

NORTH CAROLINA

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I. 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 generally applies to a communication that meets the following prerequisites:

A privilege exists if (1) the relation of attorney and client existed at the time the communication was made; (2) the communication was made in confidence; (3) the communication relates to a matter about which the attorney is being professionally consulted; (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated; and (5) the client has not waived the privilege. *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). The person asserting the privilege has the burden of establishing each of the essential elements for application of the privilege.

II. Does the jurisdiction recognize/preserve the attorney-client 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?

Generally speaking, North Carolina courts recognize the common interest doctrine, which is “an exception to the general rule that the attorney-client privilege is waived when the client discloses privileged information to a third party.” *Sessions v. Sloane*, 789 S.E.2d 844 (N.C. Ct. App. 2016) (treating as interchangeable the analysis for joint-defense and common-interest privilege). Where the common interest doctrine applies, the attorney-client privilege may extend to communications between and among parties sharing a common *legal* interest. *See Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 788 S.E.2d 170, 177 (N.C. Ct. App. 2016). Where two parties employ the same attorney for a *business* transaction, however,

communications to the common attorney are not ordinarily privileged because the communications are not considered confidential. *Brown v. Green*, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

In North Carolina, multiparty arrangements to obtain legal counsel for a common legal purpose are known as “tripartite” attorney-client relationships. *Raymond v. N.C. Police Benevolent Ass’n*, 365 N.C. at 100, 721 S.E.2d at 927 (2011). The common interest doctrine applies as to disputes between third parties and members of the tripartite relationship, but not to disputes among themselves. “The rationale for recognizing this tripartite attorney-client relationship is that individuals with a common interest in litigation should be able to freely communicate with their attorney, and with each other, to more effectively defend or prosecute their claims.” *Id.* at 99, 721 S.E.2d at 926.

North Carolina courts recognize tripartite relationships most commonly where there exists between the parties an indemnification agreement. “Like the common interest found between the insurer and the insured, an indemnification agreement creates a common interest between the indemnitor and the indemnitee in that the indemnitor contractually shares in the indemnitee’s legal well-being because the agreement subjects the indemnitor to the “damages assessed and loss resulting from an adverse judgment.” *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 370 N.C. 235, 239, 805 S.E.2d 664, 668 (2017) (internal citations omitted). Thus, the Supreme Court of North Carolina has held, an indemnification that relates to a business purpose “does not sever but strengthens the common interest” and a “tripartite attorney-client relationship arises because the interests of both the indemnitor and the indemnitee in prevailing against the plaintiff’s claims are contractually aligned.” *Id.*

Even where a tripartite attorney-client relationship is established, however, the privilege is not triggered unless the communications at issue satisfy the five-factor *Murvin* test: (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege. *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981).

III. 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.

- A. The client holds the privilege and can choose to waive it. Similarly, a party’s failure to properly object to the introduction of a privileged communication amounts to a waiver of the privilege. Thus, where a party voluntarily answers questions objectionable on the basis of attorney-client privilege but fails to timely object, the privilege is waived. *See e.g., State v. Bronson*, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992) (holding that the defendant

waived attorney-client privilege as to communications with his attorney where the defendant answered the prosecutor's questions regarding the same without objection); *Hulse v. Arrow Trucking Co.*, 161 N.C. App. 306, 310, 587 S.E.2d 898, 901 (2003) (holding that the defendant's deposition testimony that handwritten interrogatory responses faxed to his attorney differed from the typed interrogatory responses waived attorney-client privilege).

- B.** A communication is not confidential when made in the presence of another person whose presence is not essential to the communication. *State v. Van Landingham*, 283 N.C. 589, 602 (1973); *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). Likewise, a communication is not confidential when the client intends that his or her communications be conveyed to a third party, or where the client discloses the communication to a third party. See e.g., *State v. McIntosh*, 336 N.C. 517, 524, 444 S.E.2d 438, 442 (1994); *Industrotech Constructors, Inc. v. Duke University*, 67 N.C. App. 741, 743, 314 S.E.2d 272, 274, 17 Ed. Law Rep. 269 (1984). However, the attorney-client privilege persists where communications are conveyed to an agent of a party. For instance, in *Berens v. Berens*, a wife brought her close friend to a meeting with her divorce attorney. The court held that the attorney-client privilege was not destroyed where the wife and friend had previously agreed in writing that the friend would act as the wife's "personal advisor" during the dispute, thereby creating an agency relationship. 247 N.C. App. 12, 22, 785 S.E.2d 733, 741 (2016).
- C.** The attorney-client privilege may also be waived by inadvertent and/or intentional disclosure. Although North Carolina appellate courts have not weighed in on the circumstances under which privilege is destroyed by inadvertent disclosure, the lower courts have looked favorably to a five-factor balancing test utilized within the Fourth Circuit, which considers (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosure; and (5) the overriding interests of justice. *Blythe v. Bell*, No. 11 CVS 933, 2012 WL 3061862 (N.C. Super. July 26, 2012) (citing *Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2011 WL 3808544 (N.C. Super. Aug. 26, 2011), supplemented, (N.C. Super. 2011)). Further, lower courts have "recognized that an inadvertent waiver does not lead to a broad subject-matter waiver." *Safety Test & Equipment Co., Inc. v. American Safety Utility Corp.*, No. 13 CVS 1037, 2014 WL 4351401, at *4 (N.C. Super. Sept. 2, 2014).

