

Attorney-Client Privilege - South Dakota

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

South Dakota law provides that communications between a client and its attorney for the purposes of rendering professional legal services is protected by the attorney-client privilege. S.D. Codified Laws § 19-19-502. This includes communications between:

- (1) A client's representative and its lawyer or its lawyer's representative;
- (2) Between its lawyer and the lawyer's representative;
- (3) By a client, its representative, its lawyer or the lawyer's representative to another lawyer or the lawyer's representative who is representing another party concerning a matter of common interest;
- (4) Between representatives of the client or between the client and a representative of the client; or
- (5) Among lawyers and their representatives representing the same client.

Id.; see also *State v. Catch the Bear*, 352 N.W.2d 640, 645 (S.D. 1984) ("Minimum elements now necessary to invoke that privilege include: (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of the five relationships enumerated in SDCL 19-13-3.")

"A communication is considered 'confidential' if it is not intended to be disclosed to third party other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." S.D. Codified Laws § 19-19-502. Additionally, written communications are included under South Dakota's attorney-client privilege.

The South Dakota Rules of Professional Conduct also recognize the attorney-client privilege. South Dakota protects communications relating to the representation of a client, unless the client gives informed consent for disclosure of same, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure falls under one of the exceptions to the rule regarding client confidentiality. S.D. R. Prof. Conduct 1.6.

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?

South Dakota state courts have not recognized the joint defense or common interest doctrines with respect to privileging communications between and among two or more co-defendants.

South Dakota federal court, applying federal law, has recognized the common interest doctrine as “an exception to the rule that voluntary disclosure of confidential, privileged material to a third party waives the [attorney-client] privilege.” *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 239 F.R.D. 572, 582 (D.S.D. 2006). “[T]he common-interest doctrine applies to privileged communications between parties in three instances: ‘(1) one party is seeking confidential information from the other on behalf of an attorney; (2) one party is relaying confidential information to the other on behalf of an attorney; and (3) the parties are communicating work product that is related to the litigation.’” *Id.* at 584 (quoting *IBJ Whitehall Bank & Trust Co. v. Cory & Assocs., Inc.*, No. Civ A. 97 C 5827, 1999 U.S. Dist LEXIS 12330, 1999 WL 617842, at *6 (N.D. Ill. Aug. 12, 1999)). The common interest doctrine “presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine.” *Id.* at 583 (citing *In re Grand Jury Subpoenas*, 89-3 & 89-4, *John Doe* 89-129, 902 F.2d 244, 249 (4th Cir. 1990)).

To note, South Dakota Rule of Professional Conduct 1.7 provides the following regarding the representation of multiple parties:

(a) Except as provided by paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or same matter before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

S.D. R. Prof. Conduct 1.7.

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Additionally, under South Dakota law, if parties retain an attorney to represent their joint interests, then neither party can prevent the other from obtaining any private communications it had with the attorney. See *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 700 (S.D. 2011). If the parties are adverse or have conflicting interests, then their communications with their separate outside counsel will be protected. *Id.*

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.

Under South Dakota law, a lawyer may waive the attorney-client privilege upon any of the following events:

- (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;
- (2) To secure legal advice about the lawyer's compliance with these Rules;
- (3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (4) To the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used;
- (5) To comply with other law or a court order; or
- (6) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

S.D. R. Prof. Conduct 1.6 (2018).

Additionally, South Dakota law provides that a party can lose the protection of the attorney client privilege if communications fall within the advice-of-counsel exception. *Bertelsen*, 796 N.W.2d at 701. This exception provides that "a party cannot affirmatively assert reliance upon an attorney's advice and then refuse to disclose such advice." *Id.* A party also need not expressly rely on the advice of its counsel to waive the attorney-client privilege. *Id.* at 702.

South Dakota courts, however, will apply the following test to determine if a party has lost its attorney-client privilege:

- (1) the analysis on the issue of whether a party has waived the attorney-client privilege should begin with a presumption in favor of preserving the privilege;
- (2) a client only waives the privilege by expressly or impliedly injecting his attorney's advice into the case; and
- (3) a client only waives the privilege to the extent necessary to reveal the advice of counsel he placed at issue.

Id. at 703.

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

Below are some relevant South Dakota cases regarding the attorney-client privilege

- Voorhees Cattle Co., LLP v. Dakota Feeding Co., LLC, 868 N.W.2d 399 (S.D. 2015).
 - Holding: “Putting a party’s knowledge at issue in ongoing litigation does not necessarily exclude attorney-client communications from the scope of the [attorney-client] privilege.” Id. at 406. In regards to a waiver due to placing advice of counsel at issue, the court stated:

Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney’s advice might affect the client’s state of mind in a relevant manner. The advice of counsel is placed in issue 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.
- Nylén v. Nylén, 873 N.W.2d 76 (S.D. 2015).
 - Holding: The court held that the attorney-client privilege is waived when a client can no longer reasonably believe they are consulting an attorney with a “view to obtain legal services.” Id. at 80.