney [shall not testify] . . . concerning a communication made to him by his client . . . in that relation, or his advice to his client The attorney . . . may testify by express consent of the client . . . , and if the client . . . voluntarily testifies the attorney . . . may be compelled to testify on the same subject.⁴⁹

In short, the privilege protects communications between an attorney and client, in that relation.⁵⁰

As discussed below, the Wyoming statute leaves many questions unanswered.⁵¹ These include, for example, who is a client and who is an attorney for the purpose of the privilege, and what communications does the privilege protect? It would therefore be good for both clients and attorneys for the statute to be amended.⁵²

⁴² *Id.* r. 1.6(b)(5).

⁴³ *Id.* r. 1.6(b)(7).

⁴⁴ *Id.* r. 1.6(b)(8).

⁴⁵ *See, e.g.*, WYO. STAT. ANN. § 1-12-101 (2017).

⁴⁶ WYO. R. EVID. 501.

⁴⁷ *Id.* (emphasis added).

⁴⁸ WYO. STAT. ANN. § 1-12-101(a)(i).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See infra* notes 82–86 and accompanying text.

⁵² *See infra* notes 81–119 and accompanying text.

C. *The Third Confidentiality Concept: The Work Product Doctrine*

A problem arose when Congress liberalized the Federal Rules of Civil Procedure in the 1930's. While the attorney-client privilege protected communications between attorneys and clients, the privilege did not protect attorney's trial preparation materials.⁵³ In *Hickman v. Taylor*, the U.S. Supreme Court addressed the question as to whether some other privilege protected these materials.⁵⁴ In the opinion, the Court agreed that "the memoranda, statements and mental impressions in issue . . . fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis."⁵⁵ Concerned that a party was attempting to secure production of an opposing attorney's trial preparation materials without a showing of necessity or undue prejudice, the Court denied discovery.⁵⁶ It reasoned that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."⁵⁷ Allowing discovery of such materials "contravenes the public policy underlying the orderly prosecution and defense of legal claims."⁵⁸

In essence, the Court invented a zone of privacy, known as the *work product doctrine*, which protects an attorney's materials prepared in anticipation of litigation from discovery. This doctrine still exists but is no longer simply a product of the Court's imagination. Rather, it is now contained in both Wyoming's rules of civil and criminal procedure.⁵⁹ The doctrine's contours depend both on the type of information sought and on the identity of the party who prepared it. The answers to these questions largely dictate whether the information is discoverable.⁶⁰

1. *Civil Cases*

a. *The Type of Information Protected*

In a civil case, the threshold question for asserting the work product doctrine is whether the material was "prepared in anticipation of litigation."⁶¹ If so, the material falls under the protective umbrella of the doctrine. If not, the information is discoverable unless otherwise privileged, so long as it is relevant to a party's claim or defense and proportional to the needs of the case.⁶²

⁵³ See *infra* note 54 and accompanying text.

⁵⁴ *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁵⁵ *Id.* at 508.

⁵⁶ *Id.* at 509–10.

⁵⁷ *Id.* at 510.

⁵⁸ *Id.*

⁵⁹ WYO. R. CIV. P. 26(b)(3); WYO. R. CRIM. P. 16(a)(2), (b)(2).

⁶⁰ See *infra* notes 61–75 and accompanying text.

⁶¹ *Thomas v. Harrison*, 634 P.2d 328, 331, 339 (Wyo. 1981).

⁶² WYO. R. CIV. P. 26(b)(1).

If a party prepared information in anticipation of litigation, it is discoverable only if the seeking party makes a requisite showing of substantial need, and that equivalent materials cannot be obtained absent undue hardship.⁶³ Upon a requisite showing, the court may order discovery of the requested materials, but must protect against disclosure of “the mental impressions, conclusions, opinions, or legal theories of a party’s attorney”⁶⁴

b. Attorney vs. Expert Trial Preparation Materials

As discussed above, attorneys enjoy absolute protection against discovery of their mental impressions, conclusions, opinions, or legal theories prepared in anticipation of litigation.⁶⁵ Often, attorneys employ the aid of experts in preparation for trial. Whether an opposing party can discover an expert’s trial preparation materials depends on whether the expert is expected to testify at trial.⁶⁶

If a party expects its expert to testify at trial, the opposing party can gain information regarding that testimony through two avenues. First, the party retaining the expert must disclose the expert’s identity, along with a written report containing “a complete statement of all opinions the witness will express and the basis and reasons for them,”⁶⁷ “the facts or data considered by the witness in forming them,”⁶⁸ and “any exhibits that will be used to summarize or support them.”⁶⁹ If the party further desires information, the seeking party “may depose any person who has been identified as an expert whose opinions may be presented at trial.”⁷⁰

The rules are different if a retained expert is not expected to testify at trial.⁷¹ The opposing party may obtain discovery only as provided in Rule 35(b) reports of a court-appointed examiner or “on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.”⁷²

⁶³ *Id.* 26(b)(3)(A)(ii).

⁶⁴ *Id.* 26(b)(3)(B).

⁶⁵ *See supra* notes 54–60 and accompanying text.

⁶⁶ WYO. R. CIV. P. 26(a)(2).

⁶⁷ *Id.* 26(a)(2)(B)(i).

⁶⁸ *Id.* 26(a)(2)(B)(ii).

⁶⁹ *Id.* 26(a)(2)(B)(iii).