- D.** Communications with an attorney to further commission of a crime or a tort are not protected under attorney-client privilege. Thus, an attorney may reveal information otherwise subject to privilege to the extent the attorney believes disclosure is reasonably necessary to prevent commission of a crime by a client. N.C. REV. R. PROF. CONDUCT, 1.6(b)(2) (2015); *see also In re Miller*, 357 N.C. 316 (2003) (“[T]he fourth prong of [the *Murvin*] test makes it clear that the attorney-client privilege cannot serve as a shield for fraud or as a tool to aid in the commission of future criminal activities; if a communication is not ‘made in the course of seeking or giving legal advice for a proper purpose,’ it is not protected.”).
- E.** A party may waive the attorney-client privilege by failing to timely provide a privilege log during discovery, or by providing an insufficient privilege log. A party withholding information on the basis of privilege must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged, will enable other parties to assess the claim. N.C. Gen. Stat. § 1A-A, Rule 26(b)(5)(a).
- F.** By asserting ineffective assistance of counsel, a client waives both attorney-client and work-product privileges, but only concerning matters relevant to allegations of ineffective assistance of counsel. *State v. Taylor*, 327 N.C. 147, 152 (1990).
- G.** North Carolina courts generally hold that a party waives attorney-client privilege when a party raises a claim or defense that may be disproved only by use of privileged communications. *See Jones v. Nanthala Marble & Talc Co.*, 137 N.C. 237, 49 S.E. 94, 95 (1904). However, appellate courts have not provided a bright-line rule addressing when or to what extent a party may waive attorney-client privilege by placing the advice of counsel at issue in the litigation. The North Carolina Business Court has addressed the issue with guidance from federal courts. *Banc of American Securities, LLC v. Evergreen Intern. Aviation, Inc.*, No. 03 CVS 9138, 2006 WL 401679, at *3 (N.C. Super. Ct. 2006) (unpublished opinion) (citing *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863-64 (3d Cir. 1994)). In *Banc of American Securities*, the court relied on the *Rhone-Poulenc* approach, which permits piercing of the attorney-client privilege “if, and only if, a party puts the attorney’s advice directly in issue in the litigation.” *Id.* at *4. Attorney advice is not at issue simply because is relevant, but only where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.” *Id.* The scope of a waiver resulting from reliance on advice of counsel depends on the breadth of the asserting party’s claim. *See Richardson v.*

Frontier Spinning Mills, Inc., 2011 NCBC 39, 2011 WL 4709564 (N.C. Super. Ct. 2011).

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

As a general rule, communications do not qualify as privileged as between attorney and client where the communication is made in the presence of a third-party who is not necessary to the communication. *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 536, 645 S.E.2d 117, 122 (2007); *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). However, in *Berens v. Berens*, the North Carolina Court of Appeals clarified that the privilege extends to communications made in the presence of a third party who is an agent of either party. 247 N.C. App. 12, 21, 785 S.E.2d 733, 740 (2016). The *Berens* case involved a divorce litigation, in which the defending wife relied on the advice, aid, and counsel of a friend who was a non-practicing attorney. *Id.* at 14, 785 S.E.2d at 736. The friend attended meetings with the wife and her attorneys and had access to the wife's file materials, including confidential communications. *Id.* Of particular significance was the fact that the friend and the wife's attorney had memorialized the relationship between the parties in a confidentiality and agency agreement, which emphasized that the exchange of privileged information was to be used exclusively for litigation and/or settlement. . *Id.* at 14-15, 785 S.E.2d at 736-37. The terms of the agreement demonstrated that the requirements to establish agency under North Carolina law were satisfied. *Id.* at 21-22, S.E.2d. at 741. Thus, the Court of Appeals held that the wife's friend was the wife's agent and that the friend's presence during confidential communications between the wife and the wife's attorneys did not destroy the attorney-client privilege. *Id.*