

Attorney-Client Privilege- Tennessee

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

The attorney-client privilege is the oldest privilege recognized in Tennessee both at common law and by statute. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002). The attorney-client privilege in Tennessee is codified at Tenn. Code Ann. § 23-3-105, which states that “No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person’s injury.” This privilege “encourages full and frank communication between attorney and client by sheltering these communications from disclosure.” *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314, 318 (Tenn. 2019) (citing *State ex. rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Group Trust, Inc.*, 209 S.W.3d 602, 615-16 (Tenn. Ct. App. 2006)).

The attorney-client privilege, however, is “not absolute, nor does it cover all communications between a client and his or her attorney. The communications must involve the subject matter of the representation and must be made with the intention that they will be kept confidential.” *Moore Freight Servs. v. Mize*, No. E2021-00590-COA-R9-CV, 2022 Tenn. App. LEXIS 44, at *36 (Tenn. Ct. App. Feb. 3, 2022). Whether the privilege applies to a specific communication is “necessarily question, topic and case specific.” *Dialysis Clinic*, 567 S.W.3d at 318 (citing *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992)). The scope of the attorney-client privilege “applies not only to the client’s communications but also to the attorney’s communications to his or her client when the attorney’s communications are specifically based on the client’s confidential communications or when disclosing the attorney’s communications would, directly or indirectly, reveal the substance of the client’s confidential communications.” *Moore Freight Servs.*, 2022 Tenn. App. LEXIS 44, at *35.

However, the attorney-client privilege “does not protect communications between attorneys and clients that take place in the presence of a third party or are divulged to a third party.” *Dialysis Clinic*, 567 S.W.3d at 318. The exception to this rule is when “the third party is an agent of the client,” in which case, attorney-client privilege still applies. *Id.*

The attorney-client privilege “belongs” to the client, and as such, the client can waive this privilege “either by communicating in the presence of others who are

not bound by the privilege,” or “by voluntarily divulging the communication to third parties.” *Moore Freight Servs.*, 2022 Tenn. App. LEXIS 44, at *36. If a client waives this right by divulging information he seeks to protect, then “the attorney may testify to its contents.” *Culbertson v. Culbertson*, 393 S.W.3d 678, 684 (Tenn. Ct. App. 2012) (citing *State v. Buford*, 216 S.W.3d 323, 326 (Tenn. 2007)). As stated above, the privilege can be waived by communication in the presence of a third party or through the party’s own affirmative conduct. A party claiming that attorney-client privilege has been impliedly waived through their conduct must meet three conditions: “(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his [or her] defense.” *Id.* at 685 (citing *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992)).

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 that two or more co-defendants’ communications qualify?

Yes, the common interest privilege extends the scope of the attorney client privilege by providing an exception to the general rule that communications made in the presence of or shared with third parties are not protected by the attorney client privilege. *Boyd v. ComData Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002). The common interest privilege has been specifically recognized by the Tennessee Supreme Court. *Vance v. State*, 230 S.W.2d 987, 990-91 (Tenn. 1950). This privilege “recognizes the advantages of, and even necessity for, an exchange or pooling of information among attorneys representing parties sharing a common legal interest in litigation.” *Moore Freight Servs.*, 2022 Tenn. App. LEXIS 44, at *37. As such, it “extends the scope of the attorney-client privilege by providing an exception to the general rule that communications made in the presence of or shared with third parties are not protected by the attorney-client privilege.” *Id.* This means that the common interest privilege extends the circle of persons to whom clients may disclose privileged communications and permits the participants in a joint defense to communicate among themselves and with their attorneys on matters of common legal interest for the purpose of coordination of their joint legal strategy. *Boyd v. ComData Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002) (citing *United States v. Henke*, 222 F.2d 633, 637 (9th Cir. 2000)).

In circumstances where the common interest privilege applies, it protects not only the communications between any of the clients and attorneys regardless of whether the communicating client’s own attorney is present, but also the communications between any of the clients’ respective attorneys. *Boyd v. ComData Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002) (citing *United States v. Schwimmer*, 892 F.2d at 244; *Bank of Brussels Lambert v. Credit Lyonnais Suisse, S.A.*, 160 F.R.D. 437, 446 (S.D.N.Y. 1995); *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App. 1999)). Although originally limited to cases involving actual co-defendants, the courts now routinely apply the common interest privilege to potential co-defendants and others who have a community of interest in the subject matter of the communications. *Id.*; (citing *In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe 89-129*, 902 F.2d at 249; *Schachar v. American Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191 (N.D. Ill. 1985), Attorney-Client Privilege in the United States § 4:35, at 201). However, the privilege applies only to communications given in confidence, and intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy. *Id.* (citing *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999); *United States v. Schwimmer*, 892 F.2d at 243; *In re Bevill, Bresler & Schulman Asset Mgt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *Griffith v. Davis*, 161 F.R.D. 687, 692 n.6 (C.D. Cal. 1995); *Bass Pub., Ltd. v. Promus Companies, Inc.*, 868 F. Supp. 615, 621 (S.D.N.Y. 1994)).

