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 applies to “confidential communication[s] between an attorney and the attorney’s client.” Shook v. City of Davenport, 497 N.W.2d 883, 886 (Iowa 1993) (overruled on other grounds by Wells Dairy v. American Indus. Refrigeration, Inc., 690 N.W.2d 38 (Iowa 2004)). This privilege is codified at Iowa Code § 622.10, which explains that the privilege applies to “[a] practicing attorney…or the stenographer or confidential clerk of any such person…who obtains information by reason of the person’s employment.” The attorney-client privilege prohibits a “practicing attorney” from disclosing “confidential communication[s] properly entrusted to the person in the person’s professional capacity, and necessary and proper to enable the person to discharge the functions of the person’s office according to the usual course of practice or discipline.” Id.

The attorney-client privilege “belongs to the client alone.” Bailey v. Chicago, B. & Q.R. Co., 179 N.W.2d 560, 564 (Iowa 1970). The privilege generally attaches as soon as the client consults the attorney about potential representation, even if a formal representation does not materialize. Hansen v. Kline, 113 N.W. 504, 507 (1907). The privilege “survives the client’s death, termination of the relationship, or dismissal of a case in litigation.” Bailey, 179 N.W.2d at 564.

To qualify as privileged, the communication must be “necessary and proper to enable” the attorney to serve as the client’s legal counsel. Iowa Code § 622.10. Therefore, communications regarding matters unrelated to the attorney’s representation are not privileged.

“The attorney-client privilege is not a strategic tool designed to enable a litigant to gain an advantage by keeping evidence to himself or herself rather than sharing it with others.” Young v. Gibson, 423 N.W.2d 208, 209-10 (Iowa Ct. App. 1998). “The privilege is established so clients can communicate concerns about their legal problems without fear the communication might subsequently be used as evidence against them.” Id. “The burden is upon one claiming the attorney-client privilege to establish it.” State v. Tensley, 249 N.W.2d 659, 661 (Iowa 1977).
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?

Iowa generally applies the privilege to communications “where two or more persons jointly consult with the same attorney to act for them in a matter of common interest.” *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633, 639 (Iowa 2004). However, Iowa courts have not provided clear guidance on whether communications between co-defendants represented by separate counsel are protected by the attorney-client privilege. See *Progressive Cas. Ins. Co. v. F.D.I.C.*, 49 F.Supp.3d 545, 555 (N.D. Iowa 2014) (explaining that “no Iowa courts appear to have addressed the issue of the ‘common interest’ exception to waiver.”). The general rule is that “no privilege protection ordinarily attends when a client imparts information to his attorney…for transmittal to others.” See *Bailey*, 179 N.W.2d at 564. Therefore, attorneys practicing in Iowa should proceed with caution before revealing privileged information to co-defendants with separate counsel, even when those co-defendants have a common interest or are asserting a joint defense.

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.

A. Waiver

Under Iowa law, waiver of the attorney-client privilege “may be express or implied.” *Brandon*, 681 N.W.2d at 642. See also *Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235 (Iowa 2018). The privilege belongs to the client, so the client alone has the power to waive the privilege. Iowa Code § 622.10(2); *State v. Bean*, 239 N.W.2d 556, 560 (Iowa 1976) (“The privilege belongs to the client and he alone can waive it.”). Generally, the client’s waiver must be voluntary. See *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 504-505 (Iowa 1986).

“An express waiver occurs when a client voluntarily discloses the content of privileged communications.” *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995) (overruled on other grounds by *Wells Dairy*, 690 N.W.2d at 38). For example, a client expressly waives privilege by voluntarily testifying regarding a privileged communication or by providing an affidavit that discusses a privileged communication. *Miller*, 392 N.W.2d at 505.

