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

A. Attorney-Client Privilege Generally

Attorney-client privilege is rooted in the overarching principle of client-lawyer confidentiality, which also gives effect to related bodies of law such as the work-product doctrine and the rule of confidentiality in professional ethics. See Ind. Rules of Prof’l Conduct r. 1.6 cmt. Attorney-client privilege and the work-product doctrine apply in judicial proceedings where a lawyer may be called as a witness or be required to produce evidence concerning a client, whereas the rule of confidentiality applies in situations other than those sought through compulsion of law. See Ind. Code §§ 34-46-3-1, 33-43-1-3; Ind. Trial Rule 26(B)(1); Ind. R. Evid. 501-502.

Attorney-client privilege embodies the principle that “when an attorney is consulted on business within the scope of his profession, the communications between him and his client should be treated as strictly confidential.” Jenkinson v. State, 5 Blackf. 465, 466, 1840 WL 2315 (Ind. 1840). The attorney should not be required nor permitted to divulge the privileged communications against his client, if the latter objects to the evidence. Id. Essentially, the privilege protects against judicially compelled disclosure of confidential information by way of testimony or court-ordered compliance with a discovery request which a party has attempted to resist. Rocca v. S. Hills Counseling Ctr., Inc., 671 N.E.2d 913, 917 (Ind. Ct. App. 1996). The privilege’s purpose is to encourage “full and frank communication between attorneys and their clients” while promoting “broader public interests in the observance of law and the administration of justice.” Bartlett v. State Farm Mut. Auto. Ins., 206 F.R.D. 623, 626 (S.D. Ind. 2002). Full disclosure between an attorney and client allows the client to give complete information so that the attorney may provide informed advice, and the client is assured that her confidences will not be violated. Id. The privilege of the communications continues as long as confidentiality is preserved, both during and

### B. The Elements of Attorney-Client Privilege

Not every communication between an attorney and client is a confidential communication entitled to a reasonable expectation of confidentiality. *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721 (Ind. Ct. App. 1995). Indiana courts have identified eight elements which must be satisfied before a communication from a client to an attorney qualifies for attorney-client privilege:

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 [may] be waived.

*See In re Estate of Voelker*, 396 N.E.2d 398, 399 (1979) (citing VIII Wigmore, Evidence § 2292 (McNaughton rev. 1961)). More generally, Indiana courts have narrowed these elements down to two essentials: (1) the existence of an attorney-client relationship and (2) that a confidential communication was involved. *Mayberry v. State*, 670 N.E.2d 1262, 1266 (Ind. 1996). The burden is on the individual asserting the attorney-client privilege to prove its applicability to a communication. *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d 734, 740 (Ind. Ct. App. 2000). A preponderance of evidence must establish the applicability of the privilege as to each question asked or document sought. *Brown v. Katz*, 868 N.E.2d 1159, 1166 (Ind. Ct. App. 2007). Once the attorney-client privilege has been established, the confidential information remains privileged until the client consents to the disclosure or the privilege is waived by client’s conduct. *Id.* Communications made *after* the professional relationship’s termination are not privileged. *Brewer v. State*, 449 N.E.2d 1091, 1093 (Ind. 1983).

#### 1. Existence of Attorney-Client Relationship


Whether a communication is confidential cannot be determined conclusively by a client’s subjective opinion as to what is confidential, but depends upon an objective determination whether – under the facts and circumstances – the communication was made within the scope of the attorney-client relationship. *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721, 726 (Ind. Ct. App.
1995). It is irrelevant that litigation was neither pending nor contemplated for the privilege to apply. *Colman v. Heidenreich*, 269 Ind. 419, 381 N.E.2d 866, 869 (1978). When an attorney is consulted on business within the scope of his profession, i.e. for the purpose of obtaining legal advice, there is a *prima facie* showing of confidentiality. *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721, 726 (Ind. Ct. App. 1995). Therefore, “what is essential to the privilege is a confidential relation of client and attorney.” *Colman v. Heidenreich*, 381 N.E.2d 866, 869 (Ind. 1978). This privilege also extends to confidential communications from the client to an agent of the attorney and from the client to the attorney in the presence of an agent. *In re Witham Memorial Hosp.*, 706 N.E.2d 1087, 1090 (Ind. Ct. App. 1999).

