

Attorney-Client Privilege-Texas

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 protects information when the communication is between the attorney and client (or either of their representatives), the communication is confidential, and the communication is made to facilitate rendering professional legal services.ⁱ

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?

The allied-litigant privilege protects communications of a party, its attorney, or a representative of either, to another party's attorney or attorneys' representative, where the parties are represented by different attorneys, both are parties to pending litigation, and share a common legal interest.ⁱⁱ

Note that the joint-defense privilege can only be asserted by defendants in pending litigation, the allied-litigant privilege found at Tex. R. Evid. 503(b)(1)(C) applies to both plaintiffs and defendants. The common-interest privilege can be asserted by both litigants and nonlitigants, whereas the allied-litigant privilege only applies to parties to pending litigation.

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 attorney-client privilege does not apply to communications subject to the following exceptions set out in Tex. R. Evid. 503(d):

- Communications made in furtherance of a crime or fraud.ⁱⁱⁱ The crime-fraud exception only applies where the party seeking the information makes a prima facie case of contemplated crime or fraud and the information sought is related to the prima facie proof.^{iv} To make a prima facie case, the party seeking the information must establish the elements of the crime or fraud and that it was ongoing or about to be committed when the attorney-client communications

were made.^v

- Communications relevant to an issue between parties who assert claims through the same deceased client.^{vi} Otherwise, communications between attorney and client survive the client's death.
- Communications relevant to breach of an attorney's duty to the client or the client's duty to the attorney.^{vii}
- Communications relevant to an issue concerning an attested document to which the lawyer is an attesting witness.^{viii}
- In a lawsuit between clients of a jointly retained an attorney, communications with the attorney that are relevant to a matter of common interest between the clients and relevant to the dispute.^{ix}

The attorney-client privilege also does not apply to:

- Documents that preexisted the attorney-client relationship and were delivered to the attorney by the client.
- Nonconfidential matters of employment, including the terms, conditions, and purpose of the attorney's employment.
- Communications with the client's employees unless the employee has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered, or the employee, in order to facilitate the rendition of legal services to the client, makes or receives confidential communication while acting in the scope of employment for the client.
- Communications normally subject the attorney-client privilege where they are used offensively.

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

Normally, all communications to or from an expert are discoverable. However, the Texas Supreme Court recently clarified that when an employee of a business will testify as its expert, the attorney-client privilege trumps the expert discovery rule.^x The Court held that email communications between the client's attorney and the client's employee expert related to drafts of the expert's affidavit were privileged. While normally all communications with an expert are discovery, including draft reports and affidavits, the Court found that nothing in the Texas Rules of Civil Procedure permits discovery of such materials when they are attorney-client privileged.

ⁱ Tex. R. Evid. 503(b).

ⁱⁱ Tex. R. Evid. 503(b)(1)(C); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52-53 (Tex. 2012).

ⁱⁱⁱ Tex. R. Evid. 503(d)(1).

^{iv} *Granada Corp. v. First Ct. of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992).

^v *In re Park Cities Bank*, 409 S.W.3d 859, 869 (Tex. App.—Tyler 2013, orig. proceeding).

^{vi} Tex. R. Evid. 503(d)(2).

^{vii} Tex. R. Evid. 503(d)(3).

^{viii} Tex. R. Evid. 503(d)(4).

^{ix} Tex. R. Evid. 503(d)(5).

^x *In re City of Dickinson*, 568 S.W.3d 642 (Tex. 2019).