

Attorney-Client Privilege - South Carolina

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 against disclosure of confidential communications by a client to his attorney.” *State v. Owens*, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992) (citing *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980)). In South Carolina, the privilege exists where:

“(1) . . . legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relate to that purpose (4) are made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”

Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 293, 692 S.E.2d 526, 530 (2010). Accordingly, the privilege only exists where the relationship between the parties is that of attorney and client. *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 47 (Ct. App. 1984) (citing *Love*, 275 S.C. at 59, 271 S.E.2d at 112). “A person attains the status of a ‘client’ when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice.” *Id.* at 539, 320 S.E.2d at 47 (citing *In re Colocotronis Tanker Sec. Litig.*, 449 F. Supp. 828, 831 (S.D.N.Y. 1978)). The attorney must be acting as a “legal advisor” at the time of the communication for the privilege to apply. *Id.* (citing *Branden & Nether v. Gowing*, 7 Rich. 459, 472 (S.C. 1854)).

Additionally, the communication must be made for the purpose of securing an opinion on law, legal services, or assistance in some legal proceeding. *Id.* at 538, 320 S.E.2d at 47.

The privilege also applies to communications originating from the lawyer rather than from the client. *Id.* at 538-39, 320 S.E.2d at 47. “When the attorney communicates to the client, the privilege applies only if communication is based on confidential information provided by the client.” *Id.* at 539, 320 S.E.2d at 47.

The attorney-client privilege may not extend to documents or communications relating to matters that the client reveals or intends to reveal to others. *Cameron v. Gen. Motors Corp.*, 158 F.R.D. 581, 585 (D.S.C. 1994).

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?

Yes, South Carolina recognizes the attorney-client privilege for communications that take place in common-interest situations. *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 295, 692 S.E.2d 526, 531 (2010). "The common interest doctrine is not a privilege in itself but is instead an exception to the waiver of an existing privilege." *Id.* "The doctrine 'protects the transmission of data to which the attorney-client privilege or work product protection has attached' when it is shared between parties with a common interest in a legal matter." *Id.* (quoting Freeman, The Common Interest Rule, 6 S.C. Law. 12 (May/June 1995)). The doctrine is an exception to the general rule that disclosure of privileged information waives the applicable privilege. *Id.* (citing *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990)). "Information covered by the common interest doctrine cannot be waived without the consent of all parties who share the privilege." *Id.*

"[The] common interest rule applies as long as the parties share a common interest about a legal matter, even when the holder of the interest is a non-party or a potential co-party to prospective litigation." *First S. Bank v. Fifth Third Bank, N.A.*, 2013 WL 1840089, at *8 (D.S.C. May 1, 2013). However, "a shared 'desire to succeed in an action does not create a common interest.'" *Wellin v. Wellin*, 211 F. Supp. 3d 793, 812 (D.S.C. 2016) (quoting *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002)). "A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice." *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974).

South Carolina's state courts have not defined the exact scope of the common interest doctrine's applicability. See, e.g., *Wellin*, 211 F. Supp. 3d at 811 (stating "the doctrine's availability is simply an open question under South Carolina law"). The doctrine's scope has not been fully defined by the state's appellate courts, although the doctrine appears to be at least applicable in a case like *Tobaccoville*, where several states' attorneys general were responsible for coordinating and enforcing a settlement and the settling states [had] executed a common interest agreement. See, e.g., *State Farm Fire & Cas. Co. v. Admiral Ins. Co.*, 225 F. Supp. 3d 474, 480 (D.S.C. 2016) (finding that "*Tobaccoville* adopted the common interest doctrine only for a narrow factual scenario"). Still, some federal district courts have been willing to expand the doctrine into other situations. See, e.g., *Maseng v. Tuesday Morning, Inc.*, No. CV 3:19-3245-SAL-SVH, 2020 WL 3130261, at *3 (D.S.C. June 12, 2020) (stating that: "[T]he South Carolina Supreme Court would apply the common interest doctrine in additional scenarios, including, for example, a confidential relationship between and insurer, an insured, and counsel by the insurer for the insured.").

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.

South Carolina law recognizes various circumstances in which a client may lose the ability to claim the protections of the attorney-client privilege. One such situation is an explicit or implicit waiver of the privilege.

The power to waive the protections afforded by the attorney-client privilege belongs to the client and not the attorney. See e.g., *State v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 219 (1981). Accordingly, "[a] client may call his attorney to the stand and waive privileged communications between them by questioning him concerning

such communications, and the attorney may then be cross examined concerning the communications in question.” *Drayton v. Industrial Life & Health Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148, 153 (1944).