⁷⁰ *Id.* 26(b)(4)(A).

⁷¹ *Id.* 26(b)(4)(D).

⁷² *Id.*

2. *Criminal Cases*

The doctrine's application is similar in the criminal context.⁷³ The Wyoming Rules of Criminal Procedure do not permit "the discovery or inspection of reports, memoranda, or other internal state documents made by the attorney for the state . . . in connection with the investigation or prosecution of the case . . ." ⁷⁴ A reciprocal provision governs the defense's materials.⁷⁵

III. IMPROVING WYOMING'S ATTORNEY-CLIENT PRIVILEGE

The Wyoming Rules of Evidence permit all relevant evidence to be admitted, unless law provides otherwise.⁷⁶ This rule supports a fundamental purpose of Wyoming's evidentiary rules: ascertaining the truth in adversarial proceedings.⁷⁷

The attorney-client privilege is an exception to this rule. The privilege prevents admitting what might otherwise be highly probative relevant evidence, the private communications between a client and their attorney.⁷⁸ As Learned Hand once conceded, "the privilege is to suppress the truth."⁷⁹ The purpose of this privilege, though, is thought to outweigh the costs.⁸⁰ Its purpose, the Supreme Court declared, is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."⁸¹

As mentioned above, Wyoming's attorney-client privilege statute leaves many questions unanswered.⁸² Furthermore, the Wyoming Supreme Court has offered little guidance on how it should be read. As a result, practitioners face many

⁷³ On the applicability of the work product doctrine to criminal cases in Wyoming, see *Alexander v. State*, 823 P.2d 1198, 1201–02 (Wyo. 1992) (holding that the trial court did not err in denying defendant access to the work product behind the presentence investigative report). The court stated that "it would be a dangerous precedent to open up the work product that goes behind that report." *Id.*

⁷⁴ WYO. R. CRIM. P. 16(a)(2).

⁷⁵ *Id.* 16(b)(2) ("[T]his subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys . . . in connection with the investigation or defense of the case . . .").

⁷⁶ WYO. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by statute, by these rules, or by other rules prescribed by the Supreme Court.").

⁷⁷ *Id.* 102 ("[The Wyoming Rules of Evidence] shall be construed . . . to the end that the truth may be ascertained . . .").

⁷⁸ A client, for example, may tell his or her lawyer that the client committed a crime. Such evidence would be extremely probative, but very prejudicial to the client.

⁷⁹ *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942).

⁸⁰ See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

⁸¹ *Id.* at 389.

⁸² See *supra* notes 48–52 and accompanying text.

uncertainties. These include the following types of inquiries. Who is a client and who is an attorney for purposes of the privilege?⁸³ What communications does the privilege protect and which does it not?⁸⁴ Does the rule prevent a client from being compelled to disclose communications arising from the attorney-client relationship, or just the attorney?⁸⁵ Last, who may claim the privilege?⁸⁶

This part addresses these questions, noting how other jurisdictions have resolved them, and describes how the proposed statute incorporates these improvements into Wyoming's attorney-client privilege. The proposed statute follows.⁸⁷

A. Attorney and Client

Wyoming's attorney-client privilege statute applies to communications between a *client* and an *attorney*.⁸⁸ The application of these terms is clear when the client is an individual directly communicating with an attorney. But the statute's applicability presents problems in the context of both prospective clients seeking legal services and an attorney's former clients who are now deceased.⁸⁹ Moreover, if the privilege extends to organizational entities, which communications with which employees does the privilege protect?⁹⁰ Finally, does the privilege apply when a client corresponds indirectly with an attorney through the attorney's support staff?⁹¹ The following sections address these problems.

1. Prospective Clients

While it is clear that Wyoming's statute covers communications arising from an established attorney-client relationship, it is silent on whether the privilege applies to prospective clients seeking legal services.⁹² Generally, courts extend the privilege to include communications during an initial consultation between a prospective client and attorney whether or not the attorney-client

⁸³ See *infra* notes 88–119 and accompanying text.

⁸⁴ See *infra* notes 120–86 and accompanying text.

⁸⁵ See *infra* notes 187–89 and accompanying text.

⁸⁶ See *infra* notes 190–94 and accompanying text.

⁸⁷ Proposed Statute.

⁸⁸ WYO. STAT. ANN. § 1-12-101(a)(i) (2017) (“An attorney . . . [shall not testify] concerning a communication made to him by his client . . . or his advice to a client . . .”).

⁸⁹ See *infra* notes 92–103 and accompanying text.

⁹⁰ See *infra* notes 104–14 and accompanying text.

⁹¹ See *infra* notes 115–19 and accompanying text.

