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

Massachusetts highest court, the Supreme Judicial Court, has defined the attorney-client privilege as follows:

The classic formulation of the attorney-client privilege... is found in 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961): (1) Where 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.


Such communications, however, are destroyed when the communication is made in the presence of a “nonnecessary agent of the attorney or client.” Commonwealth v. Senior, 433 Mass. 453, 457 (2001). The privilege can also be waived expressly or implicitly. See Commonwealth v. Woodberry, 26 Mass. App. Ct. 636, 637 (1988).

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?

Yes. Defendants invoking the joint defense privilege need only prove that (1) the communication was made in the course of a joint defense effort, (2) the statement was designed to further such an effort, and (3) the privilege was not waived. See Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 619 (2007).
A Massachusetts Superior Court, however, recently held the joint defense doctrine does not protect against communications regarding a shared legal interest with parties that do not have counsel. See Am.'s Test Kitchen, Inc. v. Kimball, No. 1684CV03325BLS2, 2018 WL 2049490, at *4 (Mass. Super. 2018).

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 attorney-client privilege does not apply to the following:

- Disputes between joint clients. See Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 19 (1st Cir. 2012).
- A decedent’s intent as to the disposition of property by will. See Doherty v. O'Callaghan, 157 Mass. 90, 92, 31 N.E. 726, 727 (1892).
- The identity of an attorney’s client, the source of payment for attorney’s fees, the date of any communications and the amounts paid to the attorney. See Conlon v. Rosa, 2004 WL 1627337 (Mass. Land Ct. 2004).

Additionally, in RFF v. Burns & Levinson, 465 Mass. 702, 703 (2013), the Massachusetts Supreme Judicial Court for the first time ruled that the privilege does not necessarily apply to confidential communications between law firm attorneys and a law firm’s in-house counsel. Specifically, the Court stated that such can only be deemed confidential “provided that (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.” Id.

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

With the increase in the use of e-discovery, there has inevitably been, and will continue to be, a growing concern over the attorney-client privilege and the inadvertent disclosure of
potentially privileged communications. While Massachusetts has yet to rule on the waiver of the privilege specifically in the e-discovery context, courts look to a balancing test as set forth in Matter of Reorganization of Elec. Mut. Liab. Ins. Co., (Bermuda), 425 Mass. 419, 423, 681 N.E.2d 838, 841 (1997). Courts look to whether the disclosure was inadvertent and whether reasonable and prompt steps were taken prevent disclosure. Id.