HEALTHY HABITS FOR IN-HOUSE ATTORNEYS: THE ATTORNEY-CLIENT PRIVILEGE

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This article provides an overview of the attorney-client privilege and healthy habits for protecting legal communications between the in-house attorney and her client, the company. This issue can be confusing in this context, particularly because in-house attorneys often serve in more roles, formally or informally, than just that of an attorney.[1]

GENERAL PRINCIPLES

The attorney-client privilege only protects communications in which (1) the client is seeking legal advice, (2) the lawyer is providing legal advice, and (3) the communication is made in confidence.[2] What most attorneys know, but can sometimes be harder for non-lawyer executives and management to fully appreciate, is that privilege does not create a "cone of silence" that shields broad ranging communications so long as a lawyer is present or involved. In fact, courts construe the attorney client-privilege narrowly and apply particular scrutiny when the communication involves an in-house attorney, especially in non-criminal matters.[3] Establishing and maintaining privilege depends on the answers to the following questions:

- Who is the client?
- Is the client requesting, or the attorney providing legal advice?
- Is the communication confidential?

Who is the client?

The client of an in-house attorney is the company, not individuals working for the company—including the CEO. Unless there is a unity of interest between the company and the employee (such as when an officer or director is sued for actions lawfully taken by the company), the attorney does not (and cannot) represent any of the officers, directors or employees of the company with respect to their company related activities.

As a result, any personal information given to the attorney by an employee (such as an employee's admission that she embezzled company funds) is not privileged and not protected from disclosure. In fact, the attorney is ethically obligated to report that information to the company if the information involves conduct harmful to the company.

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[1] Because application of the privilege varies between jurisdictions, and because certain foreign countries take a differing view of privilege or simply do not recognize that a company has an attorney-client communications privilege, specific advice will depend on the jurisdiction.

[2] *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

[3] *See Teltron, Inc. v. Alexander*, 132 F.R.D. 394, 396 (E.D. Pa. 1990).

But entities only act through people, so the question becomes which individuals working for the company are clients for the purposes of applying the attorney-client privilege. Courts generally use two tests: (1) the Control Group Test and (2) the Subject Matter Test. Texas has a unique test.

The Control Group Test

Under this test, privilege only extends to the company's controlling executives and managers. Typically, this means only those employees in a position to control the operations of the corporation or who play a significant role in the decision utilizing the requested legal advice.[4] After the Supreme Court rejected the Control Group test in *Upjohn*, only a few state courts still apply this test.[5]

The Subject Matter Test

The majority rule states that communications to the company's attorney are privileged if the employee communicates with counsel at the direction of the employee's superiors and the subject matter of that communication relates to the employee's job related performance.[6]

Federal courts generally follow some form of the Subject Matter Test, and under Federal Rule of Evidence 501, federal common law generally governs when privilege questions arise in federal court.[7]

The Texas Rule

In Texas, Rule 503 of the Texas Rules of Evidence defines a "representative of the client" as a person having authority to obtain professional legal services, or to act on advice thereby rendered" or "any other person who, for the purpose of effectuating legal representation for the client, make or receives a confidential communication while acting in the scope of employment of the client." This rule is generally thought to incorporate the Subject Matter Test.[8]

For the rest of this article, the group that constitutes the client under the applicable test will be referred to as the Client Group.

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[4] *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 119, 432 N.E.2d 250 (1982).

[5] *See, e.g.*, *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 119, 432 N.E.2d 250 (1982); *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988).

[6] *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977).

[7] Applied by most circuits, including the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. *See, e.g.*, *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353 (4th Cir. 2009); *In re Avantel, S.A.*, 343 F.3d 311 (5th Cir. 2003); *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977); *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Arizona*, 881 F.2d 1486 (9th Cir. 1989).

[8] *See PPD Enterprises, LLC v. Stryker Corp.*, No. CV H-16-0507, 2017 WL 11144568, at *1 (S.D. Tex. Apr. 10, 2017) (citing *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 225 (Tex. 2004)).

Is the client requesting, or the attorney providing, legal advice?

