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New York Law Journal

Attorney-Client Privilege Is Not Family Friendly

By Lita Beth Wright and Yosef Trachtenberg
November 12, 2025

Clients often want a trusted family member by their side when they consult with attorneys. While understandable, doing so can carry serious risks. Under New York law, the general rule is the presence of any third party, including a family member, destroys the attorney-client privilege.

While intuitively, a client may think a family member should fall within the umbrella of the privilege, New York law takes a stricter view. Unless a recognized exception applies, a family member's inclusion in attorney-client communications can waive the privilege.

This article explores how New York courts treat attorney-client privilege when family members are present, the exceptions that preserve privilege and practical steps to safeguard privilege.

Forwarding an Email to Your Daughter Can Waive Privilege?

For Martha Stewart, the renowned entrepreneur and media personality, the simple act of sharing with her daughter an email about Stewart's controversial stock trade waived the privilege. During the investigation that ultimately led to her insider-trading conviction, Stewart emailed her lawyer with her account of the controversial stock sale. The next day, she forwarded that email to her daughter. The seemingly harmless act of sharing that email with someone Steward trusted implicitly waived the attorney-client privilege. As the court put it, "Stewart's intent and the sanctity of the family notwithstanding, the law in this Circuit is clear: apart from a few recognized exceptions, disclosure to third parties of attorney-client privileged materials results in a waiver of that privilege. No exception is applicable in this case." *United States v. Stewart*, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003).

Lita Beth Wright

Yosef Trachtenberg

Fortunately for Stewart, the court held that her email was protected by the broader attorney work product doctrine (discussed below). While the work product doctrine may have saved Stewart's email from disclosure, the recognized exceptions to the attorney-client privilege are far more limited.

Attorney-Client Privilege in New York

The attorney-client privilege, codified in Rule 4503(a) of the New York Civil Practice Law and Rules ("CPLR"), protects confidential communications between an attorney and client made for the purpose of obtaining or facilitating legal advice. *See App. Advocs. v. New York State Dept. of Corr. & Cmty. Supervision*, 40 N.Y.3d 547, 552 (2023).

This privilege "encourages full and frank communication between attorneys and their clients," *People*

Attorney-Client Privilege

ex. rel. Spitzer v. Greenberg, 50 A.D.3d 195, 200 (2008), so that "one seeking legal advice will be able to confide fully and freely in his attorney[.]" *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016) (citations omitted). "Because the [attorney-client] privilege shields from disclosure pertinent information and therefore constitutes an 'obstacle' to the truth-finding process, it must be narrowly construed."

A key element of this privilege is preserving the confidential nature of the communications which voluntary disclosure to third parties vitiates. Generally, family members are considered "third parties" whose presence can waive privilege. *See e.g., In re Horowitz*, 16 Misc. 3d 1106(A), 841 N.Y.S.2d 826 (Sur. Ct. 2007) ("Communications between an attorney and client are generally not privileged in New York if the client's spouse is present at the time of the transaction.").

When Presence of Family Members Maintains or Waives Privilege

For many clients, the general rule that including family members in confidential communications with counsel waives privilege is both surprising and counterintuitive. Fortunately, New York law does recognize limited exceptions to this rule.

The Agency Exception. New York courts recognize that an agent of either the attorney or client, such as interpreters, can be involved in attorney-client communications without destroying privilege so long as the communications are made and retained in confidence and they were principally made to assist in obtaining or providing legal advice to the client. *See, e.g., People v. Osorio*, 75 N.Y.2d 80, 84 (1989). As such, a family member who is present to translate communications can serve a legitimate purpose in facilitating communication between attorney and client without destroying privilege. The New York State Bar Association, however, has cautioned that attorneys should ensure that family members serving as translators understand the requirement to maintain confidentiality as they may not be familiar with the nuances of maintaining attorney-client privilege. NYSBA Committee on Professional Ethics, Opinion 1053 (Apr. 10, 2015) (*available at*: https://nysba.org/ethics-opinion-1053). A common way this exception can arise when the client is not fluent in English and asks a family member to assist with legal communications.

