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

Attorney-client privilege is one of the oldest recognized privileges for confidential communications, and therefore receives maximum legal protection. In re Public Defender Serv., 831 A.2d 890, 900 (D.C.2003). In the District of Columbia, the purpose of attorney-client privilege is to encourage the “full and frank communication between attorneys and their clients.” Adams v. Franklin, 924 A.2d 993, 998 (D.C. 2007). Thus, the privilege only applies: “(1) where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” Adams, 924 A.2d at 998–99.

The first element requires that legal advice is sought. Id. To determine if a conversation is for obtaining legal advice, D.C. courts use the primary purpose test. Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc., 892 F.3d 1264, 1267 (D.C. Cir. 2018). The test is not to ascertain the primary purpose of the communication, but rather, to ask “whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.” See id. This means that a communication need not only be for seeking legal advice to be considered privileged. Id. (emphasis added). Under this element, a testator’s consulting with an attorney about drafting a will is privileged, as well as any company’s internal investigations where legal advice is provided or obtained. See Elliott v. U.S., 23 App. D.C. 456, 467 (App. D.C. 1904); In re Kellogg Brown & Root, Inc., 756 F.3d 754, 757 (D.C. Cir. 2014). However, when the purpose of the communication from an attorney to the client, is for the client to convey it to a third party, it is not considered privileged. Logan v. Oliver, 96 A.2d 516, 517 (Mun. Ct. App. D.C. 1953).

The second element requires that the communication come from an attorney. Adams, 924 A.2d at 998. This includes agents of the attorney, so long as the remainder of the requirements for attorney-client privilege are met. Baylor v. Mitchell Rubenstein & Associates, P.C., 130 F. Supp. 3d 326, 330 (D.D.C. 2015). However, communications with an attorney or agent must be made
to them in their professional capacity, and not as simply a friend. *Patten v. Glover*, 1 App. D.C. 466, 477 (D.C. Cir. 1893).

Third, the communication must be related to the legal advice that is sought. *Adams*, 924 A.2d at 998. This privilege exists to protect only the communications, and not the underlying facts of the case. *See Gale v. U. S.*, 391 A.2d 230, 234 n.4 (D.C. 1978). In addition, communications and documents that are not otherwise privileged, cannot acquire privileged status by being communicated to an attorney. *See U. S. v. Moultrie*, 340 A.2d 828, 830 (D.C. 1975). The form of the communication is generally irrelevant, and voicemails to attorneys have been held to be protected. *See Green v. Green*, 642 A.2d 1275, 1282 (D.C. 1994).

Fourth, the communication between the client and the attorney must be confidential. *Adams*, 924 A.2d at 998. This means that the client must intend that the communication remain confidential. *See Hiltpold v. Stern*, 82 A.2d 123, 127 (Mun. Ct. App. D.C. 1951). Not only must there be intent to have the communication be confidential, but the confidentiality must also be maintained. *See Gale*, 391 A.2d at 234 n.4. The client needs a subjective intent that the communication remains confidential, which can be shown through express communication. *See Elliott*, 23 App. D.C. at 458. In the District of Columbia, some communications and information are generally not confidential, such as the identity of the client and the fact of retention, or the existence of the attorney-client relationship. *See id. at 469; Catalog Ass'n v. A. Eberly's Sons*, 50 F.2d 981, 983 (App. D.C. 1931).

Fifth, the communications must be made by the client. *Adams*, 924 A.2d at 998. The client must be the one that is seeking legal advice or assistance, and not a third party. *See Logan*, 96 A.2d at 517. However, the privilege does not attach until the attorney-client relationship exists, so, “[a] client's perception of an attorney as his counsel is a consideration in determining whether a relationship exists.” *See Matter of Lieber*, 442 A.2d 153, 156 (D.C. 1982). A written agreement or payment of fees is not necessary for the relationship to exist. *Id.*

The attorney client privilege can also extend to a client’s agent who is seeking legal advice or assistance on the client’s behalf. *See Elliott*, 23 App. D.C. at 468. In addition, an entire government agency can be a client, and the agency lawyers can function as the attorneys for attorney-client privilege. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). Attorney-client privilege applies with equal force between government counsel and the entire government agency. *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 758.

Finally, the last three elements state that once a privilege attaches, it is permanent unless waived by the client. *Adams*, 924 A.2d at 998. If it is not waived, a client’s privilege extends beyond their death, to their successors in interest. *See Olmstead v. Webb*, 5 App. D.C. 38, 50 (App. D.C. 1894). The successors in interest can then assert the deceased client’s attorney-client privilege as well as waive it. *Id.*
II. 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?

