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COSGRAVE VERGEER KESTER LLP
Portland, OR
www.cosgravelaw.com

Nicholas E. Wheeler
nwheeler@cosgravelaw.com

Attorney-Client Privilege - Oregon

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

"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." Oregon Evidence Code (OEC), Rule 503(2); see also State v. Keenan, 91 Or. App. 481, 485 (1988), aff'd 307 Or. 515 (1989) ("The availability of attorney-client privilege depends on the existence of two conditions: 1) the communication must be confidential within the meaning of the statute; and 2) the communication must be made for purpose of facilitating the rendition of professional legal services to the client.").

"Confidential communication" means a communication "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." OEC 503(1)(b). "A confidential communication is defined in terms of intent, [and] is to be inferred from the circumstances, e.g., taking or failing to take precautions." 1981 Legislative Commentary to OEC 503 (Commentary), Subsection (1), Paragraph (b). Thus, because the privilege must be directly tied to the communication of legal advice, it does not protect from disclosure basic facts such as whether a lawyer-client relationship exists, the name and address of a client, or even the dates that a lawyer and client meet. State v. Bilton, 36 Or. App. 513, 515 (1978); State v. Keenan, 91 Or. App. 481, 485 (1988), aff'd. 307 Or. 515 (1989); Cole v. Johnson, 103 Or. 319, 333-334 (1922); Little v. State By and Through Dept. of Justice, 130 Or. App. 668, 674 (1994) rev. den. 320 Or. 492 (1994).

The Oregon Legislature recognized that the privilege in some circumstances needs to extend beyond lawyers and clients. In the case of non-entity clients, the phrase "those reasonably necessary for the transmission of the [confidential] communication," has been read to typically include a "spouse, parent, business associate, or joint client." Commentary, Subsection (1), Paragraph (b). In the case of entity clients, the Oregon Legislature specifically adopted the "control group test," limiting the privilege to "representatives of the client," which means principles, officers, directors and "person[s] who ha[ve] authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the [entity]." OEC 503(1)(e); see also Commentary, Subsection (1), Paragraph (d) (citing City of Philadelphia v. Westinghouse Electric Corp., 201 F.Supp. 483, 486 (E.D.Pa. 1962)); State v. Jancsek, 302 Or. 270, 276 (1986) (the phrase "representative of the client" applies only to entity

clients). The Commentary to OEC 503 specifically cautions against a more expansive interpretation of the privilege of the kind proposed in Upjohn Co. v. United States 449, U.S. 383 (1981), pointing out that "a more permissive privilege would result in suppression of information conveyed to attorneys by employees who are more like witnesses than clients and who have no personal desire for confidentiality." Commentary, Subsection 1, Paragraph (d). Finally, consulting experts assisting in the rendering of legal advice, whether paid or not, fall under the protections of the "representative of the lawyer," so long as the expert is not also a testifying expert. Commentary, Subsection (1), Paragraph (e).

Oregon courts have also identified several other key general tenets of the lawyer-client privilege. First, the privilege belongs to the client, survives the death of the client and may thereafter be asserted by the personal representative. Booher v. Brown, 173 Or. 464, 473 (1944). Second, OEC 503(3) provides that "the person who was the lawyer…at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client." That is, the lawyer may not claim the privilege on their own behalf. Commentary, Subsection (3). Third, the client need not actually retain the lawyer for the privilege to apply. McNamee v. First National Bank, 88 Or. 636, 640 (1918).

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?

In the context of separately represented co-defendants, Oregon recognizes the common interest privilege. OEC Rule 503(2)(c) protects "confidential communications …by the client or the client's lawyer to a lawyer representing another in a matter of common interest." To have a common interest, parties must share a legal interest – but that interest need not be identical. Port of Portland v. Oregon Center for Environ¬mental Health, 238 Or. App. 404, 415 (2010), rev. den. 350 Or. 230 (2011). However, a party may still waive privilege as to its own statements in a common interest matter – just not the statements of the other parties. Commentary, Subsection (2).

Oregon also recognizes by implication a common-interest privilege in situations where one lawyer represents two or more co-defendants. See Commentary, Section (1), Paragraph (b) (recognizing that the definition of "confidential communication" includes statements made in the presence of "joint clients").

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

The attorney-client privilege is not absolute: a client may waive it voluntarily, and the rule governing privilege creates exceptions to the privilege. See Generally, OEC 503, 511 (supporting statement); Frease v. Glazer, 330 Or. 364, 370 (2000). If the communication is made in a manner that evinces an intent that the communication is not confidential – such as disclosure in the presence of a third party – then the privilege is waived. Commentary, Subsection (1), Paragraph (a) (citing Leathers v. United States, 250 F.2d 159 (9th Cir. 1957)); see also Goldsborough v. Eagle Crest Partners, Ltd., 105 Or. App 499, 503 (1991), aff'd 314 Or. 336 (1992) (waiver of attorney-client privilege does not require a subjectively intended act; waiver may be recognized by implication).

Crime-Fraud

The privilege is waived under the crime/fraud exception "if the services of the lawyer or lawyer referral service

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." OEC 503(4)(a). The party seeking to invoke the crime-fraud exception to attorney-client privilege must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Frease v. Glazer, 330 Or. 364, 371 (2000). This exception applies to any advice given in aid of future criminal activity or fraud. State v. Phelps, 24 Or. App. 329, 335 (1976). Furthermore, the criminal act or fraud need not be of the client itself. Commentary, Subsection (4), Paragraph (a).

Probate Disputes

The privilege does not apply "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." OEC Rule 503(4)(b).

Disputes between Lawyer and Client

The privilege does not apply "as to a communication relevant to an issue of breach of duty by the lawyer or lawyer referral service to the client or by the client to the lawyer or lawyer referral service." OEC Rule 503(4)(c).

Attested Documents

The privilege does not apply "as to a communication relevant to an issue concerning an attested document to which the lawyer…is an attesting witness." OEC Rule 503(4)(d).

Disputes Among Jointly Defended Clients

The privilege does not apply "as to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." OEC Rule 503(4)(e).

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

The primary recent trend in Oregon is an increasing skepticism of broad and generic assertions of privilege, which has resulted in more detailed assessments of the propriety of those assertions. See Crimson Trace v. Davis Wright Tremaine 355 Or. 476, 478 (2014) (vetting, in detail, claim that attorney-client privilege applied to internal law firm communications about potential legal malpractice in a pending matter, so as to shield those communications from the firm's client); see also Frakes v. Nay, 254 Or. App. 476, 249 (2012) (blanket assertion of privilege over the production of an attorney's file was improper; privilege applied only to specific confidential communications within file).

On the other hand, when Oregon courts have deemed assertions of privilege appropriate, they also have provided additional tools to trial courts to protect those privileged communications. See Longo v. Premo, 355 Or. 525, 536 (2014) (held inappropriate for the court to fail to protect privileged communications that fell outside the narrow OEC 503(4)(c) breach-of-duty exception); State v. Bray, 363 Or. 226, 253 (court has authority to institute additional protections such as in camera review to protect privileged communications)