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

A client (defined as a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer) has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications (a communication is defined as confidential if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication) made for the purpose of facilitating the rendition of professional legal services to the client.

A. Between the client or her/his representative and his/her lawyer (a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation) or the client’s lawyer's representative (one employed by the lawyer to assist the lawyer in the rendition of professional legal services),

B. Between the client’s lawyer and the lawyer's representative,

C. By the client or his/her representative or her/his 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,

D. Between representatives of the client or between the client and a representative of the client, or

E. Among lawyers and their representatives representing the same client.

Vermont Rules of Evidence, Rule 502(b).
The privilege may be claimed by the client, the client’s guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client. V.R.E. 502(c).

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. As noted above, the privilege extends to the client, the client’s representative or his/her 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. V.R.E. 502(b)(3). Common interest has not been extensively defined in Vermont. The central case regarding common interest doctrine is State v. Hodgdon, 89 Vt. 148 (1915). In Hodgdon, a conversation between attorneys for the two co-defendants was deemed not to be privileged because the two co-defendants had, in part, not made a common defense, and one of the co-defendants had been cross-examined by the attorney for the other co-defendant. Thus, the requirement for establishing that two or more co-defendants’ communications qualify under the privilege is the ability to demonstrate that the two co-defendants shared a common interest throughout the proceedings and that at no point did one co-defendant’s interests conflict with the other’s.

However, there is no privilege 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. V.R.E. 502(d)(5).

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.

A. Furtherance of Crime or Fraud. There is no privilege 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 to be a crime or fraud. V.R.E. 502(d)(1).

B. Claimants Through Same Deceased Client. There is no privilege 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 inter vivos transactions. V.R.E. 502(d)(2).
C. Breach of Duty by a Lawyer or Client. There is no privilege as to a communication relevant to an issue of breach of duty by the lawyer to her/his client or by the client to his/her lawyer. V.R.E. 502(d)(3).

D. Document Attested by a Lawyer. There is no privilege as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness. V.R.E. 502(d)(4).

E. Voluntary Disclosure. A person with the privilege waives the privilege if that person or that person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged. However, in the case of attorney-client and work product privilege, when a disclosure is made in a Vermont proceeding or to a Vermont office or agency and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

1. The waiver is intentional;
2. The disclosed and undisclosed communications or information concern the same subject matter; and
3. They ought in fairness be considered together.

Further, when made in a Vermont proceeding or to a Vermont office or agency, the disclosure does not operate as a waiver in any proceeding if:

1. The disclosure is inadvertent;
2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. The holder took reasonable steps to rectify the error.

When the disclosure is made in a non-Vermont proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Vermont proceeding if the disclosure:

1. Would not be a waiver under this rule if it had been made in a Vermont proceeding; or
2. Is not a waiver under the law of the jurisdiction where the disclosure occurred. V.R.E. 510(a) and (b).
F. Court Order. A Vermont court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court in which event the disclosure is also not a waiver in any other proceeding. V.R.E. 510(b)(5).

G. Agreement. An agreement on the effect of a disclosure in a Vermont proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order. V.R.E. 510(b)(6).

H. Erroneous Disclosure Protected. A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege. V.R.E. 511.

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

Vermont is a small state with a limited number of court rulings each year. As such, there are no new trends or limitations imposed on the scope of the attorney-client privilege. However, an attorney should be careful not to disclose anything electronically to anyone he/she would not disclose it to non-electronically (for example, making sure not to copy non-privileged parties in emails).