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

Rule 502 of the North Dakota Rules of Evidence provides, in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer,

(2) between the lawyer and a representative of the lawyer,

(3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein,

(4) between representatives of the client or between the client and a representative of the client, or

(5) among lawyers and their representatives representing the same client.

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?

To ensure that communications among participants in the joint defense and documents prepared in furtherance of the joint defense are protected by the joint defense privilege, participants
should have the court expressly recognize the privilege and preclude discovery by the policyholder into such matters at the outset of the litigation in a case management order. Such communications also should be exempt from inclusion on privilege logs. By taking these steps, insurers will minimize uncertainty as to the application of the privilege.

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.

There is no privilege under Rule 502:

(1) if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud;

(2) as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos;

(3) as to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) as to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;

(5) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) as to a communication relevant to a matter of common interest between or among 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 or among any of the clients; or

(7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.
IV. Identify any recent trends or limitations imposed by the jurisdiction on the scope of the attorney-client privilege.

See Rule 502 of the North Dakota Rules of Evidence.