2. **Confidential Communication**

The second element required for the privilege to apply is that a confidential communication was involved. A confidential communication is naturally the outgrowth of the relationship because the attorney-client privilege applies to all communications between the client and her attorney for the purpose of obtaining professional legal advice or aid regarding the client’s rights and liabilities. *Penn Cent. Corp. v. Buchanan*, 712 N.E.2d 508, 515 (Ind. Ct. App. 1999). This second element can be broken down into subsections: communication and confidentiality.

**Communication**

As to the communication, the client’s method or form of communicating is not important; the privilege applies equally to all types and forms of client communication. *See Bingham v. Walk*, 128 Ind. 164, 171–72 (1891). The attorney-client privilege protects communications made for the purpose of seeking legal advice or aid; it does not protect confidential information contained within communications to the attorney. The fact that a client discloses certain information to his or her attorney does not protect the client from having to disclose that information if asked about it in discovery or at trial. *See, e.g., Barnes v. State*, 537 N.E.2d 489, 490–91 (Ind. 1989). For instance, if a client tells his attorney that the client did in fact sign a contract at issue in a case, the client is not then protected from answering questions at deposition or at trial about whether he signed the contract. Thus, information such as clerical matters, questions about a statement’s veracity, public records, previously disclosed statements, etc., would not be protected. *Id. See also Taylor v. State*, 587 N.E.2d 1293 (Ind. 1992); *Leavell v. State*, 455 N.E.2d 1110, 1117 (Ind. 1983); *Washington v. State*, 441 N.E.2d 1355, 1358–59 (Ind. 1982).

Communication in this context is not only extended from client to attorney, but also from *and* between attorney to client to the extent the information reveals the substance of protected client communications. *See Taylor v. Taylor*, 643 N.E.2d 893, 897 (Ind. 1994); *See also Richey v. Chappell*, 594 N.E.2d 443, 445–46 (Ind. 1992). And as discussed *supra*, the privilege also extends to confidential communications from the client to an agent of the attorney and from the client to the attorney in the presence of an agent. *In re Witham Memorial Hosp.*, 706 N.E.2d 1087, 1090 (Ind. Ct. App. 1999). However, it does not extend to communications between the attorney and third parties, even if it came at the request of the client. *Webster v. State*, 302 N.E.2d 763, 765 (1973).
Confidentiality

Even if a professional attorney-client relationship is created, and the communication itself is protected in its form and content, the communication must be kept confidential and secret to receive protection. Oliver v. Pate, 43 Ind. 132, 141 (1873). “Before the attorney-client privilege can exist, the communication must be confidential.” Lewis v. State, 451 N.E.2d 50, 55 (Ind. 1983). For the communication to be considered confidential and secret, it must not be subject to an exception, be waived, or disclosed to a third party. See infra, Sec. III. Confidentiality cannot be determined conclusively by a client’s subjective opinion as to what is confidential, but depends upon an objective determination whether under the facts and circumstances the communication was made within the scope of the attorney-client relationship. Corll v. Edward D. Jones & Co., 646 N.E.2d 721, 726 (Ind. Ct. App. 1995); See also Lewis v. State, 451 N.E.2d 50, 55 (Ind. 1983). For example, the presence of third parties is used as a factual circumstance to determine whether a client had a reasonable subjective expectation of confidentiality. This similarly applies where an attorney acts as a conduit for the communication because, even though a third party is not present at the time, the client’s intention is for the communication not to be confidential. See Model Clothing House v. Hirsch, 42 Ind. App. 270, 85 N.E. 719, 720 (1908) (“Statements made, even by a client to his attorney, to be communicated to a third person, are not confidential within the meaning of the statute.”).

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?

