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. Governing Law

The attorney-client privilege is recognized in Rule 504(b) of the Utah Rules of Evidence and Utah Code § 78B-1-137(2). It “is intended to encourage candor between attorney and client and promote the best possible representation of the client.” Krahenbuhl v. The Cottle Firm, 427 P.3d 1216 (Utah App. 2018). “The mere fact that the relationship of attorney and client exists between two individuals does not ipso facto make all communications between them confidential.” Anderson v. Thomas, 159 P.2d 142 (Utah 1945).

Utah Code § 78B-1-137(2) provides that an attorney: (1) cannot be examined as to any communication made by the client to the attorney or any advice given regarding the communication (2) made in the course of the professional employment (3) without the consent of the client. Additionally, an attorney’s “secretary, stenographer, or clerk cannot be examined . . . concerning any fact, the knowledge of which has been acquired as an employee.” Utah Code § 78B-1-137(2); see also Utah R. Evid. 504(b) (“that a client has a privilege to refuse to disclose . . . confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client’s . . . lawyers.”).

The privilege may be claimed by the client, the client’s guardian or conservator, the personal representative of a client who is deceased, the successor, the trustee, or similar representative of a client that was a corporation, associate, or other organization, and the lawyer or the lawyer referral service on behalf of the client. See U.R.E. 504. Rule 504 is only concerned with defining whether a communication is privileged at the time it is made; whether the privilege was subsequently waived is a question properly considered under U.R.E. 510.

The United States Supreme Court has stated that the purpose of the privilege is to “encourage clients to make full disclosure to their attorneys.” Gold Std., 801 P.2d. 909 (Utah 1990).
(citing, *Fisher v. United States*, 425 U.S. 391 (1976)). The Court cautioned, that “since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.” *Id.*

### B. Confidential Communications

1. To determine whether a communication is confidential, Utah courts will analyze whether the circumstances demonstrate an intent for confidentiality. *Anderson v. Thomas*, 159 P.2d 142 (Utah 1945). When a client seeks professional legal advice, he or she must divulge all of the facts to his attorney. *Id.* This, as the circumstances of the relationship are to indicate, expressly or impliedly, the communication was “intended” to be confidential. *Id.* Thus, for example, when a client expressly instructs the attorney to notify the bank (a third party) of certain payment arrangements, no privilege applies. *Anderson*, 159 P.2d 142.

2. In *State v. Snowden*, 65 P. 479 (Utah 1901), the court held, “it is evident that such relations existed between the attorney and defendant as to make the communication in question privileged. . . a close confidence existed between the parties and that the defendant made the statement in confidence to a person whom he regarded, and had reason to regard, as his attorney in the case at bar.” *Id.*

### C. Professional Employment

A party asserting attorney-client privilege has the burden to establish that an attorney-client relationship exists. In *Jackson v. Kennecott Copper Corp.*, the Utah Supreme Court identified the general requirements of the attorney-client relationship which must be shown by the party asserting the privilege. Communication “must be for (a) the purpose of securing primarily either an opinion on law, (b) or legal services, (c) or assistance in some legal proceeding, (d) and not for the purpose of committing a crime or tort.” *Jackson v. Kennecott Copper Corp.*, 495 P.2d 1254, (Utah 1972) citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

For communications used for the purpose of securing primarily legal opinion on law, etc., the party asserting privilege must prove the communication was provided pursuant to the underlying litigation. *S. Utah Wilderness All. v. Automated Geographic Reference Ctr.*, 200 P.3d 643, 655 (Utah 2008). “Channeling work through a lawyer does not itself create a basis for attorney client privilege.” *Id.* Utah courts provide that communication must be the “primary purpose” for legal analysis and advice for a “particular prospective litigation.” *Kennecott Copper Corp.*, 495 P.2d 1254.

