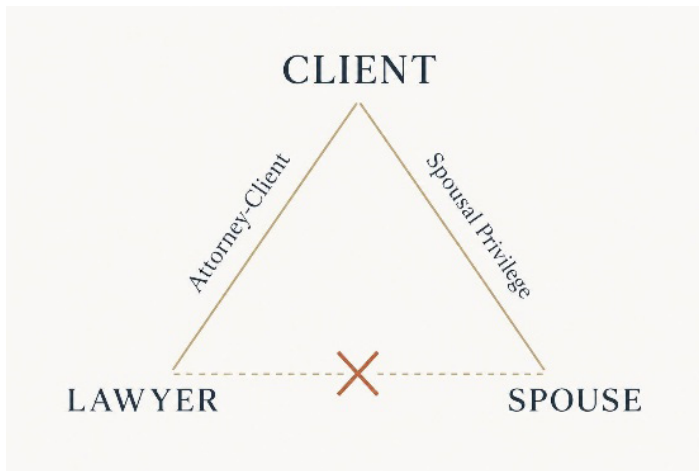


When two privileges collide — The intersection of attorney-client and spousal privileges

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Introduction



Source: Sher Tremonte LLP

Consider a common scenario. A wife meets with her attorney to discuss a pending lawsuit. After the meeting, she calls her husband and tells him what the lawyer said. Under well-settled law, the attorney-client privilege survives that phone call. The spousal privilege protects this subsequent disclosure, and the privilege protecting the original communication remains intact.

Now imagine the husband sits in the room when the lawyer gives the advice. Under the traditional rule, his presence may destroy the attorney-client privilege. The contrast is striking. The same information, shared between the same people, may receive different treatment depending on the sequencing of the communications.

This concern about privilege waiver is not theoretical — at least one court has said that both the attorney client and spousal privileges are waived where communications were made during the “course of a three-way conversation between” a husband, wife and the husband’s lawyer. See *People v. Allen*, 104 Misc. 2d 136 (Sup. Ct. Westchester County 1980).

As any practitioner knows, clients show up to meetings and take calls with their spouses all the time and routinely share

legal correspondence with them. Accordingly, attorneys will do well to navigate this doctrinal landscape with care.

This article examines the more restrictive approach to resolving this privilege conflict seen in certain jurisdictions compared to other more flexible approaches.

The baseline rule — Spousal presence may break privilege

The attorney-client privilege protects communications between an attorney and client that are made for the purpose of obtaining or facilitating legal advice. The privilege “fosters the open dialogue between lawyer and client that is deemed essential to effective representation.” *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991).

Like attorney-client privilege, spousal privilege depends on confidentiality: Communications made in the presence of third parties are presumptively not confidential.

The spousal communications privilege provides that a husband or wife is not required, or (without the consent of the other living spouse) allowed, to disclose a confidential communication made in confidence and in reliance on the marital relationship. Like attorney-client privilege, spousal privilege depends on confidentiality: Communications made in the presence of third parties are presumptively not confidential. See *People v. Melski*, 10 N.Y.2d 78, 80 (1961).

It is well-settled that the presence of any third party destroys the confidentiality element of both privileges. See *Baumann v. Steingester*, 213 N.Y. 328, 332–33 (1915). When these two privileges intersect, for example, where a spouse is present during an attorney-client communication, traditional application of these rules suggests that each privilege may cancel the other.

As one court put it: “When the third person present [at an attorney–client meeting] is the husband or wife of the client, neither spousal nor attorney–client privilege protects the conversation; the attorney’s presence prevents the spouses from speaking in confidence and the spouse’s presence prevents the attorney and client from talking confidentially.” *People v. Investigation into a Certain Weapon*, 113 Misc. 2d 348, 354 (Sup. Ct. Kings County 1982) (quoting 5 Zett, N.Y. Crim. Prac. at 35–29).

The agency exception

Despite this “mutual destruction” theory, some jurisdictions have recognized that the presence of a third party may not automatically destroy the attorney–client privilege where that person is acting as an “agent” of the client to facilitate communication with counsel. Under the agency approach, a spouse’s presence does not destroy privilege.

The Restatement (Third) of the Law Governing Lawyers looks to whether the spouse’s presence destroys confidentiality — and concludes that the answer is that it never does, because the spousal privilege independently ensures that the communication remains confidential.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016), the Court of Appeals held that statements made to agents of the attorney or client “retain their confidential (and therefore, privileged) character, where the presence of such third parties is deemed necessary to enable the attorney–client communication and the client has a reasonable expectation of confidentiality.”

Applying this exception in *In re Horowitz*, 16 Misc. 3d 1106(A), 2007 WL 1893622 (Sur Ct, Nassau County June 21, 2007), the court found that a client’s husband was an agent where he was familiar with the business enterprises at issue and was therefore able to provide information and advice to his wife who was serving as executrix.