The District of Columbia preserves the attorney-client privilege between two or more co-defendants regarding a matter of common interest. In re Sealed Case, 29 F.3d 715, 719 (D.C. Cir. 1994). However, there is “no clear uniformity in the case law” as to when and how a common interest is defined. Trustees of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc., 266 F.R.D. 1, 15 (D.D.C. 2010). Generally, individuals may share information without waiving attorney-client privilege if “(1) the disclosure is made due to actual or anticipated litigation; (2) for the purpose of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with maintaining confidentiality against adverse parties.” Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D.D.C. 1995). The joint-client or common interest privilege will end when the clients or their representatives become adversaries in a dispute about the common interest for which the joint clients sought representation. See Duggan v. Keto, 554 A.2d 1126, 1129 (D.C. 1989).

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.

One way to lose the ability to assert attorney-client privilege is through waiver. See Adams, 924 A.2d at 999. Generally, when the application of attorney-client privilege does not serve the purpose for which it is intended, courts will not apply it, and will deem it waived. See id. The purpose is to encourage communication between the attorney and the client. Id. Although the courts can deem privileged communications as waived, the privilege is for the benefit of the client, so only the client may waive their privilege. See Bundy v. U.S., 422 A.2d 765, 767 n.4 (D.C. 1980). Waiver may be either express or implied. See Oliver v. Cameron, 11 D.C. (MacArth. & M.) 237, 242 (D.C. 1880).

An attorney may only waive the client’s privilege if they are acting as an agent of the client and reveal the substance of the communication. See Bundy v. U. S., 422 A.2d 765, 767 n.4 (D.C. 1980). A lawyer does not waive a client’s privilege if the lawyer communicates with other lawyers within the firm. See Suesbury v. Caceres, 840 A.2d 1285 (D.C. 2004).

The attorney-client privilege may be waived by voluntary disclosure. See Doughty v. U.S., 574 A.2d 1342, 1343 (D.C. 1990). The voluntary disclosure of otherwise privileged information to nonprivileged third parties will be interpreted as a waiver of privilege. Id.; see Adams, 924 A.2d at 999. In addition, when a client communicates with his attorney in the presence of third parties who are not agents of the attorney or client, the privilege will be waived due to the breach in confidentiality. See Logan, 96 A.2d at 517.
Courts in the District of Columbia also follow federal law that does not allow the selective waiver of privilege in order to gain an unfair advantage over an opponent. See Wender v. United Services Auto. Ass'n, 434 A.2d 1372, 1375 (D.C. 1981). A party cannot claim a document or communication as privileged and withhold it from the opponent until a “strategically advantageous stage of trial.” Id. On the other hand, if a party withholds documents, communications, or information on the basis of attorney-client privilege, and the privilege is waived, the opponent should receive access to the remaining relevant materials that were previously withheld. Edmund J. Flynn Co. v. LaVay, 431 A.2d 543, 551 (D.C. 1981).

The attorney-client privilege can also be impliedly waived. See Oliver, 11 D.C. at 242. If a third party gains access to confidential communications and the client does not object, the client impliedly waives the privilege. See id. Fairness is an important consideration in assessing the issue of implied waiver. Adams, 924 A.2d at 999. District of Columbia courts have identified three factors that support a finding of implied waiver:

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 defense.


The District of Columbia also recognizes the crime-fraud exception to attorney-client privilege. In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). When a client consults with an attorney for assistance in the furtherance of a crime or fraud, the communications between them are not privileged. Id. This is because the law should not assist a client in the furtherance of a crime or fraud. Id.

For the crime-fraud exception to apply, two conditions must be met. Id. at 49. First, the client must have “made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act.” Id. Second, the client must have actually carried out the crime or fraud. Id. The exception does not apply if the client once had bad intentions but did not carry them out, because the purpose of consulting a lawyer is to achieve law compliance. Id. In addition, because it is the client’s privilege, it is the client’s criminal or fraudulent act that matters, so acts of a third party cannot break the privilege. Id.
Attorney-client privilege also does not apply in cases of will contests. *Duggan v. Keto*, 554 A.2d. at 1141. If there is a dispute “between beneficiaries claiming under a will or heirs claiming through the decedent” the privilege will not apply. *Id.*

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

Recent Circuit Court decisions in the District of Columbia have supported a broader application of attorney-client privilege than other states. *See Fed. Trade Comm'n*, 892 F.3d at 1267; *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 757. The District of Columbia is not as restrictive with attorney client privilege as other circuits are because it allows communications that may have multiple purposes to remain privileged. *Id.*

In the case of internal investigations, if there are other purposes for the investigation, and even if it was mandated by a regulation rather than company discretion, the communication is privileged if one of the significant purposes of the communication was to provide legal advice. *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 757.

The same rule applies when businesses consult with a lawyer. *See Fed. Trade Comm'n*, 892 F.3d at 1267. Privilege can apply if the communication has a legal and business purpose, as long as the legal advice was one of the significant purposes of the communication. *Id.*