#### 1. Agents of the Attorney

Under Utah Code 78B-1-137(2), agents of the attorney are also not to be examined concerning their knowledge of privileged matter. However, Utah has recognized a few exceptions to this rule. For example, in *Young v. Taylor*, the court held that the testimony of an attorney’s
secretary did not violate the attorney-client privilege. 466 F.2d. 1329 (10th Cir. 1972). In that case, the attorney’s secretary testified to hearing a conversation between the attorney (who was a co-defendant in the trial at hand) and another co-defendant in regards to defrauding the plaintiffs. Id. The trial court overruled the privilege objection for several reasons, and the 10th Circuit Court of Appeals upheld the trial court’s decision because the attorney was not the attorney of the co-defendant, he acted as a participant in the transaction, and that the transaction was one the attorney was interested in other than in his capacity as an attorney. Id.

Additionally, agents of the attorney may be required to disclose privileged communications if the joint-client exception is applicable. See infra, Sec. II. Note, however, that the privilege is not generally extended to agents of the client. Busch v. Doyle, 141, U.S. Dist. LEXIS 5805 (Utah Dist. Court 1992).

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 the case of multiple clients represented by the same attorney, Utah has adopted the joint-client exception to attorney-client privileged communications. Evans v. Evans, 372 P.2d 260 (Utah 1958); see also, U.R.E. 504(d)(5). Under U.R.E. 504(d)(5), the joint client exception applies to “communication relevant to a matter of common interest between 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 any of the clients.” U.R.E. 504(d)(5). Under this exception, the communications between previous jointly represented parties and their single representing attorney are not privileged.

Utah courts look to see if (1) the communications pertained to a matter in which both parties had a common interest and (2) the information was divulged to the attorney for the common interest of both. Evans, 372 P.2d 260. The court examines several factors to determine whether a common interest exists. These factors include: (a) whether the knowledge of the two parties was equally shared by the parties and their attorney; (b) the nature of the communications; (c) the intent to be regarded as confidential; (d) if the attorney indicates a pattern of behavior that treats all of the parties as one “family” and does not segregate the activities of one from the other. Evans, 372 P.2d 260; Farnsworth v. Van Cott, Bagley, Cornwall & McCarthy, LEXIS 8795 (D. Colo. 1992). If a joint-client relationship does exist, the attorney, its employees, officers, and those related will be required to provide documents and testimony concerning the attorney-client relationship. Farnsworth, LEXIS 8795.

Additionally, the Federal District of Utah recognizes the common-interest privilege and protects communications among separately represented co-defendants as long as the parties’ interests are “identical,” and not merely “similar”. “The common interest doctrine . . . operates as a shield to preclude waiver of the attorney-client privilege when a disclosure of confidential
information is made to a third party who shares a community of interest with the represented party." Gulf Coast Shippers, Ltd. P’ship v. DHL Express (USA), Inc., No. 2:09-cv-221 (D. Utah July 15, 2011); see also, Frontier Refining, Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 705 (10th Cir. 1998). "A community of interest exists where different persons or entities have an identical legal interest with respect to the subject matter of a communication between an attorney and client concerning legal advice . . . . The key consideration is that the nature of the interest be identical, not similar." Id. (quoting NL Indus. Inc. v. Commercial Union Ins. Co., 144 F.R.D. 225, 230-31 (D. N.J. 1992).

It is currently unclear whether Utah state courts will apply the common-interest doctrine in the same manner as Federal Courts. That being said, Utah’s adoption of the joint-client exception to attorney-client privileged communications, Rule 504(d)(5), suggests that Utah would recognize the doctrine as a logical extension of the current law.

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. The key pitfall in Utah is a finding of waiver.