⁹² WYO. STAT. ANN. § 1-12-101(a)(i) (“An attorney . . . [shall not testify] concerning a communication made to him by his client . . . *in that relation* . . .”) (emphasis added).

relationship results thereafter.⁹³ This broad application of the privilege affords clients the freedom to choose legal representation.⁹⁴ Fear of subsequent disclosure might encourage a prospective client to selectively communicate only favorable information to the attorney. Any advice based on this information, the California Supreme Court noted, would be “useless, if not misleading”⁹⁵ Poor advice clearly frustrates a prospective client’s ability to make an informed decision regarding legal representation. The proposed statute includes within the definition of *client* a person or entity who “consults an attorney for the purpose of retaining legal services.”⁹⁶

2. Deceased Former Clients

The current statute does not address whether an attorney’s deceased former client is a *client* for purposes of the privilege. Some commentators suggest that the privilege should not survive a client’s death, a position grounded in a policy of fairness to litigants, particularly when a communication between a client and attorney bears on an issue of pivotal significance.⁹⁷ No jurisdiction has, however, adopted this view in either its legislation or case law.⁹⁸ Moreover, when the U. S. Supreme Court addressed the issue in relation to the federal attorney-client privilege, it found “weighty reasons that counsel in favor of posthumous application.”⁹⁹ One reason the Court articulated in support of its position was knowing that a communication will remain confidential following death encourages full and frank correspondence with counsel.¹⁰⁰ The Court also reasoned that “clients may be concerned about reputation, civil liability, or possible harm to family and friends.”¹⁰¹ Posthumous disclosure, the Court urged, “may be as feared as disclosure during the client’s lifetime.”¹⁰² By allowing a

⁹³ *E.g.*, *People v. Canfield*, 527 P.2d 633, 636–37 (Cal. 1974) (“The lawyer-client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results.”).

⁹⁴ *See* JOHN M. BURMAN, PROFESSIONAL RESPONSIBILITY IN WYOMING 283 (2008).

⁹⁵ *City & Cty. of San Francisco v. Superior Court*, 231 P.2d 26, 30 (Cal. 1951).

⁹⁶ Proposed Statute (a)(ii).

⁹⁷ *See, e.g.*, *In re Sealed Case*, 124 F.3d 230, 233–35 (D.C. Cir. 1997) (considering exception to the privilege in criminal cases when the statements bore on a significant aspect of the crimes at issue and scarcity of other reliable evidence), *overruled by* *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

⁹⁸ *Id.* at 239 (Tatel, J., dissenting) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77 cmt. d (AM. LAW INST. 2000)).

⁹⁹ *Swidler & Berlin*, 524 U.S. at 407.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

former deceased client's representative or attorney to assert the privilege on the client's behalf, the proposed statute adopts the universal view that the privilege survives a client's death.¹⁰³

3. *Organizational Entities*

Organizational entities present two problems for Wyoming's privilege statute. First, are entities *clients* for purposes of the privilege?¹⁰⁴ Second, if so, which employee's communications with an attorney are privileged?¹⁰⁵

Wyoming's statute does not explicitly recognize organizational entities as clients. Though extending the privilege to include entities was formerly a troublesome matter,¹⁰⁶ it is no longer questioned,¹⁰⁷ and the majority of jurisdictions either assert or assume the privilege's applicability to entities.¹⁰⁸ The rationale given for this broad application is that extending the privilege to entities encourages them to have their agents confide in attorneys in order to realize the entities' rights and comply with the law.¹⁰⁹ The proposed statute, then, includes entities within the definition of *client*.¹¹⁰

Extending the privilege to entities presents a second problem: whose communications from the entity to the attorney are protected? Courts have developed two competing approaches to this problem. The first limits the privilege to communications with persons in the entity authorized to seek and act upon the attorney's advice, such as corporate directors.¹¹¹ The second applies the "subject matter" test, protecting communications with any of the entity's employees or agents, so long as the communication relates to the subject matter

¹⁰³ See Proposed Statute (a)(vi)(C).

¹⁰⁴ See *infra* notes 106–10 and accompanying text.

¹⁰⁵ See *infra* notes 111–14 and accompanying text.

¹⁰⁶ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:21 (4th ed. 2013).

¹⁰⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. b (AM. LAW INST. 2000).

¹⁰⁸ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) ("Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation.").

¹⁰⁹ See *id.*

¹¹⁰ Proposed Statute (a)(ii).

¹¹¹ E.g., *City of Phila. v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) (finding that privilege is limited to those who can "control or even . . . take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.").

of the entity's representation.¹¹² The rationale behind the latter approach is that lower-level employees often know the facts relevant to litigation.¹¹³ This makes sense because excluding communications between attorneys and those from an entity with relevant knowledge frustrates the attorney's ability to render adequate advice. In turn, such exclusion would inhibit the entity from realizing their rights and complying with the law. The proposed statute codifies the "subject matter" test, protecting communications between an attorney and "an employee or agent of an entity if the communications pertain to the subject matter of the attorney's representation of the entity"¹¹⁴

4. *Non-attorney Support Staff*

Communication between clients and attorneys often occurs indirectly, through the attorney's non-attorney support staff. These persons may include firm insiders, such as secretaries, paralegals, or clerks, or outsiders to the firm, like language interpreters, investigators, doctors, or accountants. Wyoming's current statute refers only to a client's communications with an *attorney*, casting uncertainty on the privilege's applicability to communications between a client and an attorney's non-attorney support staff.¹¹⁵

Most courts agree that the privilege protects these communications.¹¹⁶ The Third Restatement of The Law Governing Lawyers, for example, applies the privilege to communications between "privileged persons," including agents who facilitate communication between the client and attorney.¹¹⁷ Privileged persons

¹¹² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d. In a leading United States Supreme Court decision, *Upjohn Co. v. United States*, the Court held that the federal attorney-client privilege protects information unavailable to corporate superiors, but available to and communicated by lower level employees to corporate counsel that was needed to supply a basis for legal advice concerning compliance with law. See *Upjohn*, 449 U.S. at 391. The Court of Appeals held that the communications fell outside the scope of the privilege because corporate superiors did not communicate the information to corporate counsel. See *id.* In reversing, the Court criticized the Court of Appeals' approach, stating that its narrow scope interferes with corporate counsel's ability to formulate sound advice and threatens corporate counsel's efforts "to ensure their client's compliance with the law." *Id.*

¹¹³ *Id.* (finding that middle and lower level employees can "embroil the corporation in serious legal difficulties," and these employees often have relevant information that corporate counsel needs); see also MUELLER & KIRKPATRICK, *supra* note 106, § 5:21 ("[T]he control group test fails to protect communications of important information to the attorney and thus impedes her ability to help the corporation comply with the law.").

