

27-503. Rule 503. Lawyer-client privilege; definitions; general rule of privilege; who may claim privilege; exceptions to the privilege.

(1) As used in this rule:

(a) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;

(b) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;

(c) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services; and

(d) 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.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

(3) The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this rule:

(a) If the services of the lawyer are 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; or

(b) As to a 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; or

(c) As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication 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.

Source: Laws 1975, LB 279, § 23.

Annotations

The party asserting a lawyer-client privilege has impliedly waived it through his or her own affirmative conduct where (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting 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 or her defense. *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001).

If the district court determines a party asserting the attorney-client privilege has made out a prima facie claim, it shall (1) order the alleged protected material produced to the court, (2) order the asserting party to submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material, (3) privately review the material outside the presence of all counsel, (4) make a determination of whether the material is protected, and (5) seal the material for purposes of appellate review. *Greenwalt v. Wal-Mart Stores, Inc.*, 253 Neb. 32, 567 N.W.2d 560 (1997).

In response to a motion to compel production, a party asserting the attorney-client privilege must make out a prima facie claim that the privilege applies by submitting a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege, which must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected. *Greenwalt v. Wal-Mart Stores, Inc.*, 253 Neb. 32, 567 N.W.2d 560 (1997).

A communication concerning the date, time, and place of a scheduled trial is not confidential in nature and is not protected from disclosure by this section. *State v. Hawes*, 251 Neb. 305, 556 N.W.2d 634 (1996).

A litigant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain his claim against another while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted. *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985).

Under the provisions of this section, a communication between a lawyer and a client is not privileged if the services of the lawyer are 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 fraud. *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979).