I. 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 is the oldest of the privileges for confidential communications known to the common law. 8 John H. Wigmore, EVIDENCE § 2290, at 542 (McNaughton rev. ed. 1961). The privilege exists to encourage full and frank communication to embody the principle that sound legal advice and advocacy are dependent upon such free communication. People v. Simms, 192 Ill. 2d 348, 381 (2000); Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 117-18 (1982); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

Historically, the elements required to establish the existence of attorney client privilege were expressed in People v. Adam, where the Illinois Supreme Court defined the privilege as follows:

(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 the disclosure by himself or by the legal adviser
(8) except where the protection be waived.

51 Ill. 2d 46, 48 (1972) (citing 8 John H. Wigmore, EVIDENCE § 2290 (McNaughton Rev. 1961)).

Illinois courts have since simplified the elements, and an individual claiming attorney client privilege must show that:

(1) The statement originated in confidence that it would not be disclosed;
(2) It was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and,

(3) It remained confidential.


Illinois also protects communications between an insured and insurer as if they were made to an attorney. To assert a privilege for communications between an insured and insurer, one must establish:

(1) the identity of the insured;

(2) the identity of the insurance carrier;

(3) the duty to defend a lawsuit; and,

(4) that a communication was made between the insured and an agent of the insurer.


In the corporate environment, Illinois law only protects the attorney-client privilege for communications involving the corporation’s “control group,” which includes top management and employees in an advisory role whose opinion and input are required or standard for any final corporate decisions. *Motorola, Inc. v. Lemko Corp.*, 2010 WL 2179170, at *2 (N.D. Ill. June 1, 2010); *Consolidation Coal*, 89 Ill 2d at 119-21; *Sterling Fin. Mgmt., L.P. v. UBS PaineWebber, Inc.*, 336 Ill. App. 3d 442 (1st Dist. 2002).

In the context of married individuals, only the represented individual’s communication is protected. *Golden v. Mullen*, 295 Ill. App. 3d 865 (1st Dist. 1998). However, if an attorney represents both parties, then the spouses’ communications are both protected. *Exline v. Exline*, 277 Ill. App. 3d 10 (2d Dist. 1996).

The privilege will also protect multiple persons where a client is acting on behalf of another, i.e. in the context of an appointed guardian. *Schwartz v. Hamblen*, 276 Ill. App. 3d 1018 (4th Dist. 1996). Additionally, communications between a client and a lawyer’s agents, such as a paralegal or secretary, are also protected by the privilege. *Boettcher v. Fournie Farms, Inc.*, 243 Ill. App. 3d 940 (5th Dist. 1993).
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?

Illinois federal courts distinguish between the joint defense doctrine and the common interest doctrine. The joint defense doctrine applies where co-clients can share communications with a common lawyer without destroying confidentiality. See United States v. Keplinger, 776 F.2d 678, 701 (7th Cir. 1985). In contrast, the common interest doctrine will protect communications between a client and co-party’s counsel where clients do not share the same attorney but are pursuing a common interest. United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979); see For Your Ease Only, Inc. v. Calgon Carbon Corp., No. 02 C 7345, 2003 WL 21920244, at *1 (N.D. Ill. Aug. 12, 2003) (holding that common interest privileges requires actual cooperation in litigation, not just similar legal interests).

State courts in Illinois, however, do not distinguish between the two doctrines, instead discussing them in tandem as the “common interest doctrine.” See Selby v. O’Dea, 2017 IL App (1st) 151572. Though Illinois courts and federal courts applying Illinois law were passively recognizing “joint defense agreements” or the “dual representation” doctrine, it was not until 2017 that Illinois fully outlined the definition and scope of the common interest doctrine. Id., see Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill. 2d 178 (1991) (recognizing the common-interest doctrine as rooted in the dual representation doctrine in which an attorney has provided joint or simultaneous representation of the parties); Brunton v. Kruger, 2015 IL 117663, ¶ 79 (“The common interest doctrine is rooted in the dual representation doctrine, which has a long history as an exception to the attorney-client privilege.”); BorgWarner, Inc. v. Kuhlman Elec. Corp., 2014 IL App (1st) 131824 (parties entered into a “Joint Defense and Confidentiality Agreement” to outline the parties’ common interest); Grochocinski v. Mayer Brown Rowe & Maw LLP, 251 F.R.D. 316, 326 (N.D. Ill. 2008) (“The legal principles governing application of the common interest doctrine appear to be the same under Illinois and federal law.”).

Thus, pursuant to Selby, “co-parties in a case who agree to share information pursuant to their common interest in defeating their litigation opponent do not waive either the attorney-client or work-product privilege when they do so.” 2017 IL App (1st) 151572, ¶ 4. The protection, however, will cease to apply to communications should the co-parties that once had a common interest later sue one another. Waste Management, 144 Ill. 2d 178.

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.

The most obvious destruction of the attorney-client privilege is express waiver. Express waiver occurs where a client voluntarily testifies or reveals privileged communications, expressly waives the protection of the attorney client privilege, or fails to raise the attorney client privilege.
In contrast, and more subtle, is implied waiver, which occurs where a claim or defense puts the communication at issue, most commonly in the context of a legal malpractice suit, an attorney’s fee dispute, breach of fiduciary duty claims, and even where the discovery rule is at issue in a statute of limitations defense. Daily v. Greensfelder, Hemker & Gale, P.C., 2018 IL App (5th) 150384 (finding implied waiver applied in breach of fiduciary duty case); Lama v. Preskill, 353 Ill. App. 3d 300 (2d Dist. 2004) (waiver by plaintiff when defendant raises limitations period defense and plaintiff urges discovery rule tolled the running of the limitations period). To impliedly waive the privilege, a party voluntarily injects as a factual or legal issue into a case privileged communications, the truthful resolution of which requires an examination of the confidential communications. Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc., 189 Ill. 2d 579 (2000) (reviewing the parameters of at-issue waivers when attorney’s fees and legal malpractice claims are presented).


Another common pitfall can occur in the context of expert communications. As a general rule of thumb, the attorney client privilege will only protect non-testifying experts and investigators, not experts that are disclosed, deposed, or presented for trial. See e.g. People v. Knuckles, 165 Ill 2d 125, 135 (1995) (conversations between client and non-testifying mental health consultant privileged from disclosure); People v. Knippenberg, 66 Ill. 2d 276, 284 (1977) (defendant’s communications with defense investigator privileged from disclosure).

The crime fraud exception is another limit imposed on the attorney client privilege, which is recognized where a client “seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity.” People v. Radojcic, 2013 IL 114197, ¶ 41 (citing In re Marriage of Decker, 153 Ill. 2d 298, 313 (1992)). In such instances, no attorney client privilege exists whatsoever, because the client is not seeking advice from an attorney in his or her professional capacity. Id. at ¶¶ 41-42.

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

The common interest doctrine exception to the waiver of attorney-client privilege remains an evolving issue in Illinois. Following the 2017 decision in Selby, which is the first case to
officially recognize and define the common interest doctrine in Illinois, courts have recently further restricted the application of this doctrine only to instances where a common interest agreement has been entered into by the parties. *Ross v. Ill. Cent. R.R. Co.*, 2019 IL App (1st) 181579. Thus, it is wise to still advise clients to not share information with anyone, including co-defendants and/or co-plaintiffs, without first considering the necessity or utility of a written common interest agreement.