¹¹⁴ Proposed Statute (a)(vii)(D).

¹¹⁵ WYO. STAT. ANN. § 1-12-101(a)(i) (2017).

¹¹⁶ See, e.g., *Llubes v. Uncommon Prods., LLC*, 663 F.3d 6, 24 (1st Cir. 2011) (holding that privilege protects client confidences in pursuit of legal services "regardless of whether it came from the client, his attorney, or an agent of either one.").

¹¹⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70.

include those whose “participation is reasonably necessary to facilitate the client’s communication with a lawyer”¹¹⁸ This approach best reflects the principle of encouraging communication between attorneys and those needing legal services. The proposed statute adopts this position.¹¹⁹

B. *Communications*

The attorney-client privilege applies to *communications* between attorneys and clients.¹²⁰ It follows that the privilege generally excludes other information relating to legal representation, including the client’s identity, information about fees, the general subject matter of consultation, and the fact of consultation itself.¹²¹ Wyoming’s statute does not, however, describe the kinds of communications the privilege protects. This section outlines the consensus concerning the types of communications the privilege protects and those it does not.¹²²

1. *Protected Communications*

a. *Communications Made in Confidence*

The attorney-client privilege protects only those communications made in confidence.¹²³ This idea is merely implicit in Wyoming’s current privilege law, despite explicit reference to this concept within the statute’s plain language. There would be, after all, no reason for an evidentiary privilege protecting communications made without an expectation of privacy.¹²⁴

Yet jurisdictions have disagreed about whether the privilege covers those communications intended to be confidential or those in which confidentiality is reasonably implied from the circumstances.¹²⁵ The Second Circuit, for instance,

¹¹⁸ *Id.* § 70 cmt. f.

¹¹⁹ Proposed Statute (a)(vii).

¹²⁰ WYO. STAT. ANN. § 1-12-101(a)(i) (“The following persons shall not testify in certain respects: [a]n *attorney* . . . concerning a communication made to him by his *client* . . . or his advice to his client”) (emphasis added).

¹²¹ If, however, disclosing a client’s identity provides essential evidence to support convicting the client of a crime, or if disclosing other facts of consultation directly or by reasonable inference reveals the content of a confidential communication, courts agree that the privilege protects this information. See Proposed Statute (c)(ii).

¹²² See *infra* notes 123–86 and accompanying text.

¹²³ *E.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68(3) (AM. LAW INST. 2000) (“[T]he attorney-client privilege may be invoked . . . with respect to: a communication made . . . in confidence”).

¹²⁴ See BURMAN, *supra* note 94, at 275–76.

¹²⁵ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 cmt. b. The reason for the disagreement may be that jurisdictions vary widely in regulating lawyers. They also vary in determining the admissibility of evidence. Since the attorney-client privilege is part of the law of evidence, wide variation is natural.

has limited the privilege to “those communications which are intended to be confidential.”¹²⁶ Alternatively, the Ninth Circuit has been unwilling to protect a communication if “no reasonable person could have expected it would later be deemed protected.”¹²⁷

While this variation exists, courts almost invariably apply the latter approach, inquiring into whether a reasonable person would have expected the communications to only reach other privileged persons.¹²⁸ The proposed statute reflects this approach, only protecting communications “made with the reasonable belief that only privileged persons will learn of its contents”¹²⁹

b. Oral or Written Words and Nonverbal Communicative Acts

Communications undoubtedly refer to oral and written statements.¹³⁰ But less clear is whether the privilege protects nonverbal communicative acts. The problem is, of course, that any client act in the presence of an attorney is conceivably a communication.¹³¹

Courts agree the privilege applies to nonverbal acts, so long as the act is intended as a communication.¹³² The Third Restatement of the Law Governing Lawyers provides two helpful scenarios that illustrate this concept’s application. In the first, a client charged with a crime retains defense counsel who obtains a police report stating that the crime’s perpetrator had a tattooed right arm.¹³³ In response

¹²⁶ *United States v. Tellier*, 255 F.2d 441, 447 (2nd Cir. 1954).

¹²⁷ *Esposito v. United States*, 436 F.2d 603, 606 (9th Cir. 1970).

¹²⁸ *See United States v. Gann*, 732 F.2d 714, 722–23 (9th Cir. 1984) (finding no privilege for statements defendant made to attorney on the phone because defendant knew he was “surrounded by officers searching his residence”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 cmt. b; MUELLER & KIRKPATRICK, *supra* note 106, § 5:18 (“[F]actors that count are the nature of the communications and any precautions designed to ensure confidentiality, where a reasonable person would think such precautions suffice to keep what is said from becoming known by outsiders.”).

¹²⁹ Proposed Statute (a)(iii).

