

Attorney-Client Privilege - Nevada

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

Requirements

Pursuant to Nevada Revised Statute § 49.095, the attorney-client privilege attaches to those confidential communications between an attorney and client, for the purpose of facilitating the rendition of professional legal services to the client. “A communication is ‘confidential’ if it is 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.” Nev. Rev. Stat. § 49.055. These communications are protected by the “long-standing privilege at common law that protects communications between attorneys and clients.” *Wynn Resorts, Ltd. v. Dist. Ct.*, 399 P.3d 334, 341 (Nev. 2017) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981)).

Prospective Clients

Although Nevada law does not currently require a particular set of formalities in the creation of attorney-client privilege, Nevada does require a prospective client express the intent for an attorney to provide legal services to the client. See *Williams v. Waldman*, 108 Nev. 466 (1992). Moreover, an attorney-client relationship may be formed “even though the attorney renders his or services gratuitously.” *Id.* at 471.

Who may claim the privilege?

The client holds the attorney-client privilege, and only the client has the ability to waive that privilege. See Nev. Rev. Stat. § 40.105(1); A “client” is defined as one who is rendered professional legal services by a lawyer, or who consults with a lawyer with the objective of obtaining professional legal services from that lawyer. Nev. Rev. Stat. § 49.045. The lawyer representing the client at the time of the communication may also claim the privilege on the behalf of his client under the presumption that he has the authority to claim the privilege, unless there is evidence to the contrary. Nev. Rev. Stat. § 49.105(2).

The party asserting the attorney-client privilege has the burden of establishing all elements of the privilege. See *United States v. Martin*, 278 F.3d 988, 999–1000 (9th Cir.2002). The party asserting the privilege has the burden of establishing the relationship and the privileged nature of communication. See *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997).

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?

Common Interest Rule

Although privileged communications are traditionally waived when voluntarily disclosed to third parties, see Nev. Rev. Stat. § 49.385(1), Nevada had recognized that attorney-client privilege is not waived under the common interest rule. See *Livingston v. Wagner*, 23 Nev. 53, 58 (1895); *In re Hotels Nevada, LLC*, 458 B.R. 560, 572 (Bankr.

D. Nev. 2011). The common interest rule is not itself a privilege. Rather, it constitutes an exception to the ordinary rule on waiver where communications are disclosed to third parties. In re Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012). Thus, the common interest rule only applies if the communication at issue was privileged in the first place. FSP Stallion 1, LLC v. Luce, 2010 WL 3895914, at *17 (D. Nev. Sept. 30, 2010). Moreover, the parties must share a common legal interest, rather than a commercial or a financial interest. Id. at *18.

Nevada codified the common interest rule at Nev. Rev. Stat. § 49.095(3), which is limited to communications made by the client or attorney to “a lawyer representing another party in a matter of common interest.” The Nevada Supreme Court recently held that the common interest rule applied when the “transferor and transferee anticipate litigation against a common adversary on the same issue or issues” and “have strong common interests in sharing the fruit of the trial preparation efforts.” Cotter v. Eighth Jud. Dist. Ct., 416 P.3d 228, 232 (Nev. 2018) (quoting United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980)). Moreover, under Cotter, the Court adopted a common interest rule that allows “attorneys to share work product with third parties that have a common interest in litigation without waiving the work-product privilege.” 416 P.3d at 230.

The common interest rule commonly arises in two scenarios.

Common Interest Scenarios

As stated above, communication is protected when made by the client or the client’s lawyer to a lawyer representing another party in a matter of common interest. Nev. Rev. Stat. § 49.095(3). The rationale is that those who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims. FSP Stallion 1, LLC, 2010 WL 3895914, at *16.

Joint-Defense

In addition, joint-defense privilege arises when the communication is between two or more clients and an attorney on particular matters of common interest. Livingston, 23 Nev. at 58. Communications between each client and attorney in a joint representation will remain privileged against third parties; however, such communications between clients will not be held privileged against each other. See Nev. Rev. Stat. § 49.115(5); In re Hotels Nevada, LLC, 458 B.R. at 571; see also Livingston, 23 Nev. at 58 (finding that clients involved in a joint representation may not assert the attorney-client privilege against each other if they later become adverse).

