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. Minnesota Statute and General Attorney-Client Privilege Provisions

Under Minnesota law, communications are considered attorney-client privileged when a client:

1. Discloses information related to representation to its lawyer; or

2. When a prospective client consults with a lawyer about the possibility of forming an attorney-client relationship.

Minn. R. P. Conduct 1.18; 1.6.

Additionally, an attorney, or its employees, cannot be examined or disclose any communication made by the client to the attorney or the attorney's advice given to the client throughout the duration of its representation, without the client's consent. Put another way, Minnesota describe the attorney-client privilege as: “(1) [w]here 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.” Kobluk v. Univ. of Minnesota, 574 N.W.2d 436, 440 (Minn. 1998) (quoting John Henry Wigmore, Evidence § 2292, at 554 (McNaughton rev.1961)).

B. Written Documents or Communications

Minnesota’s general attorney-client provisions above apply both to oral and written communications. Regarding written documents or communications, an “unprivileged, preexisting document does not become privileged upon delivery by the client to the attorney.” Kobluk, 574 N.W.2d at 441. “Similarly, a document is not cloaked with the privilege merely because it bears
the label “privileged” or “confidential.”” *Id.* When the document already had an independent existence and a communication merely brings its contents to the attorney’s knowledge, then others may compel the production of that document but not the attorney’s knowledge. *Id.* However, “[w]here the document is itself the client's written communication, coming into existence merely as a communication to the attorney …[t]his communication itself is not to be produced, whether it was made by the client by word of mouth or by writing.” *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?**

Minnesota does preserve the attorney-client privilege for communications between co-defendants in a joint-defense or common interest situation against other adverse parties, as provided in Rule 1.6. Minnesota’s Professional Rules of Conduct, however, caution against such duel representation in attempts to avoid possible problems regarding attorney-client privileged communication between the co-defendants themselves.

For instance, Rule 1.7 provides the following:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Minn. R. Prof. Conduct 1.7 (2018).
The prevailing rule regarding Minnesota’s attorney-client privilege is that, “as between commonly represented clients, the privilege does not attach.” Id. At cmt. 30. Therefore, it must be assumed that if litigation transpires between the clients, the privilege will not protect any such communications between them, and the clients should be advised accordingly. Id.

Regarding the duty of confidentiality, Minnesota’s rules indicate that “continued joint representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation … because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything [affecting] the representation that might affect that client's interests….” Id. at cmt. 31. As stated above, at the beginning of joint representation, the lawyer should, as part of obtaining each client's informed consent, advise each them that information will be shared. Id. The lawyer should also advise its client’s that the lawyer will have to withdraw if one client decides that some case material to the representation should be kept from the other. Id.

“In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.” Id.

Rule 1.7 is an extension to the attorney-client privilege and confidentiality requirements provided in Rule 1.6.

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.

Under Minnesota law, the attorney-client privilege will be waived or lost upon any of the following events:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;

(4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services or to prevent the commission of a crime;
(5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;

(7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these rules;

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;

(10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or

(11) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.


Additionally, Minnesota courts have recently held that a client may impliedly waive the privilege through testimony by discussing the contents of the professional/ legal communication. In re Truscott, 2016 WL 2946218, at *3 (Minn. Ct. App. May 23, 2016). Specifically, client’s instructions to attorneys that are not given for the purpose of seeking legal advice is not protected by the attorney-client privilege. Id. The privilege, however, is not waived regarding other, privileged communications. Id.

A client may also waive the attorney-client privilege by putting the confidential communications at-issue. “Generally, a party makes an at-issue waiver when “through an affirmative act, the asserting party has placed the protected information at issue by making it relevant.”’” Id. at 5. (citing Shukh v. Seagate Tech., LLC, 872 F.Supp.2d 851, 857 (D.Minn.2012)). Compelled responses from an opposing party’s questioning, however, are not affirmative acts taken by a client to place its privileged communications “at issue.” In re Truscott, 2016 WL
Accordingly, the client must voluntarily testify to the contents of the privileged communication, or use its reliance on legal advice as a defense to waive the attorney-client privilege. *Id.* at *9.*

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

**Recent Minnesota Case Law Regarding Attorney-Client Privilege:**

  - Holding: The attorney-client privilege protects the substance of communications between a client and their attorney, not the fact that communications to place at all. *Id.* at *6.* Therefore, opposing parties are permitted to ask whether a client communicated with their attorney, not about the substance of those communications. *Id.* at *7.*

  - Holding: In the context of a party waiving the attorney-client privilege, they are prohibited from using partially redacted communications with their former attorney to create a biased impression of their communications with the attorney. *Id.* at *2.* Fairness requires that the communications be provided in their unredacted entirety. *Id.*