

Attorney-Client Privilege - Oklahoma

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

Confidential communications which are made for the purpose of facilitating the rendition of legal services and which are between the attorney and client, or the representatives of each, will generally be protected under attorney-client privilege.

In order for the privilege to apply, the party asserting the privilege must establish: (1) the existence of an attorney-client relationship; (2) the confidential nature of the communication; and that (3) the communication was made for the purpose of seeking or providing legal advice. *Lindley v. Life Investors Ins. Co. of America*, 267 F.R.D. at 388-89; *Davis v. PMA Cos.*, 2012 U.S. Dist. LEXIS 130944, *3.

An “attorney” is someone authorized, or someone the client reasonably believes to be authorized, to engage in the practice of law.

A “client” is a person, public office, corporation etc. who consults with an attorney with a view toward obtaining legal services.

Communication being “confidential” means it is not intended to be disclosed to third parties other than those to whom the disclosure is made in furtherance of rendering legal services, or to those reasonably necessary for the transmission of the communication.

12 O.S. § 2502 states: 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 the client or a representative of the client and the client’s attorney or a representative of the attorney;
2. Between the attorney and a representative of the attorney;
3. By the client or a representative of the client or the client’s attorney or a representative of the attorney to an attorney or a representative of an attorney 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 attorneys and their representatives representing the same client.

The privilege may be claimed by the client, the client's guardian, personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization whether or not in existence.

The privilege may also be claimed by the person who was the attorney at the time of the communication but only on behalf of the client.

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?

By statute, Oklahoma recognizes that attorney-client privilege can exist in common interest situations, and the same requirements apply.

The privilege will not apply if the communication is offered in an action between or among any of the clients.

Pursuant to 12 O.S. § 2502:

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:

....

By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein.

12 O.S. § 2502(B)(3).

"The joint representation or co-client doctrine applies '[w]hen the same attorney simultaneously represents two or more clients on the same matter.'" *Cantu Servs. v. Worley*, 2021 U.S. Dist. LEXIS 106266, *10 (citing Paul R. Rice, Attorney-Client Privilege in the United States § 4:30 (2011)).

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.

Waiver can happen by disclosure of the communication or information that would otherwise be privileged.

Disclosure will not act as a waiver if it was (1) inadvertent; (2) the holder took reasonable steps to prevent disclosure; and (3) the holder took reasonable steps to rectify the error.

Below are the scenarios state statute 12 O.S. § 2502 specifically identifies where the privilege will not extend:

Oklahoma

1. If the services of the attorney 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;
2. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
3. As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney;
4. As to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;
5. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness;
6. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or
7. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

12 O.S. § 2502.

Additionally, “when the legal and business purposes of the communication are inextricably intertwined—privilege will attach only when the legal purpose outweighs the business purpose.” *See Willis v. Progressive Direct Ins. Co.*, 2023 U.S. Dist. LEXIS 113251, *10.

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

Under Okla. Stat. tit. 12, § 2502(C), for the purpose of the attorney-client privilege, a parent company and its subsidiary are joint clients, giving the parent company standing to assert the subsidiary’s attorney-client privilege. *Davis v. PMA Cos.*, 2012 U.S. Dist. LEXIS 130944 (W.D. Okla. Sept. 7, 2012).

Under Okla. Stat. tit. 12, § 2502, the ownership of the Girl Scouts Council’s assets, as well as its attorney-client privilege, transferred to the nonprofit corporation by operation of law as a result of the merger. To allow a post-merger claim of privilege by the Council’s attorney to assert post-merger would be in derogation of the merger agreement. *Girl Scouts-Western Okla. v. Barringer-Thomson*, 2011 OK 21, 252 P.3d 844.