

Attorney-Client Privilege - Nebraska

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

In Nebraska, the attorney-client privilege derives from statute, and generally protects “confidential communications” regarding “the rendition of professional legal services” that are had between a client, an attorney, and/or their representatives. NEB. REV. STAT. § 27-503(2); *see also* NEB. CT. R. DISC. § 6-326(b)(1) (“Parties may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action. . .” (emphasis added)).

The privilege applies if: (1) there is an attorney-client relationship; (2) it involves a confidential communication; (3) the communication relates to the rendition of legal services; and (4) the communication does not fall within an exception or waiver. *See Id.*; *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 341, 729 N.W.2d 311, 316 (2007). The privilege may be claimed by the client, or by certain lawful representatives in the case of a deceased client or non-existent organization (e.g., personal representative, trustee)—it cannot be claimed by the attorney, unless on behalf of and with authority from the client. *See Id.* § 27-503(3). The burden to prove the required elements rests with the party asserting the privilege. *See Stivrins*, 273 Neb. at 341, 729 N.W.2d at 316. A slightly more detailed analysis of each element is provided below.

First, there must be an attorney-client relationship. *Id.* “[A] client is a person who is rendered professional legal services by a lawyer or who consults a lawyer with a view of obtaining professional legal services from the lawyer.” *Id.* A client can be either an individual or entity. NEB. REV. STAT. § 27-503(1)(a). “A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.” *Stivrins*, 273 Neb. at 341, 729 N.W.2d at 317. Then an attorney-client relationship is created when (1) a person seeks assistance from an attorney; (2) the desired assistance falls within matters related to the attorney’s professional competence; and (3) the attorney gives or agrees to give (either expressly or impliedly) the requested assistance. *Id.* at 341–42, 729 N.W.2d at 317. That said, this element can be satisfied even if the interaction is between a client who is interviewing or negotiating with an attorney the client is considering whether to retain. *See Nelson v. Becker*, 32 Neb. 99, 48 N.W. 962 (1891); *Matters v. State*, 120 Neb. 404, 232 N.W. 781 (1930).

Second, the evidence sought to be withheld must be a “confidential communication.” NEB. REV. STAT. § 27-503(2); *See also Stivrins*, 273 Neb. at 342,

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729 N.W.2d at 317. A communication is confidential “if 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.” NEB. REV. STAT. § 27-503(1)(d). In analyzing this element, Nebraska courts have looked to whether the client had a “reasonable expectation” that the communications would be deemed confidential. *Stivrins*, 273 Neb. at 342, 729 N.W.2d at 317. The presence of a third-party (i.e., non-client) generally means a communication is not confidential, and thus destroys the attorney-client privilege. *See Short v. Kleppinger*, 163 Neb. 729, 735, 81 N.W.2d 182, 187 (1957) (“Communications between attorney and client made in the presence of others do not constitute privileged communications.”).

Third, the communication must relate to the rendition of legal services. *See* NEB. REV. STAT. § 27-503(2). That is, “[i]t is not every communication of a client to his attorney that is accorded the privilege of confidentiality but only those properly entrusted by a client to his attorney in his professional capacity . . . [A] communication to be privileged from disclosure must relate to a professional matter and must have been made because of the relationship then existing of attorney and client.” *In re Miller’s Estate*, 169 Neb. 339, 343, 99 N.W.2d 473, 476 (1959); *see also Brady v. State*, 39 Neb. 529, 58 N.W. 161, 162 (holding the attorney “must have been acting . . . in the capacity of a legal adviser” when the communications were made).

To be sure, the statute explicitly allows for confidential communications to be between an attorney’s and/or client’s “representative;” notwithstanding the elements noted above. NEB. REV. STAT. § 27-503(2); *see id.* § 27-503(1)(c) (defining “representative of the lawyer”); *Brakhage v. Graff*, 190 Neb. 53, 56, 206 N.W.2d 45, 48 (1973) (“The fact that the statement was made to a field claims representative of the insurer who was not a lawyer is not controlling. The privilege extends to statements made to agents of an attorney.”).

Fourth, and final, the privilege must not be subject to a statutory exception or waiver. The statute lists five situations in which the attorney-client privilege does not apply: (1) if the lawyer’s services are sought to aid in the commission of something the client knows or should reasonably know to be a crime or fraud; (2) if the communication is between parties who claim through the same deceased client; (3) if the communication is relevant to an alleged breach of duty between the lawyer and client; (4) if the communication is relevant to an issue about an attested document for which the lawyer was an attesting witness; or (5) if the communication relates to a “matter of common interest” between multiple clients who retained or consulted the same attorney and have an action against one another. *See* NEB. REV. STAT. § 27-503(4). Further, Nebraska law recognizes that the attorney-client privilege can be waived, either explicitly or impliedly—more on this below. *See* Section III; *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985) (discussing waiver of attorney-client privilege).