¹³⁰ *E.g.*, *Soter v. Cowles Publ’g. Co.*, 174 P.3d 60, 76 (Wash. 2007) (holding that privilege extends to documents containing privileged communications); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. b (“A communication can be in any form. Most confidential client communications to a lawyer are written or spoken words”).

¹³¹ *See City & Cty. of San Francisco v. Superior Court*, 231 P.2d 26, 30 (Cal. 1951) (“[Almost] any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication” (quoting 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2306, at 590 (3d ed. 1940))).

¹³² *E.g.*, JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 503.14[3][a] (2d ed. 1997) (“Nonverbal conduct constitutes a communication within the privilege if the client intended the act to make a confidential statement to the attorney in connection with receiving legal services.”).

¹³³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. e, illus. 3.

to the attorney's question of whether the client's right arm is tattooed, the client rolls up their right sleeve revealing their forearm.¹³⁴ Because the client intended the act as a communication, the privilege attaches to the nonverbal act.¹³⁵ But in the second illustration, the client appears at the attorney's office wearing a short-sleeved shirt, revealing a tattoo.¹³⁶ This observation is not privileged because the act had no communicative intent.¹³⁷

The Fourth Circuit captured this view aptly when it wrote, "[T]he privilege protects only the client's confidences, not things which, at the time, are not intended to be held in the breast of the lawyer, even though the attorney-client relation provided the occasion for the lawyer's observation of them."¹³⁸ Accordingly, the proposed statute protects "any expression . . . intended to convey information . . . , including oral or written words, or acts intended to communicate an idea"¹³⁹

*c. Communications Related to Receiving or Retaining
Legal Services*

Wyoming's current privilege statute applies to communications between an attorney and client *in that relation*.¹⁴⁰ Many communications between clients and attorneys are not related to receiving or retaining legal services. Communications may, for instance, relate to business matters, particularly when an attorney represents an organizational client. Communications may also concern personal matters, for example, when the attorney and client are friends. Courts agree that these types of communications are not *in that relation* for purposes of the attorney-client privilege, even if the communication is to or from a person who is a client for other purposes.¹⁴¹ The test is whether the communication's purpose is for receiving or retaining legal services.¹⁴² The privilege does not

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *Id.* § 69 cmt. e, illus. 4.

¹³⁷ *See id.*

¹³⁸ *United States v. Kendrick*, 331 F.2d 110, 114 (4th Cir. 1964).

¹³⁹ Proposed Statute (a)(iii).

¹⁴⁰ WYO. STAT. ANN. § 1-12-101(a)(i) (2017) ("An attorney [shall not testify] concerning a communication made to him by his client . . . in that relation").

¹⁴¹ *E.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72 cmt. c ("[A] communication with a friend is not protected simply because the friend is a lawyer. Also not privileged are communications with a person who is a lawyer but who performs a predominantly business function within an organization, for example as a director or nonlegal officer of a corporation.").

¹⁴² *E.g.*, WEINSTEIN & BURGER, *supra* note 132, § 503.14[1] ("[T]he privilege is limited to communications that are made for the purpose of facilitating the rendition of legal services to the client. Thus, it does not extend to communications not so intended").

attach to communications outside that scope. The proposed statute, therefore, only protects communications between an attorney and a client who receives or seeks to retain legal services.¹⁴³ It further specifies that *legal services* include “giving legal advice, drafting legal documents, appearing and advocating for another before a tribunal, negotiating the legal rights or responsibilities on behalf of another, or any other services requiring an attorney’s professional and educated judgment”¹⁴⁴ Communications falling outside this definition are unprotected.

2. *Unprotected Communications*

The attorney-client privilege has limited applicability to some communications. Just as the current statute fails to define the communications that the privilege protects, it similarly neglects to articulate those to which the protection does not extend. This section outlines the communications most jurisdictions recognize as falling outside the privilege’s reach.¹⁴⁵

a. Those for the Purpose of Crime or Fraud

For over a century,¹⁴⁶ courts have excluded communications from the privilege’s protection if the client’s purpose for or use of legal services is to commit a crime or fraud.¹⁴⁷ At least three considerations underlie this policy. First, there is little social interest in protecting communications when a client intending to violate legal obligations consults an attorney.¹⁴⁸ Second is the public interest in preventing clients from using legal services for harmful ends.¹⁴⁹ Third, morality prefers denying protection on the grounds that the client’s wrongful intent forfeits the privilege’s protection.¹⁵⁰ Some commentators fear attorneys might not inquire thoughtfully into their client’s disclosures or deliver forthright advice on how to avoid criminal or fraudulent activity in order to evade the exception.¹⁵¹ This assertion has, however, been rejected as improbable.¹⁵²

¹⁴³ Proposed Statute (a)(ii).

¹⁴⁴ *Id.* (a)(v).

¹⁴⁵ See *infra* notes 146–86 and accompanying text.

¹⁴⁶ See Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF L. REV. 1061, 1063–69 (1978).

¹⁴⁷ *E.g.*, *Clark v. United States*, 289 U.S. 1, 15 (1933) (“A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.”).

¹⁴⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 cmt. b. (AM. LAW INST. 2000).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *E.g.*, *Garner v. Wolfenbarger*, 430 F.2d 1093, 1102 (5th Cir. 1970) (“[T]he cause of justice requires that counsel be free to state his opinion as fully and forthrightly as possible without fear of later disclosure to persons who might attack the transaction, and that without the cloak of the privilege counsel may be ‘required by the threat of future discovery to hedge or soften their opinions.’”) (citations omitted).