Although the specific form of agency can vary, such a relationship is generally found where the client has consented (whether expressly or implied) for the agent to act on the client's behalf and the agent is subject to the client's control. *E.g*, *Time Warner City Cable v. Adelphi Univ.*, 27 A.D.3d 551, 552 (2d Dept. 2006). For example, in *Homapour v. Harounian*, 211 A.D.3d 508 (1st Dept. 2022), the Appellate Division affirmed the trial court's finding that the defendant's personal assistant and employee qualified as the defendant's agent and therefore did not waive attorney–client privilege. The court reasoned that the assistant had entered into an agency agreement designating her as the defendant's agent and that she was "facilitating attorney-client communications by recording notes of the meeting, because her doing so allowed [the defendant] to listen rather than write."

New York courts have applied the agency exception in the familial context. *See, e.g., Stroh v. General Motors Corp.*, 213 A.D.2d 267, 268 (1st Dept. 1995) (client's daughter was deemed an agent, and therefore her presence did not waive privilege, where she helped her elderly mother select counsel, transported her mother to meetings, helped her mother communicate with counsel concerning a traumatic event, and was a potential witness to the incident at issue); *Matter of Weinberg*, 133 Misc. 2d 950 (Sur. 1986) (client's daughter was an agent where she consulted with the attorney on her father's behalf in a representative capacity, and she served as an officer, director and employee of the father's various business enterprises); *In re Horowitz*, 16 Misc. 3d 1106(A), 841

N.Y.S.2d 826 (Sur. Ct. 2007) (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).

It is important to note that New York courts enforce this exception strictly. For example, in *TGT, LLC v. Meli*, 2024 N.Y. Slip Op. 31185(U), 2024 WL 1508289 (N.Y. Sup. Ct. 2024) *aff'd* 234 A.D.3d 511 (1st Dept. 2025), the court held that a father's inclusion on legal communications waived privilege.

Notably, the court rejected that the father was an agent of the son, despite "indicia" of the father's agency, such as the father serving as a trustee for the son's trust and acting as the son's attorney with regard to the trust, because no evidence had been submitted showing that the father would keep the legal communications confidential. The court similarly rejected the notion that the father was needed to facilitate the attorney-client communications, as no evidence to that effect had been submitted.

Similarly, in *Molner v. Molner*, 231 A.D.3d 484 (1st Dept. 2024), the court rejected defendant's assertion that communications shared with her parents were privileged where she did not provide any evidence that her parents were necessary to enable the attorney-client communications. The court emphasized that "conclusory statements of nonwaiver, without an indication of how the purported agent facilitated communications, cannot preserve the privilege."

The court also considered the defendant's education and profession (a physician) in determining that she did not require her parent's assistance in communicating with her attorney. A similar result was reached in *Nacos v. Nacos*, 124 A.D.3d 462, 462 (1st Dept. 2015). There, the court held that there was no attorney-client privilege protecting correspondence between plaintiff and her father and brother, despite their being attorneys, because they were not matrimonial lawyers, had failed to state legal tasks they performed or legal advice they rendered, and they had not appear on plaintiff's behalf.

These cases underscore the key factors courts consider on this issue. First, there must be a clear understanding that the family member will maintain the client's confidences. Second, courts will narrowly construe the attorney-client privilege and its exceptions, rejecting unsubstantiated assertions of agency and looking beyond labels to determine whether the family member was truly necessary to facilitate attorney-client communication or was serving as an agent of the client. And finally, courts expect the proponent of the privileged to submit evidence showing the family member's role.

Common Interest Exception. The common interest doctrine is another exception to the general rule that communications shared with third parties waive privilege, and can potentially provide another avenue for preserving privilege when family members are present. *See Ambac Assur. Corp. v. Countrywide Home Loans*, 27 N.Y.3d 616, n.1 (2016).

Under this doctrine, an attorney-client communication that is disclosed to a third party remains privileged if both parties share a common legal interest (i.e., between co-defendants, co-plaintiffs or persons who reasonably anticipate that they will become co-litigants), and the communication was made to further that common interest.

For this exception to apply, however, the Court of Appeals has held that any such communication must relate to litigation, either pending or anticipated and, of course, remain confidential. The purpose of this exception is to promote candor and coordination between the parties who may serve as co-litigants. This doctrine would protect disclosures to family members if the above conditions are met.

