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

In Idaho, the attorney-client privilege is codified under I.C. § 9-203(2), which provides, “[a]n attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.” This is also reflected in Idaho Rule of Evidence 502, which sets out the general rule of the privilege, definitions, and exceptions. In order for a communication to be protected under the attorney-client privilege, the communication must be confidential and made for the purposes of rendering legal advice. See _Farr v. Mischler_, 129 Idaho 201, 207, 923 P.2d 446, 452 (1996).

In order for a communication to be “confidential,” it must not have been intended to be disclosed to third parties. I.R.E. 502(a)(5). Additionally, as the name would imply, the privilege only extends to lawyers and clients (and their respective representatives). I.R.E. 502(b). The rule defines “lawyer” as “a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.” I.R.E. 502(a)(3). Likewise, 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 the lawyer.” I.R.E. 502(a)(1). By its definition, the term “client” is broad enough to encompass prospective clients, and therefore confidential communications between a prospective client and an attorney are also protected under the attorney-client privilege. _Id.; see also State v. Iwakiri_, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984) (“[t]he privilege extends to communications made with a view toward employing the attorney by a potential client, whether or not actual employment results”).
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?

Under Idaho Rule of Evidence 502(b), the attorney-client privilege extends to situations where there are multiple clients represented by the same attorney where the communication made concerns a matter of common interest to the clients. I.R.E. 502(b)(3). For the privilege to apply in these situations, the same requirements need to be met as to the confidentiality and that the individuals fit within the definition of “client.” Id. Additionally, communications between attorneys for the same client are protected by the attorney-client privilege. State v. Iwakiri, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984). However, the privilege does not extend to a communication made only between joint clients where the attorney is not present. I.R.E. 502(b)(3).

There are exceptions to the rule, however. See I.R.E. 502(d). One exception provides that there is no privilege “[a]s to a communication relevant to a matter of common interest between or among 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 or among any of the clients.” I.R.E. 502(d)(5); see also State v. Cortez, 135 Idaho 561, 566, 21 P.3d 498, 503 (Idaho Ct. App. 2001). So, if an action arises between clients, the communications made to the attorney providing joint representation may not be protected under the attorney client-privilege. See Cortez, supra.

I.R.E. 502(b)(3) also applies to protect communications between legal teams of joint defendants who share a common interest in the defense. The Comment to I.R.E. 502 provides that the rule “is intended to provide that when clients who share a common interest in a legal matter are represented by different lawyers they can communicate with each other in an effort to develop a joint strategy or otherwise advance their interests, and their communications in that endeavor will be privileged[.]” However, as is the case when multiple defendants share the same attorney, communications between joint defendants are not privileged when no lawyer is present. See id.

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.

As discussed above, Idaho Rule of Evidence 502(d) provides exceptions to the attorney-client privilege. The first listed exception is for when the communication was made in furtherance of crime or fraud, also known as the crime-fraud exception. Rule 502(d) eliminates the privilege “[i]f the services of the lawyer were 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.” So, if a client seeks an attorney’s services to aid in what he/she should know to be a crime, then the client may not be able to assert this privilege to prevent the attorney from testifying.
Another situation that may result in the loss of the attorney-client privilege is waiver. Idaho Code §9-203(2) explicitly provides that an attorney cannot be examined as to any communication made by a client, “without the consent of his client.” Only the client can waive the privilege. *Id.; State v. Iwakiri*, 106 Idaho 618, 621, 682 P.2d 571, 574 (1984). The waiver, however, can be either express or implied. *Skelton v. Spencer*, 98 Idaho 417, 419, 565 P.2d 1374, 1376 (1977). There are many ways in which clients can waive the attorney-client privilege. One common way the privilege is expressly waived is when the client testifies as to a communication with his/her attorney. However, the waiver may extend beyond the communication that was testified to. *Skelton v. Spencer*, 98 Idaho 417, 420, 565 P.2d 1374, 1377 (1977) (client testifying in subsequent matter as to one specific communication with her attorney waives the privilege as to all other communications on the same subject); *see also T3 Enterprises, Inc. v. Safeguard Bus. Sys., Inc.*, 164 Idaho 738, 751, 435 P.3d 518, 531 (2019) (client stipulating to the admission of otherwise-privileged emails at an evidentiary hearing as part of arbitration proceeding between the parties waived privilege). Under similar reasoning, a party who fails to timely object to the admission of a privileged communication, waives the privilege. *State v. Ellington*, 151 Idaho 53, 64, 253 P.3d 727, 738 (2011).

Additionally, disclosure to third parties may exclude the protections of the privilege. *Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446, 452 (1996) (privilege no longer applied to documents contained in a business’s files that were provided to the buyers of the business as part of its sale). While the Federal Rules of Evidence recognize an exception for when a communication is inadvertently disclosed (Fed. R. Evid. 502(b)), Idaho has yet to adopt this exception by statute or case law. However, there is nothing to suggest that Idaho would not adopt this exception. *See Farr*, 129 Idaho at 207, 923 P.2d at 452 (recognizing the inadvertent disclosure exception in Fed. R. Evid. 502, but determined it did not apply to the disclosure at issue).

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

The Idaho Supreme Court recently addressed the impact of failing to object to the admissibility of privileged communication even after the court has ruled the such communications were discoverable. *See Thurston Enterprises, Inc. v. Safeguard Bus. Sys., Inc.*, 164 Idaho 709, 720, 435 P.3d 489, 500 (2019); *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 148 Idaho 479, 494, 224 P.3d 1068, 1083 (2009). In *Saint Alphonsus Diversified Care*, the Idaho Supreme Court determined that if the trial court does not “unqualifiedly rule” on the admissibility of the evidence, the party opposing the evidence must continue to object when the evidence is presented. 148 Idaho at 494, 224 P.3d at 1083. That decision impacted the ruling in *Thurston Enterprises*, where the Court held that while one party received an adverse discovery ruling when the trial court ordered the party to produce the documents, the party did not “receive an unqualified ruling on the admissibility of those documents.” 164 Idaho at 720, 435 P.3d at 500 (emphasis original). The party waived the attorney-client privilege when it failed to object at evidentiary hearings, despite the trial court’s prior order compelling production. *Id.*