

AUTHORS' INTRODUCTION TO THE 2025-2026 EDITION

This text, *Attorney-Client Privilege in the United States*, was one of Professor Paul R. Rice's masterworks. It was the capstone of an intensive academic study of the privilege conducted over many years and through a rich professional career serving as an appointed special master in several of the Nation's most complex modern litigations. As Professor Rice recounted in the last Preface he drafted, this treatise captured his personal examination "of virtually all reported decisions in the state and federal courts of the United States" (comprising many thousands of court opinions) as well as his examination of "all English decisions prior to the nineteenth century." By any measure, his treatise is the singular achievement in the study of the privilege as it has been understood and applied in the courts of the United States.

Professor Rice's sudden and untimely passing during the summer of 2012 brought together a group of contributing authors. Our hope, as contributing authors, is that our work over the years will continue to honor Professor Rice's extraordinary legacy of study in the field of the privilege by producing annual updates and enhancements to his treatise that ensure that, in both textual substance and citation, his work will continue to remain reliably current and consultatively useful to the bench, bar, and academic communities who have come to rely on it as an important source of guidance on the attorney-client privilege in America.

This edition of the treatise welcomes the arrival of a new contributing author and mourns the sad and untimely passing of a departing one. Professor Benjamin P. Cooper of the University of Mississippi School of Law joins the treatise as a new contributing author. He is the *Frank Montague Jr. Professor of Legal Studies and Professionalism*, a twenty-year faculty member and accomplished scholar, and, before that, a former litigation partner at two distinguished law firms. He succeeds his good friend, and ours, Dean I. Richard Gershon who tragically passed in late 2024, a cavernous loss to the legal academy, to the profession, and to all who had

the privilege to know him.

This current edition captures case law developments through the late summer of 2025. Like Professor Rice before us, we hope you find this work a valuable resource in your study of the privilege. Highlights in this 2025–2026 Edition include recent case law and scholarship discussing:

- The relationship between protective orders and FRE 502(b) governing inadvertent disclosures;
- The scope and limits of appealing privilege determinations under the Perlman exception;
- How courts deal with privilege waivers related to the advice-of-counsel defenses and the importance of raising that defense in a timely manner;
- The extension of the privilege to agents of the attorney;
- Scope of the privilege for government attorneys;
- Treatment of requests to depose opposing counsel;
- Lack of protection for identity of attorney or client, fact of retention, and existence of attorney-client relationship;
- Employees’ personal expectation of confidentiality in e-mail and digital communications;
- The ERISA fiduciary exception;
- Client’s subjective expectation of confidentiality;
- Scope of protection for legislative services;
- Legal advice as the primary purpose of the consultation;
- Treatment of attachments to privileged communications;
- Scope of privilege for investigative services;
- Common law source of the privilege;
- The elements and foundations of the privilege;
- The relevance of engagement formalities in attaching the privilege;
- Scope of the testamentary waiver of the privilege;
- Standing to assert the posthumous privilege;
- What qualifies as a “communication”;
- Differentiating between privileged “communications” and unprivileged “facts”;
- Treatment of pre-existing documents used with privileged communications;
- The privilege’s operation with electronic communications, particularly e-mail “strings” and privilege logs;

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- The intersection of the attorney-client privilege with Fourth Amendment rights in the context of electronic surveillance where courts have evaluated wiretapping conversations potentially involving privileged communications;
- The standard for establishing a Sixth Amendment violation stemming from the Government's invasion of the attorney-client privilege, including the requirements of proving both governmental misconduct and prejudice to the defendant;
- The complexities that arise when foreign legal principles intersect with U.S. attorney-client privilege standards, particularly in cases involving cross-border transactions or international clients;
- When the prima facie standard of the crime-fraud exception has and hasn't been met across various circuits;
- The appropriate factual bases needed to support in camera review of materials, to determine the applicability of the crime-fraud exception;
- The fiduciary duty exception in the context of ERISA plans;
- Discussion of privilege where agents of the client are involved;
- Scope of waiver after voluntary disclosures.

The Contributing Authors
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