¹⁵² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 cmt. c.

Consistent with this policy, the proposed statute does not prevent communications from disclosure “if the legal services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud”¹⁵³ Importantly, the exception does not apply to communications relating to a client’s crimes or fraud occurring prior to the client seeking and obtaining an attorney’s legal services.

b. Those Relevant to a Breach of the Attorney-Client Relationship

Fairness suggests that the privilege should not apply when the client puts the attorney’s legal assistance at issue. Otherwise, a client could present the attorney’s assistance in an “inaccurate, incomplete, and self-serving way.”¹⁵⁴ Courts agree that “it would be unjust for a party to that relationship to maintain the privilege so as to preclude disclosure of confidential communications relevant to the issue of breach.”¹⁵⁵

Accordingly, the majority view holds that a client who puts their attorney’s assistance in issue waives the privilege with respect to the relevant communications.¹⁵⁶ In effect, waiver affords both parties the opportunity to establish the facts giving rise to the claim. The proposed statute adopts this position, allowing disclosure “as to a communication relevant to an issue of breach . . . of a duty arising out of the attorney-client relationship”¹⁵⁷

c. Those Offered in an Action between Joint Clients

Except for those persons reasonably necessary to facilitate communications between an attorney and client, a third party’s presence typically destroys the privilege, resulting in waiver.¹⁵⁸ Similarly, the privilege is waived when a third party learns of the communicated content indirectly.¹⁵⁹

¹⁵³ Proposed Statute (c)(iii).

¹⁵⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 cmt. b.

¹⁵⁵ *E.g.*, *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 632 (D. Kan. 2000).

¹⁵⁶ *E.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) (“The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that . . . a lawyer’s assistance was ineffective, negligent, or otherwise wrongful.”).

¹⁵⁷ Proposed Statute (c)(v).

¹⁵⁸ *See supra* notes 115–19 and accompanying text.

¹⁵⁹ *E.g.*, *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954) (holding the privilege was waived where claimed privileged documents were indiscriminately mingled with routine corporate documents with no special effort to preserve them in separate files).

There is no waiver, however, when either an attorney jointly represents multiple clients,¹⁶⁰ or when separate attorneys represent multiple parties in a common interest arrangement.¹⁶¹ The privilege applies in these contexts. But if co-clients become adversaries in subsequent proceedings, neither may invoke the privilege against the other.¹⁶² The rule is the same for parties in a common interest arrangement.¹⁶³

The rationale for allowing access to the previously protected information appears to be two-fold. First, there is no principled way to decide who should prevail if one client invokes the privilege against another.¹⁶⁴ Second, allowing clients to invoke the privilege against one another would be difficult to justify because each has already disclosed the information to the other.¹⁶⁵

In brief, consenting to joint representation or a common interest arrangement means that each client assumes the risk of later disclosure. Thus, the proposed statute allows disclosure “as to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between any of the clients.”¹⁶⁶

d. Where the Attorney is an Attesting Witness

A client’s attorney is often an attesting witness to a document disposing of the client’s property. Such an attorney is in a position to know the decedent’s testamentary intent. Furthermore, they are likely free from any personal interest that could bias their testimony. Courts have therefore created an exception to the attorney-client privilege when a confidential communication is relevant to an issue

¹⁶⁰ *E.g.*, *Simpson v. Motorist Mut. Ins. Co.*, 494 F.2d 850, 855 (7th Cir. 1974) (enouncing where one lawyer represents two parties with a common interest, what each says is “privileged from disclosure at the instance of a third person.”).

¹⁶¹ *E.g.*, *Hunton & Williams v. DOJ*, 590 F.3d 272, 277 (4th Cir. 2010) (“The common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend claims.”).

¹⁶² *E.g.*, *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970) (explaining that when attorneys act for two or more persons with common interest, “neither party may exercise the privilege in a subsequent controversy with the other”).

¹⁶³ *E.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(2) (AM. LAW INST. 2000) (“[A] communication [in a common interest arrangement] is not privileged as between clients . . . in a subsequent adverse proceeding between them.”).

¹⁶⁴ MUELLER & KIRKPATRICK, *supra* note 106, § 5:19.

¹⁶⁵ *Id.*

¹⁶⁶ Proposed Statute (c)(vi).

between parties claiming an interest through the same client.¹⁶⁷ The exception is justified on the grounds that a decedent would likely want full disclosure to facilitate carrying out their testamentary wishes.¹⁶⁸ On this assumption, there is little conflict with disclosure and the principle of encouraging full and frank discussions.¹⁶⁹ The proposed statute codifies this exception, permitting disclosure “as to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness.”¹⁷⁰

e. When an Attorney Alters or Removes Evidence of a Client's Crime

The privilege has limited reach when a client provides evidence of or the instrumentality used to perpetrate a crime to their attorney, or when the attorney learns information from the client leading to such evidence or instrumentality.¹⁷¹

Consider a leading case, illustrative of such a limitation. In *People v. Meredith*, an attorney's investigator removed a robbery-murder victim's wallet from a location revealed by the defendant to their attorney.¹⁷² On appeal, the California Supreme Court addressed whether the “observation of the *location* of the wallet, the product of a privileged communication, finds protection under the attorney-client privilege.”¹⁷³ The court held the client's disclosure of the wallet's location to the attorney to be privileged.¹⁷⁴ Removing the wallet from the location, however, destroyed it.¹⁷⁵ When defense attorneys remove or alter physical evidence, the court reasoned, they necessarily deprive the prosecution of the opportunity to observe the evidence in its original condition or location.¹⁷⁶

¹⁶⁷ *E.g.*, *Glover v. Patten*, 165 U.S. 394, 406 (1897) (holding that in litigation between devisees under a will, deceased client statements to attorneys regarding execution of a will are not privileged); *see also* MUELLER & KIRKPATRICK, *supra* note 106, § 5:29 (“[T]here is an exception to the privilege for communications by a deceased client that are relevant in litigation between parties who advance competing claims against assets to the estate.”).

