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

In Wisconsin, Wis. Stat. § 905.03 governs attorney-client privileged communications. Attorney-client communications are privileged if they are confidential communications made to facilitate the rendition of legal services to the client:

(1) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(2) between the client’s lawyer and the lawyer’s representative;

(3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest;

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

(5) between lawyers representing the client.

Wis. Stat. § 905.03(2).

The client holds the privilege and may refuse to disclose such communications or prevent others from disclosing such communications. Wis. Stat. § 905.03(2). Under the attorney-client privilege statute, a client is “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.” Wis. Stat. § 905.03(1)(a). A lawyer’s representative is “one employed to assist the lawyer in the rendition of professional legal services.” Wis. Stat. § 905.03(1)(c). Confidential communications are communications “not intended to be disclosed to 3rd persons other than those
to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Wis. Stat. § 905.03(1)(d).

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 at the time of the communication may claim the privilege but only on behalf of the client. The lawyer’s authority to do so is presumed in the absence of evidence to the contrary.

Wis. Stat. § 905.03(3).

II. Does the jurisdiction recognize/preserve the attorney-client 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, but with a notable exception. Under Wis. Stat. § 905.03(2), the privilege is preserved “by the client or the client’s lawyer to a lawyer representing another in a matter of common interest.” Thus, if a co-defendant communicates with another co-defendant’s lawyer, or if a co-defendant’s lawyer communicates with another co-defendant’s lawyer, the privilege is preserved as long as the matter concerns a common interest and the communication was made to facilitate the rendition of legal services to the client. The common interest privilege is “based on the policy that one is entitled to learn from his associates what is being done in a matter in which he or she has an interest in common.” Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 923, 440 N.W.2d 548, 552 (1989).

Notably, there is no privilege as to “a communication relevant to a matter of common interest between 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 any of the clients.” Wis. Stat. § 905.03(4)(e). Thus, if two or more clients jointly retain or consult with an attorney, their communications are not privileged if an action later arises between the clients.

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 exceptions, assertion of advice of counsel, transmittal to additional non-qualifying recipients, etc.

The attorney-client privilege is absolute unless an exception applies or the privilege has been forfeited. Dilger v. Metropolitan Property & Casualty Insurance Co., 2015 WI App 54, ¶21, 364 Wis. 2d 410, 425, 868 N.W.2d 177. There are five exceptions to the attorney-client privilege rule in Wisconsin, noted in Wis. Stat. § 905.03(4):
(a) **Furtherance of crime or fraud.** 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; or

(b) **Claimants through same deceased client.** 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 transaction; or

(c) **Breach of duty by lawyer or client.** As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer’s client or by the client to the client’s lawyer; or

(d) **Document attested by lawyer.** As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) **Joint clients.** As to a communication relevant to a matter of common interest between 2 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 any of the clients.

A party may also forfeit the privilege by disclosing the privileged communication. However, under Wis. Stat. § 905.03(5)(a), disclosure of the privileged communication will not act as forfeiture of the privilege if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01 (7).

Failure to raise the issue of forfeiture constitutes waiver. *State v. Reed*, 2009 WI App 174, ¶10, 322 Wis. 2d 572, 776 N.W.2d 287.

The Wisconsin Legislature outlined the procedure to rectify inadvertent disclosure of privileged information in Wis. Stat. § 804.01(7). In this situation:

the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use
or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

A forfeited disclosure may extend to undisclosed communications, but only if all of the following apply: “(1) the disclosure is not inadvertent; (2) the disclosed and undisclosed communications concern the same subject matter; and (3) the disclosed and undisclosed communications ought in fairness to be considered together.” § 905.03(5)(b). Therefore, if one has purposely forfeited the privilege, one cannot reassert the privilege for another communication regarding the same subject matter, even if the latter communication has not been disclosed.

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

Wisconsin courts have ruled that non-verbal communications, as well as verbal communications, may be subject to the attorney-client privilege, as long as the communications are confidential. For instance, attorney billing records that “contain detailed descriptions of the nature of the legal services rendered to the client would reveal the substance of confidential client communications.” Wisconsin Professional Police Ass’n v. Marquette County, 2015 WI App 58, 364 Wis. 2d 528, 868 N.W.2d 199. (internal citation omitted). (emphasis in original). The description “must be detailed in a way that would directly or indirectly reveal the substance of a confidential client communication.” Id. Thus, billing records that contain only general descriptions of services rendered and “do not reveal the subject of confidential communications with any specificity are not privileged.” Id.