

Attorney-Client Privilege - Mississippi

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

Rule 502(b) of the Mississippi Rules of Evidence explains the privilege as follows:

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him 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, (4) between representatives of a client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

Miss. R. Evid. 502(b) (emphasis added).

The Mississippi Supreme Court has interpreted the scope of the attorney-client privilege under Mississippi law broadly, stating:

the privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client. Included are communications made by the client to the attorney and by the attorney to the client. In that sense it is a two-way street.

Hewes v. Langston, 853 So. 2d 1237, 1244 (Miss. 2003).

Further: "[t]he privilege does not require the communication to contain purely legal analysis or advice to be privileged." *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) (applying Mississippi law). "Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged." *Id.* at 875.

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. A significant part of the attorney-client privilege for purposes of this appeal is the “common interest” privilege, as set forth in Miss. R. Evid. 502(b)(3). According to the comment to the rule: “The privilege extends to statements made in multiple party cases in which different lawyers represent clients who have common interests.” *Hewes*, 853 So. 2d at 1244 (quoting Miss. R. Evid. 502 cmt).

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.

Malpractice lawsuits, voluntary/involuntary waiver, party testifying regarding what attorney told them, crime-fraud exception, and other exceptions provided in Miss. R. Evid. 502(d):

(d) Exceptions. The privilege does not apply if:

(1) Furtherance of Crime or Fraud. The lawyer’s services were sought or obtained to enable or aid anyone to plan or commit what the client knew—or reasonably should have known—was a crime or fraud;

(2) Claimants Through Same Deceased Client. The communication is relevant to an issue between parties who claim—by testate or intestate succession or by inter vivos transaction—through the same deceased client;

(3) Breach of Duty. The communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) Document Attested by Lawyer. The communication is relevant to an issue about an attested document to which the lawyer is an attesting witness; or

(5) Joint Clients. The communication:

(A) is offered in a case between or among clients who retained or consulted a lawyer in common;

(B) was made by any of the clients to the lawyer; and

(C) is relevant to a matter of common interest between two or more clients.

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

The case *Hewes v. Langston* (cited above) was distinguished in 2023 by the Mississippi Supreme Court in *Mississippi Baptist Health Sys., Inc. v. Johnson*, 360 So.3d 949 (Miss. 2023). *Hewes v. Langston*, 853 So. 2d 1237, 12447 (Miss. 2003) dealt with the Mississippi Supreme Court’s position on the review of discovery challenges involving the attorney client privilege. However, this distinction appears to only clarify the Court’s position as to the review of discovery challenges, the assertion of work product/anticipation of litigation and attorney client privilege related thereto, and imposes no limitation on the scope of the attorney-client privilege.