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.

Statutory Exceptions

Nevada expresses several statutory exceptions for privileged communications that would otherwise be protected. Attorney-client communications are not privileged under the following five circumstances: (1) communication if the legal services 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) 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) communication relevant to an issue of breach of duty by the lawyer to his or her client or by the client to his or her lawyer; (4) communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and (5) communications relevant to a matter of

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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 a subsequent action between any of the clients. Nev. Rev. Stat. § 49.115(1)-(5).

Failure To Assert

The Nevada Supreme Court has not determined whether a failure to assert the attorney-client privilege constitutes waiver; however, the Ninth Circuit has found that a client waives the attorney-client privilege for documents to which the client never specially asserted privilege. *United States v. SDI Future Health, Inc.*, 464 F.Supp.2d 1027, 1044 (D. Nev. 2006). Moreover, a generalized assertion of privilege was not enough to preserve the privilege indefinitely. *Id.*

Waiver

Voluntary Disclosure

Attorney-client privilege may be waived when the holder of the privilege, or his predecessor, voluntarily discloses or consents to disclosure of any significant part of the matter. Nev. Rev. Stat. § 49.385(1). The waiver of privilege does not apply if the voluntary disclosure is itself a privilege communication, if the disclosure was made to an interpreter employed merely to facilitate communications, or if it was made to the Department of Indigent Defense Services or a designee of the Department for a variety of reasons. Nev. Rev. Stat. § 49.385(2).

The test for waiver of attorney-client privilege is whether a client's answers to testimony were wide enough in scope and deep enough in substance to constitute a significant part of the communication with his counsel. *Lisle v. State*, 113 Nev. 679, 701 (1997), overruled on other grounds by *Middleton v. State*, 114 Nev. 1089, 1117 n.9 (1998). Merely acknowledging that a subject was discussed between attorney and client will not waive the privilege. *Id.*; see also *Manley v. State*, 115 Nev. 114, 120 (1999). If there is disclosure of privileged communication, such disclosure waives the remainder of the privileged consultation between attorney and client on the same subject. Nev. Rev. Stat. § 49.095; *Cheyenne Const., Inc. v. Hozz*, 102 Nev. 308 (1986).

Anticipatory Waiver Theory/At-Issue Doctrine

In another iteration of implied waiver by voluntary disclosure, Nevada has adopted the "anticipatory waiver theory" or the "at-issue waiver doctrine." See *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 356 (1995). "[A]t-issue waiver occurs when the holder of the privilege pleads a claim or defense in such a way that eventually he or she will be forced to draw upon the privileged communication at trial or in order to prevail[.]" *Id.* at 355. If the substance of one privileged document is disclosed, the privilege is considered waived as to all documents relating to that subject matter. *Id.* at 345-55. Testimony which states that the attorney-client communications simply occurred, without disclosing the subject matter, does not render the privilege waived. See *Lisle*, 113 Nev. at 691-92.

Involuntary Disclosure

Pursuant to Nev. Rev. Stat. § 49.395, protected communication will be inadmissible against the holder of the privilege if the holder was erroneously compelled to disclose privileged matter, or the disclosure was made without an opportunity to claim the privilege.

Inadvertent Disclosure

Nevada does not currently have any case law on whether an inadvertent disclosure of privileged communication results in a waiver of applicable attorney-client privilege. However, Rule 1.6(c) of the Nevada Rules of Professional conduct provides that a lawyer “shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Moreover, the Ninth Circuit has taken a totality of the circumstances approach in its determination of the same by considering several factors, including: (a) the reasonableness of precautions used to prevent inadvertent disclosure; (b) the time taken to rectify the error; (c) the scope of discovery; (d) the extent of the disclosures; and (e) the overriding issue of fairness. *United States v. SDI Future Health, Inc.*, 464 F.Supp.2d 1027, 1045 (D. Nev.2006), affirmed in part, reversed in part on unrelated grounds, 568 F.3d 684 (9th Cir. 2009); see also Fed. R. Evid. 502, Advisory Committee Note (b).