In Indiana, the communications among co-defendants in joint-defense or common-interest situations qualify as an extension of the attorney-client privilege. The common interest privilege “is an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.” Groth v. Pence, 67 N.E.3d 1104, 1122 (Ind. Ct. App. 2017) (citing Price v. Charles Brown Charitable Remainder Unitrust Tr., 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015). The “common interest privilege” or “community interest privilege” permits individuals to jointly consult attorneys to obtain assistance on a common legal problem. Id. at 1119. In other words, it allows the parties to share privileged materials with one another in order to more effectively prosecute or defend their claims. Zurich American Insurance Company v. Circle Centre Mall, LLC, 113 N.E.3d 1220 (Ind. Ct. App. 2018), rehearing denied. Essentially, the privilege “treats all involved attorneys and clients as a single attorney-client unit, at least insofar as a common interest is pursued.” Groth v. Pence, 67 N.E.3d 1104, 1119 (Ind. Ct. App. 2017). This privilege equally applies to large groups of prospective clients as it does to two or more persons. Corll v. Edward D. Jones & Co., 646 N.E.2d 721, 725 (Ind. Ct. App. 1995) (large group of investors who had filed a class action openly discussing a class action at a group meeting with attorneys preserved the attorney-client privilege even if they decided not to join the action) (emphasis added). This privilege has also been recognized for communications between parties with common legal interests outside the presence of attorneys. But see Reginald Martin Agency,
Inc. v. Conseco Medical Ins. Co., 460 F. Supp. 2d 915, 918–20 (S.D. Ind. 2006) (holding that conversations among plaintiffs conducted outside of counsel’s presence that “concerned the lawsuit” were not privileged or protected because plaintiffs did not demonstrate that such conversations implicated “counsel’s legal advice or mental impressions.”). Importantly, the privilege cannot be waived without the consent of all parties to the defense. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544, 556 (8th Cir. 1990).

As an extension of the attorney-client privilege, similar requirements apply to the common interest privilege. Of course, the critical requirement to apply the common-interest privilege is a common legal interest. The common interest privilege is limited to communications made to further an ongoing joint enterprise with respect to a common legal interest to the extent that the communications concern common issues and are intended to facilitate representation in possible subsequent proceedings.” Groth v. Pence, 67 N.E.3d 1104, 1119 (Ind. Ct. App. 2017) (citing Price v. Charles Brown Charitable Remainder Unitrust Trust, 27 N.E.3d 1168, 1173 (Ind. Ct. App. 2015). In addition, individuals sharing communications under a community of interests theory are required to demonstrate that the interests shared be identical, not similar, and legal, not solely commercial. Draus v. Healthtrust, Inc.-The Hosp. Co., 172 F.R.D. 384 (S.D. Ind. 1997).

However, as suggested by the dissent in Groth, additional requirements exist, including that there must be an agreement as to joint strategy by the parties, and the timing of the agreement dictates when the privilege begins. Groth v. Pence, 67 N.E.3d 1104, 1125 (Ind. App. 2017) (Vaidik, J., dissenting). An additional requirement of scope also applies because some questions asked pertaining to conversations outside the presence of counsel may be privileged depending on whether the question’s substance both concerns the lawsuit and implicates counsel’s legal advice or mental impressions. Reginald Martin Agency, Inc. v. Conseco Med. Ins. Co., 460 F. Supp. 2d 915, 920 (S.D. Ind. 2006). For example, a conversation between parties discussing how to make a good impression on the jury during trial, where a witness might be vulnerable on cross examination, or counsel’s impressions of the strength of Plaintiffs’ damages claims would be protected, so long as those conversations concerned the advice of counsel. In contrast, co-parties discussing simply discussing their personal views on how they should conduct themselves in the courtroom, the credibility of witnesses, or the amount of damages that might be awarded, where their discussion does not concern advice given to them by counsel, would not be protected.

