

KENTUCKY

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

As a general rule, the attorney client privilege requires proof of the following elements: (1) a confidential communication; (2) the communication was made between an attorney and client (or their respective representatives); and (3) the communication was made for the purpose of obtaining or providing legal advice.

More specifically, the attorney client privilege is governed by Kentucky Rule of Evidence 503. The rule provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

- (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (2) Between the lawyer and a representative of the lawyer;
- (3) By the client or a representative of the client or the client's 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;
- (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.

II. 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?

Yes, but only in limited circumstances. In Kentucky, a joint defense or common interest privilege is only recognized where the communication is between “the client or a representative of the client or the client's 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.” Ky. R. Evid. The following are critical takeaways from this limited rule: (1) the communication must be lawyer to lawyer or client to lawyer, *i.e.*, communications directly between clients will not be privileged; (2) both clients must be *parties* in a *pending action*; and (3) the communication must concern a matter of common interest.

In light of these limitations, and unlike some other jurisdictions, simply having a common interest or a common interest agreement is not enough in Kentucky; both clients must be parties in a pending action. Even where a third party was involved in the underlying facts of the litigation, if that person is not a party to the litigation, there can be no common interest privilege. Thus, where a lawyer seeks to interview a third party whose interests are aligned with his client, but that third party is not a party to the lawsuit, there will be no privilege.

Finally, it should be noted that Kentucky follows the general rule that communications that are otherwise protected by the common interest privilege are not protected as between the parties to the common interest. Thus, should the parties later become adverse, the communications between a party and the other party's lawyer (or lawyer to lawyer communications) will not be privileged in the fight between the two previously aligned parties.

III. 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.

The Kentucky rules regarding loss of privilege are generally consistent with the national norms. The following situations, among others, result in the loss of the privilege:

(1) The crime-fraud exception. Like in most jurisdictions, 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 a crime or fraud, the privilege is lost;

(2) Disclosure to a third party. Any disclosure of the communication to a third party by the client will result in an implied waiver of the privilege;

(3) Claims against the lawyer. If the client brings a claim against her lawyer, she has impliedly waived the privilege and the lawyer is permitted to use the otherwise privileged communications to defend herself;

(4) Joint clients. Where the lawyer represents two or more clients, communications with those clients are privileged as to all third parties, but are not privileged as between the jointly represented clients;

(5) Advice of counsel. Where the client utilizes advice of counsel as a defense to a legal claim, the privilege is impliedly waived;

(6) Involving or intent to involve third parties in the communications. If a third party not subject to the common interest privilege discussed above is involved in the communication, or if the client expresses an intent to share the communication with a third party (even if the client never does so), the court will determine that the communication was not intended to be confidential and will find no privilege applies.

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

Norsworthy v. Castlen, 323 S.W.3d 764, 769 (Ky. Ct. App. 2010), dealt with when a court may order an *in camera* inspection of communications that are alleged by the opposing party to be non-privileged or subject to an exception to the privilege. The Court held that *prior to an in camera review*, the court must conduct an evidentiary hearing to determine whether or not the party opposing the privilege has provided sufficient evidence to prove by a preponderance of the evidence that the communication is not privileged or is subject to an exception to privilege.

In the context of the corporate client, Kentucky follows the majority position that employees may be considered the “client” so long as the communications were within the scope of their employment. In *Collins v. Braden*, 384 S.W.3d 154, 163 (Ky. 2012), the Court found that mere eyewitness accounts may not be within the scope of an employee’s employment and, therefore, were not privileged when an investigation was conducted at counsel’s direction and those employees were interviewed. To be clear, the Court found that if the communication was by an employee who was participating in the medical procedure at issue, it would be privileged. However, if the statement was by an employee who merely happened to witness the event, but such witnessing was not within the scope of her employment, there would be no privilege.

Kentucky also recognizes that documents and communications in the regular course of business, and not specifically targeted at providing legal advice, are not privileged. *See Univ. of Ky. v. Lexington H-L Servs.*, No. 2017-CA-001423-MR, 2018 Ky. App. LEXIS 238, at *1 (Ct. App. Sep. 14, 2018) (finding that audit performed in regular scope of business and not at direction of counsel was not privileged).