

Privileges

Privileged information is excluded from evidence, not based on unreliability or irrelevance grounds, but because it promotes a social policy. For example, the exclusion of evidence deriving from communications in the lawyer-client relationship is based on encouraging free communication in a valued relationship.

The two most frequently invoked privileges before the Board are the lawyer-client privilege and the doctor-patient privilege. A client has a general privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the providing of professional services to the client by a lawyer. The privilege is claimed by the client or on behalf of the client; the claimant of the privilege has the burden of establishing the existence of a privilege.¹ The client waives the privilege by voluntarily disclosing or consenting to disclosure of any significant part of the privileged matter.²

In two cases, the Board held that information sought by a party could not be obtained due to the attorney-client privilege. In a grievance contesting a five day suspension imposed on a State Department of Social and Rehabilitative Services employee, the Board granted a motion filed by the employee to exclude from evidence e-mail communications between the employee and an attorney based on the attorney-client privilege.³ In an appeal over the dismissal of a probationary employee of the State Department of Education, the Board determined that notes taken by the dismissed employee's supervisor at a meeting with the employer's attorney were not discoverable by the employee because they were protected by the attorney-client privilege.⁴

¹ Vermont Rules of Evidence, Rule 502. Grievance of Palmer, 25 VLRB 81, 87 (2002).

² Vermont Rules of Evidence, Rule 510. Grievance of Palmer, 25 VLRB at 89-90.

³ Grievance of Palmer, *supra*.

⁴ Appeal of Harris, 28 VLRB 82 (2005).

A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, dental, or emotional condition. The confidential communications protected are among the patient, physician, dentist, nurse or mental health professional, and persons who are participating in diagnosis or treatment under the direction of the physician, etc., including members of the patient's family. The privilege is claimed by the patient or on behalf of the patient.⁵ The patient waives the privilege by voluntarily disclosing or consenting to disclosure of any significant part of the privileged matter.⁶

In one case involving the dismissal of a state employee, the VLRB concluded that an employee who engaged in sexual contact with the dismissed employee waived her patient's privilege by making voluntary disclosures of her mental health condition to the employer during the investigation of the sexual contact between the two employees, and by authorizing her therapists to discuss her mental health condition with the employer.⁷ Thus, the Board concluded that the dismissed employee had the right to depose the therapists who treated the other employee with respect to her mental health condition and provided the employer with information on such condition to the employer in connection with the employer's investigation of the sexual contact. The Board ordered that the disclosure of any information provided in the depositions was strictly limited to the parties and their representatives unless, and until, a subsequent order of the Board allowed any such information to be admitted into evidence.⁸

⁵ Vermont Rules of Evidence, Rule 503.

⁶ Vermont Rules of Evidence, Rule 510; Grievance of Towle, 16 VLRB 196, 199 (1993).

⁷ Grievance of Towle, 16 VLRB at 199-200.

⁸ Id. at 202-203.