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It's a Privilege, Not a Right: Best Practices for the In-House Lawyer

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In-house lawyers know that an email is not automatically cloaked in privilege just because a lawyer is copied on the communication. But when exactly are communications and information privileged, and when are they not? Are there risks for inadvertent waivers that an in-house lawyer might not be thinking about? And could working remotely affect privilege? This article outlines what in-house lawyers should know about the attorney-client privilege and work-product doctrine and the top four things that in-house lawyers should communicate to clients about protecting privilege.

The Basics

- Although each jurisdiction has its own privilege definitions and rules, generally, the attorney-client privilege protects confidential communications between an attorney and client, including a client representative, made for the purpose of rendering professional legal services.

> **Practice Tip:** **Even if you believe a written communication is privileged, write it thinking that someone else will see it — indeed, that someone may be a judge or jury.**

- Whether privilege protects an in-house lawyer's communications depends on the predominant purpose of the communication. If the objective is legal advice, then the communication is privileged, so long as it is confidential and between lawyer and client. Alternatively, if the lawyer is acting as a business negotiator or advisor, then the communication probably is not privileged.

- An in-house lawyer fulfills multiple roles, sometimes even within the same communication. Just because part of a document is privileged doesn't mean that the entire document is; assume that, in later litigation, the document would be produced with only the privileged parts redacted.

> **Practice Tip:** **Remember the telephone — some things are better said than written.**

- The work-product doctrine protects material, mental impressions, conclusions, opinions, or legal theories developed in anticipation of litigation. It is both broader and narrower than the attorney-client privilege. It is broader in that it does not require that the communication be confidential and therefore is less at risk of waiver. It is narrower in that it only applies once litigation is anticipated.

> **Practice Tip:** **To best protect attorney work-product, implement a litigation hold as soon as litigation is reasonably anticipated.**

Who Owns the Privilege?

Both the attorney-client privilege and attorney work-product belong to the client, which is the company, not its employees. It does not belong to the attorney, so an attorney can neither invoke nor waive the privilege if the client desires the contrary. As such, decisions about waiver of the privilege should be made by the company's management in consultation with its counsel.

> **Practice Tip: When appropriate — for example, in interviews during an internal investigation — counsel should caution an employee that information he or she tells counsel may be disclosed by the company at its discretion. Additionally, training employees about privilege and common ways that privilege can be inadvertently waived will help keep privileged information privileged.**

Privilege: Third Parties and Common Interests

The attorney-client privilege extends to clients, clients' agents or proxies, lawyers, and lawyers' agents or proxies. A voluntary disclosure to persons outside of that group typically waives the privilege. However, not all communications with third parties will waive privilege, so it is important to understand when privileged information can be shared with third parties and when it cannot.

> **Practice Tip: Even if someone is on your team, such as your accountant or insurer, disclosing confidential information to them may waive the privilege.**

Accountants – Many jurisdictions do not recognize an accountant-client privilege, including federal courts, the District of Columbia, and states such as California, Texas, New York, and Virginia. Nonetheless, communications between in-house counsel and an accountant may be privileged if the accounting services enable the rendition of legal services. However, in this context, the line between legal services and business purposes is often hard to draw.

Auditors – The general rule is that disclosure of attorney-client communications to an auditor waives the privilege.

Insurers – Communications between an insured and its insurer are not automatically privileged. Nevertheless, most states recognize that, under certain circumstances, those communications may be shielded from discovery by the attorney-client privilege if they concern a potential suit and are predominantly intended to be transmitted to insurance-appointed defense counsel.

Investment Bankers – Communications between lawyers and investment bankers may be privileged if the purpose is to obtain legal advice for the client, especially if counsel engages the banker. In limited circumstances, if the investment banker improves the comprehension of the communications between the attorney and client by translating or interpreting information given to the attorney by the client, then the communication may be afforded protection. In other instances, communications may not be privileged.

> **Practice Tip: As a general rule, it is safer for counsel, whether in-house or outside counsel, to engage third parties if privileged information is to be shared.**

Consultants – In jurisdictions following the "subject matter" test, which allows disclosure of privileged information to employees who need to know the information, privilege may extend to outside consultants who are the functional equivalent of an employee.

Counterparties – Disclosing privileged materials to another company during due diligence, even under a non-disclosure agreement, likely waives the privilege. To avoid waiver, keep privileged materials out of data rooms.

Common Interests – During litigation, counsel for parties with aligned interests may engage in confidential communications regarding matters of common interest. The existence of this "common interest" can expand the privilege to insulate communications from disclosure. Likewise, in business transactions, some courts recognize a common interest privilege that would protect communications between counsel for corporate parties if the purpose of the communication is to further a nearly identical legal interest shared by the parties, but other courts do not. Appropriate documentation can bolster an assertion of a common interest privilege if it is later challenged.