¹⁶⁸ *United States v. Osborne* 561 F.2d 1334, 1340 n.11 (9th Cir. 1977) (“The rationale behind the exception to the general rule is that the privilege itself is designed for the protection of the client, and it cannot be said to be in the interests of the testator, in a controversy between parties all of whom claim under the testator, to have those confidential communications of the testator and attorney excluded which are necessary to a proper fulfillment of the testator's intent.”).

¹⁶⁹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 81 cmt. b (AM. LAW INST. 2000) (“It is . . . probable that the exception does little to lessen the inclination to communicate freely with lawyers.”).

¹⁷⁰ Proposed Statute (c)(vii).

¹⁷¹ *See, e.g.*, *People v. Meredith*, 631 P.2d 46 (Cal. 1981).

¹⁷² *Id.*

¹⁷³ *Id.* at 48.

¹⁷⁴ *Id.* at 51–52.

¹⁷⁵ *Id.* at 53.

¹⁷⁶ *Id.*

Extending the privilege “to bar admission of testimony concerning the original condition and location of the evidence” in such a case “permits the defense in effect to ‘destroy’ critical information.”¹⁷⁷ This case illustrates why there should be a limitation applicable when a lawyer alters or removes physical evidence. “[W]henever defense counsel removes or alters evidence, the . . . privilege does not bar revelation of the original location or condition of the evidence”¹⁷⁸

The court also provided insight concerning an attorney’s obligation when the attorney comes into possession of evidence of a crime.¹⁷⁹ In short, such evidence should be given to law enforcement, after which, the evidence is admissible, but not information regarding its source.¹⁸⁰

Rule 3.4 of Wyoming’s Rules of Professional Conduct summarizes these principles.¹⁸¹ Comment 2 states that a lawyer may “take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence.”¹⁸² It continues, “in such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority”¹⁸³

While Rule 3.4 concerns an attorney’s ethical duty when that attorney comes into possession of the instrumentalities of a client’s crime, Wyoming’s current attorney-client privilege statute does not address the admissibility of this type of evidence. The proposed statute remedies this problem, following the approach in *People v. Meredith*.¹⁸⁴ The statute provides the following:

[A]n attorney coming into possession of evidence of a client’s crime shall not be compelled to disclose the source of such evidence, if, after retaining the evidence for a reasonable time to subject it to examination, the attorney notifies the prosecuting authorities of his or her possession of the evidence or turns it over to them¹⁸⁵

If, however, the attorney alters the condition of the evidence or removes it from its original location after the client provides information leading to its location, a

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 54.

¹⁷⁹ *Id.* at 50.

¹⁸⁰ *See id.* at 50, 52, 54 n.8.

¹⁸¹ *See* WYO. RULES OF PROF’L CONDUCT r. 3.4 (2014).

¹⁸² *Id.* R. 3.4 cmt. 2.

¹⁸³ *Id.*

¹⁸⁴ Proposed Statute (c)(iv)(A); *see supra* notes 171–80 and accompanying text.

¹⁸⁵ Proposed Statute (c)(iv)(A).

privilege holder may not prevent disclosure of the original condition or location of the evidence.¹⁸⁶

C. *Can a Client be Compelled to Testify?*

By its terms, Wyoming's statute protects only attorneys, not clients, from being compelled to testify about communications arising from the attorney-client relationship.¹⁸⁷ This approach does not, however, further the goals of the privilege.

The purpose of the attorney-client privilege is to encourage full and frank communication between clients and attorneys. Full and frank communications would be severely chilled if the privilege protected only attorneys, but not their clients, from having to testify about their communications. The privilege against disclosure, the Alabama Supreme Court noted:

[W]ould be a mockery if the client could be compelled to disclose that as to which counsel's lips are sealed. It would be absurd to protect by solemn sanction professional communications when the lawyer is examined, and to leave them unprotected at the examination of the client.¹⁸⁸

The proposed statute eliminates the current mockery of the attorney-client privilege, protecting attorneys, as well as clients, from compelled disclosure of privileged communications.¹⁸⁹

D. *Who May Claim the Privilege?*

It is, or ought to be, uncontroversial that the attorney-client privilege belongs to the client.¹⁹⁰ As such, only the client, or their authorized agent, may invoke or waive the privilege.¹⁹¹ Authorized agents include the client's attorney.¹⁹² Only

¹⁸⁶ *Id.* (c)(iv).

¹⁸⁷ WYO. STAT. ANN. § 1-12-101(a)(i) (2017) ("The following persons shall not testify in certain respects: [a]n attorney . . . concerning a communication made to him by his client . . . or his advice to a client . . .").