Naturally, the common-interest privilege does not protect communications between attorneys representing different parties, in the absence of a demonstration that a joint defense or community of interests exists between the clients. Penn Cent. Corp. v. Buchanan, 712 N.E.2d 508, 515–16 (Ind. Ct. App. 1999). Also, if the same attorney represents two parties having a common interest, and each communicates with the attorney, communications are privileged from disclosure to a third person, but they are not privileged in a subsequent controversy between the original parties. Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850 (Ind. 1974); See also Hanlon v. Doherty, 109 Ind. 37 (1887).
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, failure to assert, waiver, crime-fraud exception, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.

In Indiana, certain situations will result in the loss of the ability to claim the attorney-client privilege, most notable of which is waiver. However, other exceptions include: crime/fraud exception, attorney defense to accusations of incompetence, joint-client exception, shareholder actions against directors, will contests, and the public records exception.

A. Waiver

Waiver constitutes the most prominent of situations where a client loses the ability to claim the privilege. A client has the individual power to claim and waive the attorney-client privilege. \(Taylor v. Taylor,\) 643 N.E.2d 893, 898 (Ind. 1994). In other words, “information subject to the attorney-client privilege retains its privileged character until the client has consented to its disclosure.” \(Mayberry v. State,\) 670 N.E.2d 1262, 1267 (Ind. 1996). A caveat exists where an attorney can waive a client’s privilege when acting within her professional capacity on behalf of the client if she makes representations or disclosures that effectively waive the client’s privilege through her conduct. See, e.g., \(Wilson v. Ohio Farmers’ Ins. Co.,\) 164 Ind. 462 (1905). However, the attorney will not waive her client’s privilege if the conduct or disclosure is not made during representation of the client nor within the client’s interest. \(Id.\) Additionally, a deceased assignee could waive a deceased’s privilege to prove competency in matters not detrimental to the estate, \(Buuck v. Kruckeberg,\) 121 Ind. App. 262 (1950).

Attorney-client privilege can be waived by either express or implied waiver. \(Brown v. Edwards,\) 640 N.E.2d 401 (Ind. Ct. App. 1994), transfer denied. This can occur where the client and attorney fail to safeguard their communications resulting in waiver of the privilege, and potentially, compelled disclosure of the communication. \(Bartlett v. State Farm Mut. Auto. Ins.,\) 206 F.R.D. 623 (S.D. Ind. 2002). Loss of attorney-client privilege can occur where a communication is made voluntarily within the presence of a third party. \(Corll v. Edward D. Jones & Co.,\) 646 N.E.2d 721 (Ind. Ct. App. 1995). An exception to this rule is in the insured-insurer relationship where insureds expect that their statements to insurers are made for the “dominant purpose” of relaying the statements to an attorney and are thereby privileged. \(Richey v. Chappell,\) 594 N.E.2d 443, 446 (Ind. 1992). Voluntary disclosure waiving privilege also applies for reports containing the opinion of the attorney that are produced in discovery responses. \(State Farm Mut. Auto. Ins. Co. v. Gutierrez,\) 844 N.E.2d 572, 586 (Ind. Ct. App. 2006). Additionally, once a part of a privileged communication is revealed, the privilege as to the whole of the communication is waived. However, voluntary disclosure of non-privileged communications relating to the privileged communications does not constitute waiver. \(Hayworth v. Schilli Leasing, Inc.,\) 669 N.E.2d 165, 169 (Ind. 1996). Waiver can also occur for communications that are protected by the
privilege if a client fails to make a proper objection to the requested disclosure or fails to assert the privilege. *City of Indianapolis v. Swanson*, 436 N.E.2d 1179, 1185 (Ind. Ct. App. 1982).

Some situations of inadvertent disclosure may operate as an exception to the waiver of the privilege. To determine whether the inadvertent disclosure waived the privilege, courts balance several factors, including: reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, and an overreaching issue of fairness and the protection of an appropriate privilege, which must be judged with respect to whether the privilege is guarded with care and diligence, or negligence and indifference. *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d 734. (Ind. Ct. App. 2000).