> **Practice Tip:** **Don't rely on corresponding parties to label drafts and correspondence as subject to a "common interest" privilege. Labeling tends to be inconsistent and can create a false sense of security. Instead, parties should enter into a formal common interest agreement and educate their agents and employees about what is covered.**

Don't Waive the Privilege Inadvertently

A client may waive its privilege either expressly or implicitly by conduct that extinguishes one of the necessary elements of the privilege. Waiver of privilege can have disastrous implications for a waiving party's case and possibly its reputation, especially when done inadvertently. Being aware of potential pitfalls for inadvertent waiver can avoid these negative consequences.

Working from Home – People are working from home now more than ever, and working remotely may be here to stay. As such, it is crucial to recognize the bounds of the attorney-client privilege when working outside the walls of your office. First, beware of using personal devices that may not have secure data storage or internet connection, such as public Wi-Fi networks. Second, make sure that you are working away from roommates, family, spouses, and neighbors to avoid them overhearing confidential communications. Third, make sure computers are not left unlocked and physical files and notes are adequately secured when not in use. Lastly, be mindful of artificial intelligence assistants like Amazon Echo and Google Home. A persuasive opposing counsel may make the argument that any communication made in the presence of such a device waives the attorney-client privilege. Because this is a novel issue, the best practice is to make sure artificial intelligence assistants are unplugged near your work area.

Special Committees – If a special committee of the board of directors retains counsel, the client is the special committee and not the full board. Consequently, disclosure of privileged information to the full board may constitute a waiver.

Parents and Subsidiaries – If a parent and subsidiary are represented by the same counsel, then they are generally considered joint clients, and the privilege extends to both. This means (1) one cannot shield privileged communications from the other, and (2) neither can unilaterally waive the privilege. To avoid this result, consider (1) employing separate counsel for subsidiaries; (2) limiting the scope of the joint representations; and (3) retaining separate counsel when interests may diverge.

Mergers and Acquisitions – In a merger or acquisition, absent an agreement to the contrary, privilege passes to the surviving or acquiring company. To avoid awkward disclosure of privileged information—including about the negotiation of the acquisition—address privilege in transaction documents by (1) defining the scope of the deal lawyers' representation; (2) disclaiming the duty to disclose privileged information to the buyer; and (3) agreeing that the seller's privilege does not transfer to the buyer.

Shareholder Litigation – A company generally can assert the attorney-client privilege against its shareholders. However, some courts, including the Fifth Circuit and Delaware Supreme Court, have adopted a fiduciary exception to the attorney-client privilege when the company is in a lawsuit against its shareholders. In such cases, the privilege may be invaded if shareholders show good cause. The Second Circuit has suggested that it would also apply the exception under the right facts.

Voluntary Disclosure to Lower Level Employees – Disclosure of privileged information to a "control group" — higher-level employees in a position to control or even take a substantial part in a decision about any action which the company may take upon the advice of the attorney — does not waive the privilege. In most states, even disclosure of privileged information to non-"control group" employees does not waive the privilege as long as those lower-level employees "need to know" the information – the so-called "subject matter" test. However, be aware that some jurisdictions — notably Illinois — still use the "control group" test, which considers disclosure of privileged information to any lower-level employee as a waiver.

> **Practice Tip:** **To protect the privilege, be sure to exclude lower-level employees from privileged communications as soon as they no longer need to know the information being discussed.**

"At Issue" Waiver – If a party places its privileged information "at issue" in a lawsuit, the attorney-client privilege is generally waived. Waiver occurs if the party places the privileged information "at issue" through some affirmative action for its benefit and maintaining the privilege would be manifestly unfair to the opposing party. Examples of an "at issue" waiver include: (1) when the client testifies or offers evidence of otherwise privileged communications; (2) when the client places the attorney-client relationship directly at issue; and (3) when the client asserts reliance on its counsel's advice as an element of a claim or defense. "At issue" waivers likely extend to the entire subject matter. Plan accordingly if reliance on legal advice may be needed to support a claim or defense, thereby waiving the privilege.

Privilege: What to Tell Your In-House Client

Part of your job as in-house counsel is educating your client about privilege. Here are the four most important things to communicate to your client:

- A communication is not privileged just because an in-house lawyer is copied on it. Be careful what you say, no matter who the audience is.
- Pick up the phone when you are uncertain. While privilege issues are certainly still in play in oral communications, using the phone instead of writing information may save you trouble down the road in litigation.
- Disclosure of privileged information to a third party waives the attorney-client privilege — and there are no exceptions for spouses, family, roommates, or neighbors. This is particularly important when discussing privileged information while working remotely.
- There are limited instances in which privileged material can be disclosed to third parties without waiving the privilege, but such disclosure should never be done haphazardly. Always ask in-house or outside counsel before sharing or disclosing privileged information with an accountant, consultant, insurer, or other third party.

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