

Attorney-Client Privilege - Rhode Island

State the general circumstances under which the jurisdiction will treat a communication as attorney-client privileged, including identification of all required elements/circumstances.

In Rhode Island, attorney-client communications are privileged so long as the following elements are met:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

State v. von Bulow, 475 A.2d 995, 1004-1005 (R.I. 1984) (quoting *United States v. Kelly*, 569 F.2d 928, 938 (5th Cir. 1978)). The burden of establishing these elements is on the party advancing the privilege. *Id.*

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?

Rhode Island recognizes the "joint defense" or "common interest" exception which effectually extends the attorney-client privilege among co-defendants. See *State v. Lead Indus. Ass'n*, 64 A.3d 1183 (R.I. 2013). There is no waiver of privilege where the transferor of the protected information and the recipient of that information are co-parties or where they share interests in a matter litigated against a common adversary. See *id.* at 1196. To preserve the privilege, there must be a "reciprocity of duty" between the statement's publisher and the recipient, "such that the [recipient] has an interest in receiving the information that corresponds to that of the publisher in communicating it." See *Mills v. C.H.I.L.D., Inc.*, 837 A.2d 714, 720 (R.I. 2003).

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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 purpose of the attorney-client privilege is to protect evidence from disclosure to the public. *See Lead Indus. Ass'n*, 64 A.3d at 1196. Thus, a client may waive attorney-client privilege through consent, or by disclosing confidential information to a third party. *See von Bulow*, 475 A.2d at 1005-1006; *see also Mortgage Guar. & Title Co. v. Cunha*, 745 A.2d 156, 159 (R.I. 2000). It appears that Rhode Island recognizes the crime fraud exception; however, this exception has not been successfully applied so far. *See, e.g., Curato v. Brian*, 715 A.2d 631, 634-636 (R.I. 1998).

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

Attorney-client privilege is to be narrowly construed, and during a deposition, invoking the privilege must be on a question-by-question basis. *See North Kingstown School Committee v. Wagner*, 176 A.3d 1097, 1100 (R.I. 2018).

