

Attorney-Client Privilege - Missouri

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

In Missouri, the attorney-client privilege is codified by Mo. Ann. Stat. § 491.060(3), which provides in pertinent part that “the following persons shall be incompetent to testify: an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client.” While a federal court sitting in diversity jurisdiction will apply state law to resolve attorney-client privilege claims, curiously federal law governs work product claims. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000).

While attorney-client privilege is defined rather broadly, it does not automatically attach to any communication simply because it is made to an attorney. *State v. Fingers*, 564 S.W.2d 579, 582 (Mo. Ct. App. 1978). To be privileged the communication must relate to attorney-client business and not to extraneous matters. *Id.*

In Missouri, the attorney-client privilege attaches to: 1) information transmitted by a voluntary act of disclosure; 2) between a client and his lawyer; 3) in confidence; and 4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted. *State v. Longo*, 789 S.W.2d 812, 815 (Mo. Ct. App. 1990). Thus, no privilege exists as to communications between a lawyer and a non-lawyer concerning non-legal matters. *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 120 (Mo. Ct. App. 2012).

In the corporate context, the attorney-client privilege is applicable only if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *DeLaPorte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 531 (Mo. Ct. App. 1991) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978)).

In the in-house counsel context, due to the mixed nature of an in-house counsel’s role as both legal and business advisor, the claiming party must make

Missouri

a clear showing that the communication was primarily for legal advice, rather than primarily relating to extraneous matters, such as business, financial, or accounting issues. See *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 150-51 (Mo. Ct. App. 1984).

The attorney-client privilege encompasses both oral and written communications, as well as other kinds of communications passing between attorney and client by reason of the attorney-client relationship. *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 547 (Mo. Ct. App. 2008). The privilege also encompasses statements made by, and documents prepared by, employees at the direction of their employers for the purpose of obtaining legal advice or for use in pending litigation. *Id.*

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?

As a general rule, voluntary disclosure of attorney-client communications to a third party operates as an express waiver of the attorney-client privilege. In *re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 234 (8th Cir. 1988). A waiver will not be found, however, where the third party shares a common interest in the outcome of the litigation and where the communication in question was made in confidence. *Lipton Realty, Inc. v. St. Louis Hous. Auth.*, 705 S.W.2d 565, 570 (Mo. Ct. App. 1986).

This exception to the general third party waiver rule is often referred to as the common interest doctrine. *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 790 (Mo. Ct. App. 2016). "The 'common interest doctrine' allows parties with a community of interests to preserve the privilege's protections where the parties have 'joined forces for the purpose of obtaining more effective legal assistance.'" *Id.* (quoting *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007)). However, since the common interest doctrine is an exception to the third party waiver, the doctrine can only apply if the communication at issue is privileged in the first instance. *Commerce Bank v. U.S. Bank Nat'l Ass'n*, No. 4:13-CV-00517-BCW, 2015 WL 9488395, at *2 (W.D. Mo. Aug. 18, 2015).

It is always wise for clients and attorneys to document a common interest agreement, including the inception, duration, scope, boundaries, and termination of the agreement in writing. It is also important to include provisions in the agreement addressing when the common interest privilege ends and what happens when it does, as a common interest can easily fade away in the course of litigation.

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.

While the purpose of the attorney client privilege is to encourage full and frank communication between attorneys and their clients, so that clients may obtain complete and accurate legal advice, the privilege protecting these communications is not without limitation. It is well established that the attorney-client privilege does not extend to communications made for the purpose of obtaining advice for the commission of a crime or fraud. *State v. Smith*, 979 S.W.2d 215, 220 (Mo. Ct. App. 1998). This limitation is commonly referred to as the crime-fraud exception.

In addition, attorney-client privilege is waived when the client places the subject matter of the privileged communication in issue. *State ex rel. Behrendt v. Neill*, 337 S.W.3d 727, 729 (Mo. Ct. App. 2011). There are two situations where at-issue waivers are commonly found. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1055 (8th Cir. 2000). "The first is when proof of a party's legal contention implicates evidence encompassed in the contents of an attorney-client communication—for example, when a client uses reliance on legal advice as a defense or when

Missouri

a client brings a legal malpractice action.” *Id.* (citing *State v. Campbell*, 913 S.W.2d 832, 837 (Mo. Ct. App. 1995). “The second is when a client’s testimony refers to a specific privileged document.” See *Charles Woods Television Corp. v. Capital Cities/ABC, Inc.*, 869 F.2d 1155, 1162 (8th Cir. 1989) (applying Missouri law to find no at-issue waiver when witness testified generally about an issue and never mentioned any particular communication)).

In the case of a corporation, the power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors. *State ex rel. Lause v. Adolf*, 710 S.W.2d 362, 364 (Mo. Ct. App. 1986).

A waiver of privilege can also result from a failure to object or otherwise claim the privilege. “The objection of privilege must be raised at the first opportunity[,] otherwise it is not timely and it is thereby waived.” *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107, 109 (Mo. Ct. App. 1981). Thus, the proper time to make an objection is when the question calling for disclosure of privileged matters is asked and before it is answered. *Id.*

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

It is important to remember that the attorney-client privilege belongs to the client. *Bridges v. Bore-Flex Indus., Inc.*, 531 S.W.3d 66, 75 (Mo. Ct. App. 2017). To validly waive this confidential privilege it must be voluntarily done. *Id.* There is no waiver when information is disclosed in response to an adverse party’s inquiry as this is not voluntary. *Id.*