

Attorney-Client Privilege - Kansas

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

In Kansas, a judge will treat a communication between an attorney and their client as privileged if the communication between an attorney and such attorney's client is in the course of that relationship and in professional confidence. This privilege allows the client to refuse to disclose any such communication as the witness, it allows the client to prevent their attorney from disclosing communications and it allows the client to prevent any other witness from disclosing the communication if it came to their knowledge in the course of its transmittal between the client and the attorney, in a manner not reasonably to be anticipated by the client or as a breach of the attorney-client relationship. Kan. Ann. Stat. § 60-426 (2011).

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?

Kansas recognizes a joint defense privilege which "extends the attorney-client privilege to communications made in the course of joint defense activities." *State v. Maxwell*, 10 Kan. App. 2d 62, 65, 691 P.2d 1316, 1320 (1984). While typically, no privilege attaches to communications made in the presence of a third party, the "disclosure of privileged information by an attorney to counsel of actual or potential codefendants does not constitute a waiver of the attorney-client privilege." *Id.* at 1321. This privilege "encompasses shared communications to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings." *Id.* An essential element of the joint defense privilege is that the communications between the codefendants have been exchanged in confidence with the "limited purpose of assisting in their common cause." *Id.*

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.

Kansas recognizes a number of exceptions to the attorney-client privilege.

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These include the crime-fraud exception which states that “[i]f the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime or tort” then the privilege will not extend to the communication. Kan. Stat. Ann. § 60-426 (2011). Additionally, the attorney-client privilege will not extend to a communication that is “relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction.” *Id.* Kansas courts do not extend the attorney-client privilege to communications that are “relevant to an issue of breach of duty by the attorney to such attorney’s client, or by the client to such client’s attorney” or communications that are “relevant to an issue concerning an attested document of which the attorney is an attesting witness.” *Id.* Furthermore, communications “relevant to a matter of common interest between two or more clients if made by any of them to an attorney whom they have retained in common when offered in an action between any of such clients” will not be covered by the attorney client-privilege. *Id.*

Outside of these standard exceptions to the attorney-client privilege, there are situations where a person who normally would be able to claim a privilege will be unable to do so. If the judge determines that the holder of the privilege has “contracted with a party against whom the privilege is claimed that he or she would not claim the privilege”, they will have lost the ability to claim the privilege. Kan. Stat. Ann. § 60-437 (2019). Additionally, if the judge determines that the holder of the privilege has “without coercion, or without any trickery, deception, or fraud practiced against him or her, and with knowledge of the privilege, made disclosure of any part of the matter or consented to such a disclosure made by anyone.” *Id.* Finally, only the client may waive the attorney-client privilege. *Id.*

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

When dealing with the attorney-client privilege in the corporate context, Kansas courts have ruled that “a party may be able to successfully demonstrate applicability of privilege by establishing that the communication was made in confidence for the primary purpose of obtaining legal advice.” *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*, 297 F.R.D. 611, 620 (D. Kan. 2014)(quoting *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 266599, at 3 (D. Kan. Feb. 1, 2006).

Outside of this case, there are not any trends or limitations that have been imposed on the scope of the attorney-client privilege recently.