Finally, if a client has taken action interpreted as a waiver, courts analyze the scope of the waiver, including the subject matter of the waiver, the individuals whose communications will be disclosed, and the time frame the communications occurred to be relevant. § 9:80. Rice, et al., *Attorney-Client Privilege: State Law Indiana* § 9:80 (2018). The scope should be strictly confined within the narrowest possible limits. *Medical Assur. Co., Inc. v. Weinberger*, 295 F.R.D. 176 (N.D. Ind. 2013). For example, the fact that a client reveals that he obtained advice or had consultations with an attorney does not result in a waiver of privilege with respect to those communications if the voluntary disclosure does not reveal any specific communications. *In re Witham Memorial Hosp.*, 706 N.E.2d 1087, 1092 (Ind. Ct. App. 1999). Therefore, the scope of the waiver is limited to the matters “specifically related” to the disclosure, which is an additional aspect that Indiana case law has added to the more general application of federal law in Indiana related to attorney-client privilege. *Lindsey v. State*, 485 N.E.2d 102, 107 (Ind. 1985). The involuntary disclosure of privileged communication that was judicially compelled does not waive the attorney-client privilege. *Allstate Ins. Co. v. Clancy*, 936 N.E.2d 272, 276 (Ind. Ct. App. 2010).

### B. Exceptions to Attorney-Client Privilege

1. **Self-defense Against Accusations of Incompetence**

   When the professional integrity or competence of an attorney is attacked an attorney has the right to defend her conduct. *Logston v. State*, 363 N.E.2d 975, 977 (Ind. 1977). This then constitutes the waiver of the privilege on the communication so that the attorney can fully explain her conduct. *Id*.

2. **Crime/Fraud exception**

   The attorney client privilege is intended to foster full communication between client and attorney so that the attorney can properly serve the client, but it does not allow for this privilege to be abused. *Colman v. Heidenreich*, 366 N.E.2d 686, 691 (Ind. Ct. App. 1977). In effect, any communication that is intended to facilitate the commission of a crime is not privileged. *Green v. State*, 257 Ind. 244, 274 N.E.2d 267, 273 (1971). Based on the Indiana Professional Rules of Conduct, in situations where a client intends to commit a crime, an attorney may reveal the confidential information, but the attorney must reveal any prior or
current perjury or fraud to a tribunal, as well as misrepresentation of a material fact amounting a criminal or fraudulent act. See Ind. Prof. Cond. R. 1.6(b)(1); Ind. Prof. Cond. R. 3.3(a); Ind. Prof. Cond. R. 4.1(b). On the other hand, an attorney must not reveal confidential information about a prior commission or contemporaneous intent to commit a non-criminal fraud resulting damages to financial interest or property. See Ind. Prof. Cond. R. 1.6(a).

3. Advice of Counsel

A situation of implied waiver of the attorney client-privilege arises in cases where advice of counsel is in issue. For waiver of privilege on advice of counsel, the client must place the advice it received from counsel in issue. 1 Rice, et al., Attorney-Client Privilege: State Law Indiana § 9:49 (2018). In these cases, courts employ a balancing approach adopted in Allstate Ins. Co. v. Clancy, 936 N.E.2d 272 (Ind. Ct. App. 2010) to determine waiver. “The mere fact that the opponent alleges ‘bad faith’ that is denied by the client does not place the advice received by the client in issue unless the client specifically raises the advice as a defense. Id. (citing Bartlett v. State Farm Mut. Auto. Ins., 206 F.R.D. 623, 627 (S.D. Ind. 2002).

4. Joint-Client Exception

See discussion supra, Sec. II.

5. Shareholder Actions Against Directors

This exception was recently first addressed in Indiana in 2013 in In re TP Orthodontics, Inc., 995 N.E.2d 1057, 1059 (Ind. Ct. App. 2013), transfer granted, opinion vacated, 9 N.E.3d 170 (Ind. 2014) and opinion vacated, 15 N.E.3d 985 (Ind. 2014). The Court held that “where a corporation terminates a derivative action pursuant to a special litigation committee of its board of directors, it has waived the privilege, allowing the shareholders to access the committee's report in order to challenge whether the directors were disinterested and acted in good faith.” 1 Rice, et al., Attorney-Client Privilege: State Law Indiana § 8:19 (2018).

