

## Attorney-Client Privilege - Arkansas

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**State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.**

Arkansas Rule of Evidence 502 is the governing law in Arkansas regarding attorney-client privilege. Under Arkansas law, attorney-client privilege may only be claimed by the client, and if the attorney claims the privilege, they must do so on behalf of the client. Ark. R. Evid 502 (b), (c). Generally, a client has the privilege to refuse to disclose and prevent others from disclosing confidential communications that were made for the purposes of facilitating professional legal services if they are:

1. Between the client or his representative and his lawyer or his lawyer's representative; or
2. Between the client's lawyer and the lawyer's representative; or
3. By the client or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; or
4. Between representatives of the client or between the client and a representative of the client; or
5. Among lawyers and their representatives representing the same client.

Ark. R. Evid. 502 (b).

**Does the jurisdiction recognize/preserve the attorney-privilege for communications among co-defendants in joint-defense or common-interest situations? If so, what are the requirements for establishing two or more co-defendants' communications qualify?**

Regarding common-interest situations, there is privilege between (1) a client, his representative, his lawyer, or a representative of the lawyer and (2) a lawyer, or representative of a lawyer representing another party. Ark. R. Evid. 502 (b)(3). However, the common-interest privilege does not continue if the parties who were once co-defendants eventually become adversaries. *Morgan v. Wells*, 415 S.W.2d 323, 328 (Ark. 1967).

Further, Arkansas Rule of Evidence 502 (d) provides:

Michael D. Barnes  
[mbarnes@wlj.com](mailto:mbarnes@wlj.com)

Kathryn A. Pryor  
[kpryor@wlj.com](mailto:kpryor@wlj.com)

WRIGHT LINDSEY & JENNINGS LLP  
 3333 Pinnacle Hills Parkway  
 Suite 510  
 Rogers, AR 72758  
 (479) 986-0888  
[www.wlj.com](http://www.wlj.com)

Glenn S. Ritter  
[gitter@wlj.com](mailto:gitter@wlj.com)

## Arkansas

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“There is no privilege under this rule:

...

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two [2] or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.”

This exception to the rule is speaking to how the privilege does not carry over if/when there is an action between parties that were previously co-defendants represented by the same lawyer. See *Id.* If the parties have a common-interest, but are never against each other in an adversarial proceeding, then the privilege still exists. Ark. R. Evid. 502 (b)(3).

### **Identify key pitfalls/situations likely to result in the loss of the ability to claim the protections of the privilege – e.g. failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.**

A key situation where someone loses the ability to claim the protections of attorney-client privilege is if they impliedly or explicitly agree to waive the privilege. *Sedco Intern., S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982). Further, disclosing information that is privileged to a governmental office or agency does not operate as a waiver in favor of the nongovernmental persons or entities. Ark. R. Evid 502 (f). This means that disclosing protected information to the government does not count as a general waiver so that the other parties may use the information. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601 (8th Cir. 1977). Further, it has been held that the failure to raise the attorney-client privilege in a deposition constitutes a waiver of the privilege. *Reed v. Adamec*, 2014 Ark. App. 170 at 4, 2014 WL 988937, at \*2 (2014).

Ark. R. Evid 502 (d) lists the exceptions to the privilege. One of the exceptions states if “the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be crime or fraud,” then there is no attorney-client privilege.

Regarding advice of counsel, it has been ruled in Arkansas that “[a]n attorney is incompetent to testify concerning any communication made to him by his clients, or his advice thereon, without his client’s consent, and the rule as to privileged communications between attorney and client extends to statements of each to the other.” *Kinhead v. Union Nat’l Bank*, 907 S.W.2d 154, 158 (Ark. Ct. App. 1995).

### **Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.**

The Arkansas Supreme Court recently held that the rules of evidence, and thus, the rules for attorney-client privilege, do apply to grand jury proceedings and to prosecutor’s subpoenas. *Holt v. McCastlain*, 357 Ark. 455, 467, 182 S.W.3d 112, 120 (Ark. 2004).

It remains an open question in Arkansas as to whether statements between an insured and insurer are privileged. See *Schipp v. GMC*, 457 F.Supp.2d 917, 920 (E.D. Ark. 2006).

The Arkansas Supreme Court has made clear (1) the burden of showing that a privilege applies is upon the party asserting it; and, (2) “the purpose of the privilege is to promote ‘full and frank communication’ between attorneys and clients” that promotes the observance of law and administration of justice. *Id.* “Other courts have used these same purposes for recognizing a statement between an insured and an insurer as protected by attorney-client privilege, but, the Arkansas Supreme Court has not ruled that way as of yet.” *Id.* (citing *Richey v. Chappell*, 594 N.E.2d 443, 446 (Ind. 1992); *Kandel v. Tocher*, 22 A.D.2d 513, 515 (N.Y. App. Div. 1965)).