However, a client’s waiver of the attorney-client privilege “must be distinct and unequivocal.” *State v. Hitopoulus*, 279 S.C. 549, 551, 309 S.E.2d 747, 749 (1983). The mere fact that a client takes the witness stand to testify on his own behalf “does not constitute waiver of the privilege.” *Id.* Nevertheless, when a client discloses privileged communications while on the witness stand, failure to timely assert the privilege constitutes a waiver. *See Raleigh & C.R. Co. v. Jones*, 104 S.C. 332, 88 S.E. 896, 898 (1916).

South Carolina also recognizes that voluntary disclosure of privileged communications to third parties waives the attorney-client privilege. *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 46 (S.C. Ct. App. 1984). Such voluntary disclosure to a third party “waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject.” *Id.*, 282 S.C. at 538, 320 S.E.2d at 46-47 (holding that client’s father was not a client merely because he guaranteed payment of client’s attorney’s fees and therefore attorney-client privilege was inapplicable to a communication originating from attorney to client’s father).

Asserting “advice of counsel” may result in the loss of the ability to claim the privilege in both the civil and criminal context. *See Floyd v. Floyd*, 365 S.C. 56, 85, 615 S.E.2d 465, 480 (S.C. Ct. App. 2005), superseded by statute on other grounds, 2008 S.C. Acts 211 (codified as amended at S.C. CODE ANN. § 62-1-110) (clarifying that communications between a fiduciary and his attorney are privileged unless waived by the fiduciary). Placing privileged communications at issue in a case “opens the door” for admittance of such communications into evidence. *Id.*, 365 S.C. at 92, 615 S.E.2d at 484 (finding that defendant “opened the door” to the admission of various letters written by attorney when, at trial, defendant “averred his position was based on ‘what counsel had told us,’ and declared: ‘that’s the way we were so instructed by counsel.’”). “If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder.” *Id.* (quoting DANNY R. COLLINS, SOUTH CAROLINA EVIDENCE § 2.9 (2d ed. 2000)).

Criminal defendants applying for post-conviction relief on the ground of ineffective assistance of prior trial counsel automatically waive the attorney-client privilege pursuant to South Carolina statutory law. Where a defendant alleges ineffective assistance of prior trial counsel ... as a ground for post-conviction relief ... the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. S.C. CODE ANN. § 17-27-130 (1996); *see also Binney v. State*, 384 S.C. 539, 543-44, 683 S.E.2d 478, 480 (2009) (finding “that the particular allegations made in [p]etitioner’s application for [post-conviction relief] were so broad as to effectuate a complete waiver of his attorney-client privilege.”).

Finally, “communications in furtherance of criminal, tortious or fraudulent conduct” will result in the loss of the ability to claim the protections of the attorney-client privilege. *Doster*, 276 S.C. at 651, 284 S.E.2d at 220.

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

One of the more recent significant developments in this area arose in *In re Mt. Hawley Ins. Comp.*, 427 S.C. 159, 829 S.E.2d 707 (2019). There, the South Carolina Supreme Court answered a certified question from the United States Court of Appeals for the Fourth Circuit “by holding that a denial of bad faith and/or the assertion of good faith in [an] answer does not, standing alone, place a privileged communication ‘at issue’ in a case such that the attorney-client privilege is waived. 427 S.C. 159, 178, 829 S.E.2d 707, 718 (2019). The issue there arose from a discovery dispute in a bad faith tort action against an insurance company for refusing to defend or indemnify its insured in a construction defect action. *Id.*

Emphasizing the importance of the attorney-client privilege, the court rejected the approach taken by a “substantial minority” of jurisdictions that have “broadened the crime-fraud exception to the attorney-client privilege and found the privilege does not extend to any communications in furtherance of any crime or tort, including bad faith insurance claim.” *Id.* at 171, 829 S.E.2d at 714. The court also rejected an approach that upholds “the attorney client privilege absent direct, express reliance on a privileged communication by a client in making out his claim or defense.” *Id.*

In pursuit of balancing “the competing policy considerations of protecting the attorney-client privilege and promoting broad discovery to facilitate the truth-seeking function of [South Carolina’s] justice system,” the court found a case-by-case approach as “most consistent with South Carolina’s policy of strictly construing the attorney-client privilege and requiring waiver to be distinct and unequivocal.” *Id.* at 177, 829 S.E.2d at 717. Effectively, *Mt. Hawley* broadened the scope of the attorney-client privilege in the context of bad faith insurance claims. The court imposed the additional requirement that the insured make a prima facie showing of bad faith, in addition to the insurer’s denial of liability in its answer before a South Carolina court will conclude that the insurer impliedly waived the attorney-client privilege. *Id.*