Consultation for the Purpose of Crime or Fraud

Codified as a statutory exception, there is no privilege of attorney-client communication if the attorney’s legal services 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. See Nev. Rev. Stat. § 49.115(1); see e.g. *Sloan v. State Bar of Nev.*, 102 Nev. 436 (1986). The Supreme Court of Nevada has adopted a two-part test that parties must pass when seeking to invoke the crime-fraud exception. *Seibel v. Eighth Jud. Dist. Ct.*, 520 P.3d 350 (Nev. 2022). First, the party must show that “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme,” and second, it must demonstrate that the communications were “sufficiently related to” and made “in furtherance of [the] intended, or present, continuing illegality.” *Id.* at 355 (quoting *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007)).

Assertion Of Advice Of Counsel

A client only waives the attorney-client privilege by expressly or impliedly interjecting his or her attorney’s advice into the case. *Wynn Resorts*, 399 P.3d. at 345.

Transmittal To Additional Non-Qualifying Recipients

Nevada does not have any case law specifically addressing the implications of transmittal of privileged communications to additional non-qualifying recipients.

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

Waiver of Attorney-Client Privilege during a Deposition

Nevada has addressed waiver of attorney-client privilege during deposition breaks in *Coyote Springs Inv., LLC v. Eighth Jud. Dist. Ct.*, 347 P.3d 267 (Nev. 2015). In a discovery deposition, witness-counsel conferences remain privileged during unrequested recesses or breaks. See *In re Stratosphere, Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998). However, the Nevada Supreme Court held that counsel may not request a break to confer with witnesses in a discovery deposition “unless the purpose of the break is to determine whether to assert a privilege.” *Coyote Springs*, 347 P.3d at 273. For the attorney-client privilege to apply to these requested conferences, counsel must state the following on the record: (1) the fact that the conference took place; (2) the subject of the conference; and (3) the result of the conference, specifically, the outcome of the decision whether to assert a privilege. *Id.* Moreover, the Court “stress[ed] that counsel must make a record of the confidential

communications promptly after the deposition resumes in order to preserve the attorney-client privilege.”

Disclosure of Documents Used to Refresh a Witness’s Recollection as Waiver of Attorney-Client Privilege

The Nevada Supreme Court also addressed the intersection between Nev. Rev. Stat. § 50.125 and attorney-client privilege. See *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 130 Nev. 118 (2014). Nev. Rev. Stat. § 50.125(1) governs the production of writings and states that if a writing is used to refresh a witness’ memory, “an adverse party is entitled to have it produced at the hearing.” Upon a timely request, Nev. Rev. Stat. § 50.125 mandates disclosure of any document used by a witness before or while testifying, regardless of privilege. *Las Vegas Sands Corp.*, 130 Nev. at 128 (emphasis added). When a witness refreshes his memory with privileged documents, he “takes the risk that an adversary will demand to inspect the documents,” thus, requiring disclosure of those documents under Nev. Rev. Stat. § 50.125. *Id.* at 126; see *Wardleigh*, 111 Nev. at 354-55 (quoting “an attorney client privilege is waived when a litigant places information protected by [that privilege] in issue through some affirmative act for his own benefit...” (internal quotation omitted)). No Fiduciary Exception

Recently, the Nevada Supreme Court declined to recognize a fiduciary exception to the attorney-client privileged. *Canarelli v. Eighth Judicial Dist. Ct.*, 126 Nev. 247 (2020). Other states have adopted an exception that prevents a fiduciary, such as a trustee of a trust, from asserting attorney-client privilege against beneficiaries on matters such as administration of a trust. However, Nevada has held that it only recognizes the five exceptions provided by statute in Nev. Rev. Stat. § 49.115.