

Maintaining Privilege: A Refresher on Attorney-Client Privilege for the Remote-Work Environment

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Corporate counsel and their clients exchange confidential communications daily. Included in these exchanges are assumptions about what is and what will remain attorney-client privileged. For in-house counsel, communications with colleagues (legal and business) across multiple lines of business can have serious implications for invoking and maintaining privilege. Add to this a judicial bias against privilege for in-house counsel and the rapid technological advancement and remote work environments common in today's corporate setting, and attorney-client privilege becomes even more complex. This article will provide best practices for corporate counsel to preserve privilege generally and while navigating cloud collaboration tools and other means of electronic corporate communications.

Attorney-client privilege remains one of the more complicated and nuanced areas of an attorney's practice. For corporate counsel, the corporate entity – with employees, business units, and governance boards – increases the complexity of this privilege. Additionally, the dual role of in-house counsel as both trusted legal adviser and business adviser further complicates the matter. Because privilege determinations require a fact-sensitive analysis, this article aims to provide a general overview of privilege doctrines, specific issues facing in-house counsel, and finally, some practical guidance on how to address privilege issues in online collaboration tools and platforms.

Elements of Attorney-Client Privilege and Waiver

The attorney-client privilege protects communications between clients and their attorneys and allows them to communicate in a full and frank manner. Generally, for attorney-client privilege to apply to a communication (either written or oral), the communication (1) must be between a client and an attorney or an agent of an attorney; (2) must contain confidential information; (3) must be made without the presence of a non-privileged third party; and (4) is for the purpose of securing legal advice. Fla. Stat. § 90.502. The privilege belongs to the client, who may waive the privilege affirmatively, inadvertently, or by implication.

Express waiver occurs when the protected information in the privileged communication is disclosed to a third party. Inadvertent actions by corporate counsel or the client may waive privilege, such as forwarding an email to a party who does not need to know the protected information or not restricting access to a protected document. Implied waivers occur when the protected information is placed at issue in litigation, such as raising an advice-of-counsel defense. *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 508 (Fla. 2d DCA 2006).

It is important to note that federal courts and each state have different rules regarding privilege. Corporate counsel for multistate corporations should be aware of the privilege requirements in each applicable jurisdiction.

Attorney Work Product

The work product doctrine is a corollary to the attorney-client privilege. The doctrine prevents an adverse party from discovering or compelling the disclosure of written or oral materials prepared by or for an attorney in the course of a legal representation, especially when prepared for the purpose of litigation. Work product typically falls into two buckets: opinion work product and fact work product. Opinion work product includes an attorney's mental impressions, notes, and legal strategies. Fact work product includes information separate and apart from legal analysis, such as transcripts of witness interviews, reports of non-testifying experts, and financial records from the client. *Southern Bell Telephone and Telegraph Co. v. Deason*, 632 So.2d 1377, 1383 (Fla.1994).

What Is Not Protected Under Privilege?

Not all communications between the clients and attorneys receive protection. Fla. Stat. § 90.502. First, the underlying facts of a matter are always discoverable. For example, if a corporation initiates an internal investigation, the facts uncovered during the investigation are not privileged. An attorney's legal advice on the impact of the investigation and recommended course of action, however, likely is privileged.

Second, privilege protections do not extend to business advice provided by a lawyer. Again, protected communications are

those made to secure legal advice. Merely including an attorney as a recipient on a communication or meeting invitation does not necessarily make that communication or meeting privileged. Further, for those communications that mix business and legal advice, the privilege only applies to the portion containing legal advice.

Third, client communications that do not involve an attorney or an attorney's agent are not privileged. Privileged communication may lose their protected status if later forwarded to parties who are unnecessary to the conversation – meaning the additional persons do not add facts or information necessary for the provision of legal advice or they do not need to receive the legal advice to take action.

Finally, privilege does not apply to facilitate or conceal a crime or fraud.

The Corporate Attorney-Client Relationship

For corporate counsel, the corporate entity makes up the “client,” not the corporation's individual officers, directors, shareholders, or employees. Because the corporation acts and communicates with counsel only through these individuals, determining when privilege applies can be challenging.

Privilege is more likely to apply when an officer of the company or other senior management communicates with corporate counsel and less likely to apply when the communication is with a lower-level employee. Either way, in-house counsel should clarify that they represent the corporation and not any particular individual. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Protecting Privilege When Using Online Collaboration Tools

Currently, businesses rely on technology more than ever to operate. Online collaboration tools are web-based applications that connect individuals or groups through a restricted-access online portal. These tools offer myriad communication options such as voice, video, and messaging, as well as document creation, editing, and storage.

Although little case law directly addresses privilege and online collaboration tools, existing privilege rules apply. To determine whether the attorney-client privilege protects a communication, Florida courts apply the modified subject matter test. Under that approach, any corporate employee communication with the corporate attorney receives protection when it contemplates legal advice, the subject matter is within the scope of the employee's duties, the employee's superior encouraged the employee to make the request, and only those persons who need to know its contents receive the communication. *Southern Bell Telephone and Telegraph Co. v. Deason*, 632 So.2d 1377, 1383 (Fla. 1994).

Accordingly, we recommend applying the following strategies to preserve privilege while using online collaboration tools:

1. Utilize separate collaboration areas, document storage, messaging threads, and chat groups when seeking or contributing legal advice versus business advice.
2. Ensure the only participants with access to privileged collaboration tool data include an actively contributing attorney and those who share a privileged relationship (officers, directors, or other “need to know” employees).
3. Incorporate clear statements when requesting or providing legal advice (such as “seeking legal advice” or “for the purpose of providing legal advice”) and label privileged materials as “Attorney-Client Privileged” or “Attorney Work Product.”
4. Confirm the tool's data (shared documents, chats, instant messaging, teleconferencing, and videoconferencing) is maintained in an encrypted state and disable automatic recordings or transcripts (or set policies controlling the creation of, access to, and use of these materials).
5. Issue written policies and periodic reminders discouraging the use of screen capture tools, cameras, and microphone-equipped electronic devices to record materials, messages, or meetings on the collaboration platform.

Successfully navigating privilege in this evolving corporate setting takes careful planning and monitoring. Fortunately, however, the basic tenets of attorney-client privilege and the attorney work product doctrine remain firm. Now is the time to ensure those principles are consistently applied across all modes of communication with counsel, particularly those available through online collaboration platforms.