Similarly, in *Shih v. Petal Card, Inc.*, 565 F. Supp.3d 557, 577 (S.D.N.Y. 2021), the court held that the plaintiff’s husband (a lawyer) was “acting on plaintiff’s behalf, not merely to provide moral support, but as a trusted advisor, a go-between, and a researcher on demand,” thus preserving attorney–client privilege. *Id.* The *Shih* court characterized the standard for spousal agency as requiring only “a fairly minimal showing” that “the client reposed trust and confidence in her spouse

and expected the communication to remain confidential notwithstanding his presence.” *Id.* at 573.

In addition to New York, the agency approach has been explored in several other jurisdictions. See e.g., *Mazur v. Wal-Mart Stores, Inc.*, 5:05-CV-85, 2006 WL 7344548, at *3 (E.D.Mich. Apr. 19, 2006) (evaluating whether wife “was acting as plaintiff’s agent”); *Pethtel v. Veterans Roofing PLLC*, 25-CV-01648-SPM, 2026 WL 1242895, at *3 (S.D.Ill. May 6, 2026) (applying agency framework and determining spouse not “client agent” where plaintiff argued she was a trusted confidant and supporter); *Lama v. Preskill*, 353 Ill. App. 3d 300, 306 (2d Dist 2004) (finding legal communications made through a spousal agent preserves privilege); *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 893 n.10, 575 SE2d 864, 872 n.10 (2002) (recognizing that “[u]nder recognized principles of agency” spousal communications do not break privilege).

Subsequent disclosures protected



Source: *Sher Tremonte LLP*

Although a spouse’s presence during an attorney–client communication creates a risk of waiver, what is clear is that when a client *subsequently* discloses a prior attorney–client communication to a spouse the privilege survives. See e.g., *Matter of Will of Pretino*, 150 Misc. 2d 371 (Sur. Ct. Nassau Cty. 1991) (“[T]he disclosure to a spouse with the intention of preserving confidentiality does not amount to a waiver of the attorney–client privilege.”); *L-3 Commc’ns Corp. v. Jaxon Eng’g & Maint., Inc.*, No. 10-CV-02868-MSK-KMT, 2014 WL 3732943, at *3 (D. Colo. July 29, 2014) (“forwarding an email to [wife]. . . does not act as a waiver of the attorney client privilege”); *United States ex rel. Scott v. Humana, Inc.*, 3:18-CV-61-GNS-CHL, 2019 WL 7404032, at *4 (W.D.K.Y. Sept. 24, 2019) (“transmission . . . [to] one’s spouse does not waive the attorney–client or work product privilege”).

In this circumstance, the disclosure to the spouse is itself a confidential communication protected by the marital privilege — as long as it was made during the marriage, induced by the marital relationship, and intended to remain confidential. Because the subsequent disclosure occurs within the context of a separately recognized privilege, the confidentiality of the original attorney–client communication is not breached.

The restatement approach

The Restatement (Third) of the Law Governing Lawyers also offers a fundamentally different and more flexible framework providing that a spouse’s presence in or on an otherwise

attorney-client privileged communication does not destroy confidentiality because the spousal privilege independently ensures confidentiality.

Specifically, Comment b of Section 71 of the Restatement addressing the “In Confidence” prong of the attorney client privilege expressly provides:

”The presence of a stranger to the lawyer-client relationship does not destroy confidentiality if another privilege protects the communications in the same way as the attorney-client privilege. Thus, in a jurisdiction that recognizes an absolute husband-wife privilege, the presence of a wife at an otherwise confidential meeting between the husband and the husband’s lawyer does not destroy the confidentiality required for the attorney-client privilege.”

The Restatement approach does not focus on agency. It looks to whether the spouse’s presence destroys confidentiality — and concludes that the answer is that it never does, because the spousal privilege independently ensures that the communication remains confidential.

The clearest judicial endorsement of the Restatement came in *IsoNova Technologies LLC v. Rettig*, No. 20-CV-00071, 2023 WL 3741632, at *4 (N.D. Iowa May 31, 2023), where the court, citing the Restatement, held that given the state’s “marital communications privilege, the presence of [defendant’s] spouse on attorney-client privileged emails does not destroy

their confidentiality[.]” The court reasoned: “if [the client] had forwarded every attorney-client email to his spouse, the emails would have remained privileged by application of the spousal privilege. It does not make sense then that by including his spouse from the start, the emails lose their privileged nature.” *Id.*; see also *Brownfield v. Hodous*, 82 Va. Cir. 315 (Charlottesville Cir. Ct. 2011) (citing Section 71 and noting “because Virginia does recognize the husband-wife privilege . . . the presence of Plaintiffs husband does not destroy . . . confidentiality”), *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 406 (D. Kan. 1998) (“[no] waiver when the disclosure is made in the course of another privileged relationship”).

Conclusion

The law at the intersection of attorney-client and spousal privileges is continuing to evolve. In particular, recent cases in more restrictive jurisdictions have sharpened the contours of the agency exception. While the Restatement approach appears to offer the most flexible response, courts have yet to widely adopt it.

Unless and until they do, practitioners must navigate this intersection with care — recognizing the hidden but real risk of waiver by building the appropriate record to support agency and leaning on subsequent private disclosures in lieu of live spousal attendance where possible.

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