Other Pathways to Preserving Privilege. Although not the subject of this article, it is worth noting that there are other categories of privilege that could protect material shared with family members from disclosure. Under CPLR 3101(c), for example, an attorney's work product is protected from disclosure. This generally covers "materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *In re New York City Asbestos Litig.*, 109 A.D.3d 7, 12 (1st Dept. 2013).

"Work product is a separate and distinct source of immunity from the attorney-client privilege and waiver of the attorney-client privilege does not necessarily result in waiver of the protection afforded under the work product category." *Matter of Will of Pretino*, 150 Misc. 2d 371, 373 (Sur. 1991). This is because work product, unlike the attorney-client privilege, "is waived upon disclosure to a third party *only* when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent

with a desire to maintain confidentiality." *Bluebird Partners, L.P. v. First Fid. Bank, N.A., New Jersey*, 248 A.D.2d 219, 225 (1st Dept. 1998) (emphasis added).

Significantly, this would mean that sharing work product with family members often would not waive this privilege. *See Perkins v. State*, 85 Misc. 3d 1201(A), 225 N.Y.S.3d 826 (N.Y. Ct. Cl. 2024) (client sharing material with his father and a witness did not waive work product privilege); *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

Interplay With Spousal Privilege

The waiver of privilege due to a spouse's presence in legal meeting is somewhat at tension with New York's rules surrounding spousal privilege. Under CPLR 4502(b), confidential communications made between spouses during a valid marriage are privileged. The spousal privilege is separate from and independent of the attorney-client privilege.

A strict application of CPLR 4503(a) and 4502(b) in the marital context can lead to strange quirk in the law. Suppose a wife repeats to her husband legal advice from her attorney. That communication would clearly be protected as spousal privilege. *See, e.g.*, *Smartmatic USA Corp. v. Fox Corp.*, No. 151136/2021, 2024 WL 289509, at *2 (N.Y. Sup. Ct. 2024) ("spousal privilege extends to attorney-client communications shared between spouses"). However, if the husband is in the room when the attorney provides that same legal advice to his wife, his presence would presumptively waive attorney-client privilege and render that conversation discoverable.

It is worth noting that other states have recognized this tension and taken a different approach. A recent decision from Iowa, for example, opines: "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." *IsoNova Techs. LLC v. Rettig*, No. 20-CV-71-CJW-KEM, 2023 WL 3741632, at *4 (N.D. Iowa 2023) (rejecting notion that a spouse's presence necessarily destroys privilege).

Practical Guidance for Attorneys

The party asserting attorney-client privilege has the burden of establishing its applicability. Given this burden, and the foregoing risks and exceptions, attorneys should take proactive steps to preserve privilege.

Only meet with the client. Meet one-on-one with the client to ensure that privilege attaches. Similarly, do not copy the client's family members on emails to the client.

Inform the client of risks. If the client insists on a spouse or family member attending, advice the client of the potential risk of waiver.

Clarify spouse's role. Attempt to understand whether the family member is acting as a translator, agent, or otherwise facilitating communication such that privilege would be preserved. Consider also whether the common interest doctrine may be applicable, or whether it is practical to include the family member as a client, if appropriate.

Educate family members. If it is determined that the family member would fall under one of the exceptions, explain the importance of confidentiality and obtain their agreement to keep all communications confidential.

Anticipate litigation challenges. Assume opposing counsel may later argue that privilege was waived, and build a record showing why the exception applies. Remember the proponent of the privilege bears the burden of establishing the privilege applies.

Conclusion

Many clients, especially those who are older, non-English speaking or are involved in a family or matrimonial dispute, instinctively include family members in legal consultations. Without careful planning, this natural instinct can have serious consequences: privilege may be lost, and sensitive communications exposed in litigation.

New York law recognizes exceptions, and attorneys must be vigilant to ascertain whether such an exception applies. With foresight and diligence, lawyers can help clients avoid unnecessary pitfalls and safeguard the privacy that is at the heart of the attorney-client relationship.

Lita Beth Wright is a partner and founding member of Amini LLC and a commercial litigator for 30 years. **Yosef Trachtenberg** is an associate at the firm. His practice focuses on commercial litigation and related matters.