6. Will Contests

Contests over inheritance rights under wills are an exception that the attorney client privilege protection is absolute, that the protection survives the death of the client, and that only the client or the client's authorized agent can affect a waiver of the privilege protection. 1 Rice, et al., Attorney-Client Privilege: State Law Indiana § 8:27 (2018). The dispute itself waives the privilege through the rationale that the decedent would want her testamentary intentions known. In re Voelker, 182 Ind. App. 650, 396 N.E.2d 398, 399 (1979). If the party trying to waive the privilege is “claiming under” the will the exception applies, but if the party is a “stranger” to the estate, the privilege remains absolute. 1 Rice,
et al., Attorney-Client Privilege: State Law Indiana § 9:67; See, e.g., Kern v. Kern, 154 Ind. 29, 55 N.E. 1004, 1005–06 (1900); Briggs v. Clinton County Bank & Trust Co. of Frankfort, Ind., 452 N.E.2d 989, 1012 (Ind. Ct. App. 1983). To resolve a will dispute, the attorney who drafted the will is competent to reveal confidential communications relevant to the validity, provisions, and decedent’s intentions in drawing the will. See, e.g., Inlow v. Hughes, 38 Ind. App. 375, 76 N.E. 763, 769 (1906).

7. Public Records Exception

Indiana law permits the public to inspect and copy public records, except those declared confidential by the Indiana Supreme Court to preserve the attorney-client privilege for government agencies. Ind. Code § 5-14-3-3; Groth v. Pence, 67 N.E.3d 1104, 1118 (Ind. Ct. App. 2017), transfer denied, 2017 WL 1683180 (Ind. 2017).

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

Recent trends in Indiana have addressed the application of the attorney-client privilege in evidence law, particularly regarding the common-interest privilege and establishing the attorney-client relationship.

A 2017 Indiana Court of Appeals decision addressed the common-interest privilege. Groth v. Pence, 67 N.E.3d 1104, 1108 (Ind. Ct. App.), trans. denied, 86 N.E.3d 172 (Ind. 2017). In that case, then Governor Mike Pence joined Texas in a lawsuit against the President of the United States about federal immigration policies. William Groth filed a public records request pursuant to the Indiana Access to Public Records Act (“APRA”). Ind. Code § 5-14-3-1. In responding to the request, the Governor redacted some of the documents and withheld another. At issue was “whether the Governor properly withheld disclosure of the white paper that was attached to the email from Hodge, the chief of staff to the Governor-Elect of Texas, which Hodge sent to Governor Pence’s office and to numerous other governors’ offices throughout the United States.” Groth, 67 N.E.3d at 1117. Using the common-interest privilege as an extension of the attorney-client privilege, the Court held that the white paper was a privileged attorney-client communication between prospective clients. The Court reasoned that APRA does not defeat the attorney-client privilege, that the communication fell within the attorney-client privilege as legal advice from a professional about the client’s rights or liabilities, and that the white paper was a privileged communication between prospective co-plaintiffs seeking legal advice that was made to further an ongoing joint enterprise with respect to a common legal interest. What is important for purposes of attorney-client privilege is: (1) the white paper was not deemed an unsolicited email; and, (2) the white paper sent as an email attachment to thirty recipients that included attorneys, prospective clients, and other potential parties was protected under the common interest privilege.

The issue in that case was whether the communications of the plaintiffs with its accountant was privileged. This issue turned on whether the accountant was an “agent” of the plaintiffs while communicating with counsel for the purposes of attorney-client privilege. The Court recognized that, in Indiana, the privilege applies to an attorney’s agents, but that the privilege does not always apply to communications between a client’s agent and plaintiff’s counsel as in the broader scope of common law agency. *Id.* at *3. (“[T]he attorney-client privilege is to be narrowly drawn, thus the arguably broader common law agency test would not support that principle.”). The Court ultimately held that, because the common law agency test is too broad, and the privilege could not be extended to the accountant through an insured-insurer relationship or as an agent employee, the privilege did not apply.