

WASHINGTON

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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 communications and advice between an attorney and client, and extends to documents that contain a privileged communication. *Dietz v. Doe*, 131 Wn.2d 835, 842 (1997). An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists. *Id.* at 843. The subjective belief of the client will control only if it “is reasonably formed based on the attending circumstances, including the attorney’s words or actions.” *Id.* The privilege extends to communications between an attorney and a prospective client, even if there is not a subsequent agreement for representation, and even if no money is paid and there is no agreement to pay money, but further communications after a determination to not undertake the representation would not ordinarily be privileged. *Id.* at 845. The privilege applies to the client’s communications with the attorney’s team, whether or not each team member is a licensed attorney, including the attorney’s employees and consultants. *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 745 (2014). Generally, where a third-party who is not a member of the attorney’s legal team receives the communication, the privilege does not apply. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757 (2009). The determination of whether an attorney-client relationship exists is a question of fact, and the burden of proving the existence of the relationship and that the information sought falls within the privilege is on the party asserting the privilege.

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?

The “common interest” doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group. *Sanders v. State*, 169 Wn.2d 827, 853 (2010). When clients with mutual interests meet with an attorney the communications are privileged as to all,

and one client cannot waive the privilege for the group. *Broyles v. Thurston County*, 147 Wn. App. 409, 443 (2008). The party asserting the joint or common-interest privilege must show that the communication implicated a legal interest common to each party that received the communication. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757 (2009).

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.

To qualify for attorney-client privilege, the communication must be made in confidence. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757 (2009). The presence of a third-party (someone not the client and not related to the client sufficiently to enjoy the protection of a privileged communication) waives the privilege, unless the third person is necessary for the communication (e.g., an interpreter.) *Id.* See *State v. Aquino–Cervantes*, 88 Wn. App. 699, 707–09 (1997), *review denied*, 135 Wn.2d 1002 (1998). The party asserting the privilege has the burden to establish as a question of fact that the communication qualifies as an attorney-client confidential communication. *Dietz v. Doe*, 131 Wn.2d 835, 844 (1997).

If a party claims the communication was made in furtherance of a crime, civil fraud, or other improper conduct, the claimant has the burden of making a factual showing adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the fraud exception has occurred. *Whetstone v. Olson*, 46 Wn. App. 308, 311-312 (1986). The evidence must show that the client knew, or reasonably should have known, that the advice the client sought was for a wrongful purpose. *Id.* at 311. If that prima facie showing is made, then the court has discretion to inspect documents in camera to determine whether the documents should be protected from disclosure to the adverse party. *Id.* Consultation after-the-fact about wrongful conduct remains privileged; it is consultation used in furtherance of a wrongful act that may be subject to disclosure. *Leahy v. State Farm Mutual Automobile Insurance Co.*, 3 Wn. App.2d 613, 624 (2018).

Implied waiver of the attorney-client privilege may occur when the client puts the communications with the attorney at issue. *Pappas v. Holloway*, 114 Wn.2d 198, 200-01 (1990). Waiver may be implied when the client files a claim of legal malpractice that calls into question actions by another, non-defendant attorney. *Id.* A claim of qualified immunity based on a good faith action taken upon advice of counsel may waive the privilege. *Id.* at 207-208.

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

Washington considers whether the attorney’s activities involve something outside the usual practice of law, and are actions taken by the attorney who is carrying out the client’s non-attorney functions. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 701 (2013). An attorney’s communications may not enjoy protection when the communications are not part of the

communication about the party's legal rights or responsibilities. *Id.* The party invoking the privilege must show the privilege applies. *Id.*

In the insurance bad-faith area, an insurer's communications with its attorney about its coverage obligations are discoverable unless the insurer establishes they are protected. *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 700 (2013). The insurer may overcome the presumption of discoverability by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in providing the insurer with counsel as to its own potential liability; for example, whether or not coverage exists under the law. *Id.*