“[A]n implied waiver occurs where the [client] has placed in issue a communication which goes to the heart of the claim in controversy.” *Miller*, 392 N.W.2d at 504-505. For example, when a party defends a claim by asserting an “advice of counsel” defense (such as raising reliance on “advice of counsel” as a defense to an insurance bad faith claim), the Iowa Court of Appeals has held that the party has “placed the communications with its counsel at issue” and, as a result, impliedly waived privilege with respect to those communications. *B&F Jacobson Lumber &
B. **Inadvertent Disclosure**

The Iowa Supreme Court has not clearly addressed whether an inadvertent disclosure of privileged information waives the privileged status of that information.

In *Wells Dairy*, the Iowa Supreme Court noted that this is an unsettled issue in many jurisdictions, but it did not find it necessary to resolve the issue in that particular case. *See Wells Dairy, 690 N.W.2d* at 52.

However, Iowa Rule of Civil Procedure 1.503(5)(b) states as follows:

> If information is produced in discovery that is subject to a claim of privilege…, the party making the claim may notify any party that received that information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

While this rule provides a useful means for limiting a party’s immediate ability to use privileged information that has been inadvertently disclosed, it unfortunately does not provide much guidance on the ultimate issue of whether the inadvertent disclosure constitutes a waiver. This is an unsettled area of the law in Iowa; therefore, counsel and their clients should be particularly careful to avoid inadvertent disclosures in this jurisdiction. The strongest argument currently available for maintaining the privileged status of inadvertently disclosed documents in Iowa is to assert the long-standing rule that waivers of privilege must be voluntary. *See e.g. Miller, 392 N.W.2d* at 504-505; *Squealer Feeds, 530 N.W.2d* at 684. An inadvertent disclosure does not seem to meet the criteria of a “voluntary” waiver.

C. **Communications with an organizational client’s “employee” who is a witness to someone else’s actions**

The attorney-client privilege applies only to “confidential communication[s] between an attorney and the attorney’s client.” *Shook, 497 N.W.2d* at 886; Iowa Code § 622.10. Therefore, a lawyer who represents an organizational client must be aware that communications will only be
privileged if they are made exclusively between the lawyer and someone who has sufficient authority in the organization to qualify as the lawyer’s “client.”

Generally, “[w]hen a corporate employee participates in discussions with legal counsel because of his or her position within the corporate decision making structure, not because of either the employee’s own actions or what the employee has witnessed, such communications are…protected by the corporation's attorney-client privilege.” *Keefe v. Bernard*, 774 N.W.2d 663, 672 n.9 (Iowa 2009). Therefore, attorneys and their organizational clients must keep in mind that the further down “the corporate decision making structure” a conversation goes, the less likely it is to qualify for attorney-client privilege.

When a conversation takes place between an attorney and an employee who does not have decision making authority within the organization, such as an entry level employee, the attorney-client privilege only applies if the lawyer is communicating with the employee regarding the employee’s “own actions relating to potential liability of the [entity].” *Id.* at 672. In *Keefe*, the plaintiff sued a doctor and the doctor’s clinic for malpractice. *Id.* at 666. The defendants’ attorney then interviewed other employees at the clinic in an effort to gather facts related to the malpractice claims against the doctor and the clinic. *Id.* The defendants’ attorney prepared a memorandum based on these interviews. *Id.* The defendants then claimed that this memorandum was not discoverable on the basis of the attorney-client privilege. *Id.* at 667.

The Iowa Supreme Court rejected this argument and instead held as follows:

> If an employee of a corporation or entity discusses his or her own actions relating to potential liability of the [entity], such communications are protected by the attorney-client privilege.… *If, on the other hand, [an entity’s] employee is interviewed as a ‘witness’ to the actions of others, the communication should not be protected by the [entity’s] attorney-client privilege.*”

*Id.* at 672 (emphasis added).

