

HAWAII

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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.

To come within attorney-client privilege, the communication must be a confidential communication made for the purpose of facilitating professional legal services between appropriate parties as stated in Haw. R. Evid. 503 (b). *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Haw. 465, 468, 78 P.3d 1, 4 (2003).

The court has determined that a communication occurring in the following manner is privileged: (1) where legal advice of any kind is sought; (2) from a professional legal adviser in his or her capacity as such; (3) the communication relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his or her instance permanently protected; (7) from disclosure by himself or by the legal adviser; and (8) except where the protections are waived. *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?

It is likely that Hawaii recognizes the joint-defense privilege, as the 9th Circuit has long recognized that the "joint defense privilege" is an extension of the attorney-client privilege that protects not only the confidentiality of communications passing from a party to his or her attorney, but also "from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by their respective counsel." *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012).

As further explained, "[w]hether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *Id.*

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.

The crime-fraud exception will likely result in the loss of the ability to claim the protections of the privilege. “Since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. . . . The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection--the centrality of open client and attorney communication to the proper functioning of our adversary system of justice--ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. . . .” *State v. Wong*, 97 Haw. 512, 518, 40 P.3d 914, 920 (2002). Thus, attorney-client communications are not protected for the purpose of getting advice for the commission of a fraud or a crime. *Id.*

Voluntary waiver will also likely result in the loss of attorney-client privilege. Hawaii Rules of Evidence Rule 511 governs the waiver of privilege through voluntary disclosure. The commentary on this rule explains that, “any intentional disclosure by the holder of the privilege defeats [the purpose of the privilege] and eliminates the necessity for the privilege in that instance.” *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Haw. 465, 485, 78 P.3d 1, 21 (2003).

Inadvertent disclosure of information upon the attorney-client privilege has not been decided in Hawaii. *Id.* “Traditionally, courts have held that inadvertent disclosure waives the privilege because the client and attorney possess sufficient means to preserve the secret of a communication and because the disclosure makes achievement of the benefits of the privilege impossible. *Id.* at 22. However, HRE Rule 511 “provides that a disclosure must be “voluntary [.]” thus indicating a disclosure that is involuntary would not result in a loss of privilege. *Id.*

The Ninth Circuit has applied HRE Rule 511 in a diversity case involving a Hawaii party and noted that only the client held the right to the privilege. Thus, that court held that “under either Hawaii or California law, [the client] did not waive its attorney-client privilege by [the law firm’s] [inadvertent] production” of privileged evidence. *Id.* “Furthermore, it appears only the client can waive attorney-client privilege by their own voluntary act.”

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

None.