The “proponent of the common interest privilege has the burden of establishing the necessary elements of the privilege.” *Moore Freight Servs.*, 2022 Tenn. App. LEXIS 44, at *37. To meet this burden, “the proponent must

demonstrate: (1) that the otherwise privileged information was disclosed due to actual or anticipated litigation, (2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation, (3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and (4) that the person disclosing the information has not otherwise waived the attorney-client privilege for the disclosed information.” *Id.* at *38-39. Similarly, this privilege is not “limited to communications and documents generated during the period of time when persons are cooperating on a common defense. It also includes pre-existing confidential communications and documents that are shared during the common enterprise.” *Moore Freight Servs.*, 2022 Tenn. App. LEXIS 44, at *38 (citing *Boyd v. Comdata Network*, 88 S.W.3d 203, 215 (Tenn. Ct. App. 2002)). This means that when a party invokes this privilege, “the court must focus on the circumstances surrounding the disclosure of the communications or documents rather than on when communications or documents were generated.” *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.

The protections of the attorney client privilege are waived whenever a client voluntarily discloses advice received from his or her attorney and/or the facts upon which the advice is based. *Smith Cnty. Educ. Ass’n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984).

The attorney client privilege can also be waived by inadvertent disclosure. Inadvertent disclosure usually occurs during the discovery phase. Counsel and clients can also inadvertently disclose confidential information by mistakenly forwarding confidential documents and/or confidential communications to unintended recipients who are not clients, clients’ authorized representatives or attorney. This form of inadvertent disclosure is especially perilous given the scope of modern discovery. *See McCormick on Evidence*, Vol. I, § 93, page 570. Rule of Evidence 502 provides attorneys with the opportunity to “claw back” any documents or statement that has been inadvertently disclosed and which contains privileged information. In order to use this “claw back” provision, an attorney or party must make the disclosure accidentally and/or inadvertently, must have taken reasonable steps to prevent such an inadvertent disclosure, and finally once the inadvertent disclosure is discovered, must act quickly to rectify the situation. *See* T.R.E. 502.

In-house counsel for corporations and governmental entities face special challenges regarding preservation of the attorney client privilege. The privilege will only apply, in the corporate context, when the communication between the lawyer and the employee is within the scope of the employee’s duties and the employee is aware that the communication with the attorney is in order for the corporation to obtain legal advice. *See Waste Administrative Services, Inc. v. Krystal Company*, E2017-01094-COA-R9-CV, 2018 WL 4673616 (Tenn. Ct. App. Sept. 27, 2018). (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). Likewise, the attorney client privilege also applies to communications between governmental bodies and their attorneys (and can even shield such governmental bodies from the requirements of the Tennessee Open Meetings Act statute) when the governing body and its attorneys discuss facts or information regarding a lawsuit or a pending lawsuit and the governmental body is receiving advice regarding the ramification of these facts. However, once the governing body begins to discuss the course of action based on this advice, these communications are no longer privileged. *See VanHooser v. Warren County Board of Education*, 807 S.W.2d 230 (Tenn. 1991). *See also, Smith County Education Association v. Anderson*, 676 S.W.2d 328, 332-333 (Tenn. 1994).

It is also important to note that Tennessee now recognizes the “functional equivalency test” to determine when a non-employee agent of a corporation or other entity may be considered an employee for purposes of the protections of the attorney client privilege. *See Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. January 25,

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2019).

Parties should also be careful when communicating with experts. While the Tennessee Rules of Civil Procedure do not explicitly allow for the discovery of communications between attorneys and experts, adverse parties are allowed to ask through interrogatories to state the subject matter upon which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the foundation supporting the expert's opinion. During the expert's deposition, adverse parties may inquire about communications with counsel, including written and oral communications.

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

No significant recent trends or limitations to report.