These questions are often the most difficult to answer. Increasingly, the person serving as in-house attorney advises her company on legal matters while also participating in the entity's business. Sometimes this is obvious, such as when an in-house attorney also holds a formal title as compliance officer, financial officer, or otherwise. Often, however, the miscellany of an in-house attorney's day-to-day work is less clearly defined, and a person whose sole job title is purely legal will often find herself providing feedback on operational matters or participating in conversations and communications that are not—or are not purely—legal in nature. This mixture of duties often forms the basis for challenging a communication's privileged nature.

The privilege may only be invoked when the attorney is acting in her capacity as an attorney—giving, and addressing requests for, legal advice with respect to the implications of some issue or a proposed course of conduct.[9]

There is no generally accepted test for distinguishing between protected legal communications and unprotected business or personal communications. Typically, the party asserting the privilege, once challenged, bears the burden of establishing that the primary or predominant purpose of the communication was to solicit or provide legal advice.[10] Consequently, the in-house attorney must always be mindful of the risk of future challenges to presently privileged—or potentially privileged—communications and take appropriate steps to indicate where privilege is claimed and guard against later waiver of the privilege.

Is the communication confidential?

Even if a communication occurs between an attorney acting as legal advisor and a person within the Client Group, it will not be privileged if the parties do not act in a manner that indicates they intend the communication to be confidential.[11]

Where circumstances indicate a lack of confidentiality, and, similarly, where confidentiality is later breached, privilege will not attach.[12] Again, the in-house attorney must give careful thought to the circumstances and environment in which legal advice is sought or provided. Often, this requires reminders (and training) for management, directors, and others, about what communications are intended to be protected and how to ensure protection attaches and endures. This can be especially challenging for communications exchanged over email, text, instant messaging, and the like.

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[9] *See Seibu Corp. v. KPMG LLP*, No. 3-00-CV-1639-X, 2002 WL 87461, at *3 (N.D. Tex. Jan. 18, 2002).

[10] *See id.*

[11] *In re Grand Jury Proceeding*, 79 F. App'x 476, 477 (2d Cir. 2003) (finding privilege did not exist where documents in question were not intended by the parties to be confidential at the time of their creation).

[12] *See, e.g.*, *Griffith v. Davis*, 161 F.R.D. 687, 695 (C.D. Cal. 1995) (finding that statements made to employer with the understanding that such statements could be used in an administrative investigation were not protected by privilege); *360 Const. Co. v. Atsalis Bros. Painting Co.*, 280 F.R.D. 347, 352 (E.D. Mich. 2012) (finding plaintiffs waived attorney-client privilege by voluntarily disclosing communications to third-party).

HEALTHY HABITS FOR PROTECTING PRIVILEGED COMMUNICATIONS

With this general background, the following are some suggested habits for maximizing the chances that truly privileged attorney-client communications will be, and will remain, protected.

Make sure employees understand who the client is – and is not.

Many times, employees will mistakenly believe that because both they and the in-house attorney work for the company, the attorney represents the employee and communications between them are privileged. This issue becomes particularly important when in-house attorneys conduct internal investigations. In-house attorneys must ensure that, when sensitive communications with employees are not privileged, the employee is made aware and, perhaps, also informed that their communication may be shared with company management or others. This is often achieved through employee handbook disclosure, training materials, and *Upjohn* warnings.[13] Of course, this is a two-way street, and the in-house attorney needs to keep in mind that while the discussion may be confidential per the company's request, it is not privileged.

In-house attorneys need to clearly communicate with employees about who the client is, and is not, and what communications are or, are not, privileged. This can be particularly challenging in a fast-paced environment in which the company's upper echelon of senior management face many demands on their time but still need to reliably communicate in confidence with in-house attorneys. Many times, it is helpful to provide on-demand training at board and committee meetings and recurring management meetings where outside counsel can speak to these issues with helpful perspective.

The in-house attorney should also consider privilege issues that may arise when individuals in the Client Group leave the company. The company's privileged communications should remain protected despite the departure of one or more members of the Client Group,[14] though when an employee leaves it poses a waiver risk if that person later volunteers, or is asked to share (through deposition notice, subpoena, or less formal means) privileged information. In other words, while the privilege belongs to the company, the ability to guard and enforce it diminishes as employees depart.