**D. Joint clients where one client subsequently brings litigation against the other client related to the original representation**

The Iowa Supreme Court has held “that communications between an automobile liability insurer and an attorney employed by the insurer to defend the insured in litigation resulting from an automobile accident were not privileged in a subsequent action by the insured against the insurer for bad faith and negligence in failing to settle the underlying litigation within the policy limits.” *Brandon*, 681 N.W.2d at 639 (citing *Henke v. Iowa Home Mut. Cas. Co.*, 87 N.W.2d 920, 924 (Iowa 1958)).
Similarly, the Iowa Supreme Court has refused to recognize the attorney-client privilege for communications between an attorney and his clients (a city and a police officer who worked for the city) where one client subsequently sued the other client. *City of Coralville v. Iowa Dist. Ct.*, 634 N.W.2d 675 (Iowa 2001).

Therefore, while the attorney-client privilege applies to communications with joint clients represented by the same attorney, it may not apply in subsequent litigation between those clients.

**E. Communications with non-attorney investigators or expert witnesses**

Attorney-client privilege, as codified in Iowa Code § 622.10, extends only to communications ‘entrusted’ to a practicing attorney.” *State v. Leutfaimany*, 585 N.W.2d 200, 209 (Iowa 1998) (quoting *State v. Craney*, 347 N.W.2d 668, 677 (Iowa 1984)).

Iowa courts have held that attorney-client privilege does not apply to communications with non-attorneys retained or employed by a client or a client’s attorney.

In *St. Paul Reinsurance Company, Ltd. v. Commercial Financial Corp.*, the court explained as follows:

The clear implication of both Iowa common-law and Iowa’s statutory embodiments of the privilege is that it applies only to communications between an attorney and a client in the context of a professional relationship involving the attorney as an attorney. Hence,…because [an investigator] was acting in his capacity as a claims investigator or claims adjustor, not as an attorney, and [materials generated or provided to the investigator] were generated in the ordinary course of the [client’s] business of claims investigation, no attorney-client privilege attaches to either.


Although distinct from attorney-client privilege, Iowa common law and the Iowa Rules of Civil Procedure protect some communications with investigators and expert witnesses based on qualified privilege for information and materials prepared “in anticipation of litigation,” sometimes referred to as “work product.” *See Wells Dairy*, 690 N.W.2d at 48-49.

Iowa Rule of Civil Procedure 1.503(3) generally protects from discovery “documents and tangible things” that were “prepared in anticipation of litigation or for trial” unless the party seeking discovery demonstrates “substantial need” for those materials and is “unable without undue hardship to obtain the substantial equivalent of the material by other means.” Even when limited discovery is permitted concerning materials prepared in anticipation of litigation, Rule 1.503(3) expressly provides that “the court shall protect against the disclosure of the mental impressions, conclusions, opinions or legal theories or an attorney or other representative of the party concerning the litigation.”
With regard to expert witnesses, Iowa Rule of Civil Procedure 1.508 also protects from disclosure during discovery “drafts of any report or disclosure” required from expert witnesses and other communications between a party’s lawyer and expert witnesses (who are subject to the disclosure requirements of Rule 1.500(2)(b)) -- except to the extent that those communications: involve compensation for the expert witness; identify facts or data that the expert witness considered in forming opinions to be expressed; or identify assumptions that the lawyer provided and the expert witness relied on in forming opinions to be expressed. See Rule 1.508(d) and (e).

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

In 2018, the Iowa Supreme Court addressed waiver of the attorney-client privilege in the context of an employment discrimination lawsuit. *Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235 (Iowa 2018). In *Fenceroy*, an employer defended an employment discrimination lawsuit by arguing that it exercised reasonable care to prevent discrimination, to investigate claims of discrimination, and to provide opportunities for employees to seek corrective actions from the employer. *Id.* at 240-41. The Court held that by asserting this defense, the employer waived attorney-client privilege with regard to the employer’s attorney’s investigation into the plaintiff’s discrimination claim. *Id.* at 242. The Court reasoned that because the employer defended the case by arguing that its attorneys had properly investigated the plaintiff’s claims, the employer injected these privileged communications into the case and had thereby “waive[d] attorney-client privilege over the investigation.” *Id.* at 243.