It is the client, or those recognized as agents by U.R.E. 504, who is the holder of the privilege and who may waive the privilege. Krahenbuhl v. The Cottle Firm, 427 P.3d 1216 (Utah App. 2018). U.R.E. 504(d) provides several instances where the privilege is inapplicable. See U.R.E. 504(d); see also, Terry v. Bacon, 269 P.3d 188 (Utah App. 2011). Further, the privilege does not apply if: (1) the services of the lawyer were sought or obtained to enable or aid to commit or plan to commit a crime or fraud; (2) communications are relevant to an issue between parties who claim through the same deceased client; (3) there was a breach of duty by the lawyer or client; (4) there are issues concerning a document to which the lawyer was an attesting witness; (5) the communications relevant to a common interest between two or more clients to a lawyer retained or consulted in common.

B. “At Issue” Waiver

Generally, when a client places “privileged matters at issue in the litigation,” that client consents to disclosure of those matters. Terry v. Bacon, 269 P.3d 188 (Utah App. 2011). Courts have disagreed, however, regarding when a matter is placed “at issue.” Id. There are, generally, three approaches. The first is the “automatic waiver” rule, which provides that a litigant automatically waives the privilege upon assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant. Id. The second provides that the privilege is waived only when material to be discovered is both relevant to the issues raised in the case and either vital or necessary to the opposing party’s defense of the case. Id. The third provides that a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney’s advice at issue in the litigation. Id. Ultimately, the Terry court adopted
the most restrictive approach that the waiver of the privilege occurs when the attorney’s advice was directly put at issue. *Terry*, 269 P.3d 188.

The Court of Appeals subsequently followed suit in *Krahenbuhl*. *Krahenbuhl v. The Cottle Firm*, 427 P.3d 1216 (Utah Ct. App. 2018). The privilege may not be used both as a sword and a shield. Thus, the “at issue” waiver is triggered when the party seeking application of the attorney-client privilege places attorney-client communications at the “heart of a case.” *Id.* “More specifically communication between the attorney and client are ‘placed in issue where the client asserts a claim or defense, and attempts to prove the claim or defense by disclosing or describing an attorney client communication.’” *Id.* However, even when a court determines that the privilege has been waived, courts should exercise caution to ensure that only communications relevant to the subject matter at issues are introduced. *Id.* Utah courts reiterate that in an “at issue” matter, it is the client, and the client only, who is the holder of the privilege and who may waive the privilege. *Id.*

C. Third-party waiver

The standard determining when the presence of a third party during communications between a lawyer and client results in a waiver of the attorney-client privilege is whether the third person’s presence is reasonably necessary under the circumstances. *Hofmann v. Conder*, 712 P.2d 216 (Utah 1985). In *Hoffman*, the court held that the petitioner’s statement to his attorney, in the presence of the hospital nurse, was an intentionally confidential communication and still protected. *Id.* The court reasoned that privilege was not waived by the presence of a third-party because the client: (1) requested his attorney immediately before the communication; (2) requested that the police and hospital personnel be out of “earshot”; and (3) was in a helpless physical condition and receiving hospital care. *Id.*

D. Additional Waivers Examples

There are several additional ways in which a client may expressly or implicitly waive the privilege:


- The attorney is an attesting witness to the execution of a deed or will. *Anderson v. Thomas*, 159 P.2d 142 (Utah 1945).

- Examination of the attorney by the client during litigation or pre-trial proceedings. *Young v. Taylor*, 466 F.2d. 1329 (10th Cir. 1972).
IV. Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.

In today’s era of email communications, questions about privileged communications often arise. “The mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege.” Mem. Decision and Order Granting Pl.’s Mot. for Special Master, *Entrata, Inc. v. Yardi Systems, Inc.*, No. 2:15-cv-00102 (Utah D. 2018). For a communication between non-attorney employees to be held privileged, it must be apparent that the communication from one employee to another was for the purpose of the second employee transmitting the information to counsel for advice, or the document itself must reflect the requests and directions of counsel. *Id.* For instance, the District of Utah held that the mere fact that an attorney is “CCed” in an email does not render the communication subject to the attorney-client privilege. *Id.* If the party establishes that the communication was confidential, the party must establish that the communication between the lawyer and client relates to legal advice and strategy. *Id.*