¹⁸⁸ *Birmingham Ry. & Elec., Co., v. Wildman*, 119 Ala. 547, 549–50 (Ala. 1898).

¹⁸⁹ *See Proposed Statute* (a)(vi), (b).

¹⁹⁰ *See, e.g., Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992) ("It is certainly true that the attorney-client privilege belongs to [the client] . . .").

¹⁹¹ *E.g., Sandra T.E. v. S. Berwyn Sch. Dist.* 100, 600 F.3d 612, 618 (7th Cir. 2010) (enouncing that privilege belongs to the client and lawyer may claim it on their behalf).

¹⁹² *See, e.g., Fisher v. United States*, 425 U.S. 391, 402 n.8 (1976) (explaining that the privilege may be "raised by the attorney"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78 (AM. LAW INST. 2000); MUELLER & KIRKPATRICK, *supra* note 106, § 5:32 ("The lawyer's authority to claim the privilege is presumed in the absence of evidence to the contrary.").

by inference does the current statute reach this conclusion, however. It provides that “[t]he attorney . . . may testify by express consent of the client . . . and if the client voluntarily testifies the attorney . . . may be compelled to testify on the same subject.”¹⁹³ Such a statement, of course, is commensurate with the argument that the privilege belongs to the client. The proposed statute removes the superfluous need for inference, explicitly placing the privilege in the hands of the client or the client’s authorized agent.¹⁹⁴

IV. PROPOSED ATTORNEY-CLIENT PRIVILEGE STATUTE

The following proposal is not a proposed amendment to the current statute. Rather, it is an entirely new statute. The reason for a new statute is that the number of amendments necessary to correct the current statute’s deficiencies would be considerable. The best approach is a new statute that makes sense.

- (a) as used in this statute:
 - (i) an “attorney” is a person authorized, or a person the client reasonably believes is authorized, to practice law in any state or nation;
 - (ii) a “client” is a person or entity who receives legal services from an attorney or consults an attorney for the purpose of retaining legal services;
 - (iii) a “confidential communication” is any expression between privileged persons intended to convey information, made with the reasonable belief that only privileged persons will learn of its contents, including oral or written words, or acts intended to communicate an idea;
 - (iv) an “entity” is an association, corporation, estate, partnership, sole-proprietorship, trust, or any other public or private organization;
 - (v) “legal services” include giving legal advice, drafting legal documents, appearing and advocating for another before a tribunal, negotiating the legal rights or responsibilities on behalf of another, or any other services requiring an attorney’s professional and educated judgment;
 - (vi) a “privilege holder” is:
 - (A) the client or the client’s guardian or conservator, if the client has a guardian or conservator;

¹⁹³ WYO. STAT. ANN. § 1-12-101(a)(i) (2017).

¹⁹⁴ See Proposed Statute (a)(vi).

- (B) the entity's authorized representative;
 - (C) the deceased client's personal representative, if the client is dead;
 - (D) the attorney at the time of the confidential communication, unless another privilege holder authorizes disclosing the confidential communication;
- (vii) "privileged persons" include:
- (A) the client;
 - (B) the attorney;
 - (C) an accountant, financial planner, non-attorney support staff, language interpreter, or any other person whose participation is reasonably necessary to facilitate communication between the client and the attorney;
 - (D) an employee or agent of an entity if the communications pertain to the subject matter of the attorney's representation of the entity and are within the scope of the employee's or agent's duties.
- (b) a privilege holder may prevent the disclosure of a confidential communication made between privileged persons for the purpose of facilitating the rendition of legal services to the client.
- (c) a privilege holder may not prevent disclosure:
- (i) as to the client's identity, unless disclosing the client's identity provides essential evidence to support convicting the client of a crime;
 - (ii) as to the fact of consultation between the attorney and the client, the general subject matter of the consultation, and information about fees, unless such evidence directly or by reasonable inference would reveal the content of a confidential communication;
 - (iii) if the legal services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud;

- (iv) of the original condition or location of physical evidence, if, after a client provides information leading to such evidence, the attorney alters or removes it;
 - (A) an attorney coming into possession of evidence of a client's crime shall not be compelled to disclose the source of such evidence, if, after retaining the evidence for a reasonable time to subject it to examination, the attorney notifies the prosecuting authorities of his or her possession of the evidence or turns it over to them;
- (v) as to a communication relevant to an issue of breach, by the attorney or by the client, of a duty arising out of the attorney-client relationship;
- (vi) as to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between any of the clients;
- (vii) as to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness.

V. CONCLUSION

This article has aimed to clarify possible confusion concerning the confidentiality arising from the attorney-client relationship. By discussing the three bodies of law giving confidentiality its effect, the article helps Wyoming attorneys understand when and under what conditions confidentiality applies. Importantly, readers should now recognize that the broad ethical duty of confidentiality does not necessarily prevent later disclosure of a client's confidential communications in judicial proceedings. Disclosure of ethically confidential information in this context is only prevented when the information is privileged work product or the attorney-client privilege applies.

The article has also argued that Wyoming's current attorney-client privilege statute does little to resolve the perplexing nature of confidentiality. It has highlighted the problems the current statute creates and identified the predominating solutions that other jurisdictions have adopted in response to similar difficulties. Further, the article proposes a new attorney-client privilege statute that gives better guidance to practicing Wyoming attorneys. The authors hope the Wyoming Legislature will consider the proposed attorney-client privilege statute.