The procedure for challenging and defending the attorney-client privilege is set forth in *Greenwalt v. Wal-Mart Stores, Inc.*, 253 Neb. 32, 38–41, 567 N.W.2d 560, 566–67 (1997). If a party wishes to challenge the invocation of the attorney-client privilege on certain materials, then it can file a motion to compel. *Id.* Faced with such a motion, the party asserting the privilege “must make out a prima facie claim that the privilege or [work product] doctrine applies.” *Id.* at 566. To do this, the withholding party “must submit a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege.” *Id.* Specifically, the motion must (1) verify that it accurately describes the documents; (2) provides a summary of each document that lists the type, subject matter, date, author, and recipient; (3) states in a specific and non-conclusory manner how each element is met, without revealing the information alleged to be protected. *Id.* at 567. The requesting party then must be given the opportunity to respond to the motion. *Id.* If the withholding party establishes a prima facie case, then the court shall order the material produced to the court for in camera review, accompanied by an index directing the court to the specific material in dispute. *Id.* Then the court will make a determination and, if appropriate, seal the material for potential appellate review. *Id.*

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?

Nebraska law generally recognizes and preserves the attorney-client privilege in joint- or common-interest situations (such as between co-defendants), but does not extend the privilege to situations when multiple clients consult the same attorney and the clients later become adverse to one another. *See* NEB. REV. STAT. §§ 27-503(2)(c), 27-503(4)(e).

As to the first scenario—common interest—the relevant statute explicitly states that protected communications include statements by the client or the client's lawyer "to a lawyer representing another in a matter of common interest." *Id.* § 27-503(2)(c); *see also Nelson v. Glidewell*, 155 Neb. 372, 51 N.W.2d 892 (1952); *Jahnke v. State*, 68 Neb. 154, 94 N.W. 158 (1903), *rev'd on other grounds*, 68 Neb. 154, 104 N.W. 154 (1905); *In re Grand Jury Supoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). Thus, Nebraska practitioners routinely enter into written joint-defense agreements with one another to confirm both parties' understanding that the clients share a common interest.

As to the second scenario—joint communications with a shared attorney by now-adverse parties—the relevant statute is again explicit in covering the situation, but this time says protection does not extend to communications 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." NEB. REV. STAT. § 27-503(4)(e); *see also Jenkins v. Jenkins*, 151 Neb. 113, 36 N.W.2d 637 (1949) ("It is sufficient to state that the testimony of an attorney as to a transaction in which two or more parties consult him, for their mutual benefit, is not privileged in an action between such parties or their representatives, involving such transaction. . . . Where two or more persons employ the same attorney in the same business, their communications with the attorney in relation to the business are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence and hearing of all parties concerned, or are intended for the information of all parties."). As a practical matter, when a single attorney is consulted by and communicates with multiple parties who share a common interest, all parties must be cognizant of the fact that communications between them will not be privileged if a dispute between the clients ever arises.

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.

As noted above, the relevant statute lists explicit situations in which the attorney-client privilege does not apply: (1) if the attorney's services are sought or obtained to commit a crime or fraud; (2) if the communication is relevant to an issue between parties who claim through the same deceased client, (3) if the communication is relevant to an issue of breach of duty by the attorney or client, (4) if the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness; (5) if there are two or more clients and the communication is relevant to a common interest between them, and the communication is made by either client to the attorney. NEB. REV. STAT. § 27-503(4).

In addition, the attorney-client privilege is not available if the asserting party voluntarily waives it. *Id.* § 27-511 ("A person . . . waives the privilege if he or his predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication."). Additionally, the Nebraska Supreme Court listed the following three factors that determine whether a party impliedly waived the attorney-client privilege: "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting

Nebraska

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 defense.” *League*, 221 Neb. at 44, 374 N.W.2d at 856 (cleaned up). If each condition is met, then the party has impliedly waived any protection that would otherwise exist. *Id.* Stated otherwise, “a litigant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.” *Unland v. City of Lincoln*, 247 Neb. 837, 844, 530 N.W.2d 624, 629 (1995).

Nebraska courts have addressed numerous examples of potential waiver scenarios. *See League*, 221 Neb. at 44, 374 N.W.2d at 856 (finding waiver of the attorney-client privilege where a shareholder attempted to circumvent the statute of limitations by asserting lack of knowledge and concealment); *State v. Roeder*, 262 Neb. at 958, 636 N.W.2d at 877 (2001) (finding waiver where a criminal defendant sought to withdraw her pleas, since her basis for withdrawal put communications with her counsel at issue); *Crutcher-Sanchez*, No. 8:09-CV-288, 2011 WL 61206, at *10 (D. Neb. Feb. 10, 2011) (analyzing and finding no waiver where the defendant asserted the Ellerth-Faragher defense while defending a harassment claim).

Two other points regarding waiver warrant mention. First, an explicit waiver occurs when otherwise confidential information is disclosed because disclosure is “inconsistent with the confidential attorney-client relationship.” *Lutheran Med. Ctr. of Omaha v. Contractors, Laborers, Teamsters, & Engrs. Health & Welfare Plan*, 25 F.3d 616, 622 (8th Cir. 1994), *abrogated on other grounds by Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966 (8th Cir. 2002). Second, a waiver can be withdrawn at any time before the waiver is acted upon. *See Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 661, 150 N.W.2d 268, 273 (1967).

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

There are no notable recent trends in Nebraska regarding the scope of the attorney-client privilege.