Addressing privilege concerns relating to former employees can become particularly messy where the former employee believes the in-house attorney was also representing him individually and, therefore, the privilege belongs to him rather than the company. In such situations, courts apply different tests to determine whether an attorney-client privilege existed but generally look at whether the employee sought personal legal advice from the attorney, among other factors.[15]

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[13] *Upjohn*, 449 U.S. at 394.

[14] *Price v. Porter Novelli, Inc.*, No. 07CIV.5869(PAC), 2008 WL 2388709, at *1 (S.D.N.Y. June 11, 2008) (holding that information obtained by a former employee during her employment remained privileged after her employment ended).

[15] *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 119 F.3d 210, 215-16 (2d Cir. 1997) (holding that former employees must demonstrate the following in order to claim personal privilege: (1) the employee approached the in-house attorney for the purpose of seeking legal advice; (2) when they approached the attorney, they made it clear they were seeking legal advice as an individual; (3) that attorney saw fit to communicate in an individual capacity, despite possible conflicts; (4) the conversations with the attorney were confidential; and (5) the substance of the conversation with the attorney did not concern matters regarding the company).

Build and enforce good email habits.

Emails, text messages, and instant messaging applications are most commonly the subject of dispute over the applicability, or waiver of, the attorney-client privilege. While email has become a fixture of company communication, it and other real-time communications exponentially raise the risk for disclosure of privileged communications. Consider the following healthy habits.

Separate legal and business advice in an email.

To defend against allegations from opponents seeking to discover privileged company communications by arguing that the in-house attorney was working in a business capacity and not a legal capacity, try to separate legal and business advice.[16] "Business advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client[,]" because the purpose and intent is not to communicate legal advice.[17] When possible, business and email advice should be in separate emails or separated within the communication.

It can be helpful to train employees how to best seek legal advice. For example, words like "I need your legal advice" or "request for legal advice" in the email to the attorney are more effective than "I have a question." A request for legal advice and communications in connection with obtaining advice, iterative as they often are, should be sent directly to the attorney, and non-lawyers should not be copied unless they are necessary to the Client Group or are added by the in-house attorney.

For legal advice only, it is best to use the legal title in email signatures. In other words, if someone is General Counsel, Senior Vice President and Secretary, only General Counsel should be used on legal communications.

Control the copies.

Indiscriminately copying people outside the Client Group on emails should be avoided, and the in-house attorney should be committed to discouraging such conduct by management. Directors, management, and others should be reminded—as should in-house attorneys themselves—to consider which individuals in the company truly need to know the contents of an email before hitting the send button.

It is important for management to remember that simply cc'ing an in-house attorney on a communication does not make that the communication privileged.[18] When challenged in litigation, a court will look to the substance of the communication—*meaning the judge will read the communication in dispute in her chambers*—to make a privilege determination.[19]

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[16] *See e.g.*, *In re General Motors Ignition Switch Litigation*, 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015).

[17] *In re Vioxx Prod. Liability Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (quoting *In re CFS-Related Securities Fraud Litig.*, 223 F.R.D. 631 (N.D. Okla. 2004)).

[18] *See, e.g.*, *Urb. 8 Fox Lake Corp. v. Nationwide Affordable Housing Fund 4, LLC*, 334 F.R.D. 149, 163 (N.D. Ill. 2020) (declining to apply privilege to email where an attorney is "merely cc'ed and neither provides input nor is asked for any input or advice."); *In re Hum. Tissue Prod. Liability Litig.*, 255 F.R.D. 151, 164 (D.N.J. 2008), appeal denied, judgment aff'd, No. CIV. 06-135, 2009 WL 1097671 (D.N.J. Apr. 23, 2009) ("merely copying a lawyer on an e-mail does not, by itself, make the e-mail privileged.").

[19] *See, e.g.*, *Texas Brine Co. v. Dow Chemical Co.,* 2017 WL 5625812, at *2-3 (E.D. La. 2017).

Emails containing legal advice should generally not be copied to non-lawyers or at least limited to a "need to know" Client Group basis. It is important that employees understand not to share, distribute, or forward emails or other communications containing legal advice without first consulting the in-house attorney.

The same rationale applies to having an attorney attend business meetings. Having an attorney present will only protect communications seeking and giving legal advice that are kept confidential. If third-parties or employees outside the Client Group are present at the meeting, then those communications—or that portion of the meeting—will not be privileged. This issue often arises in the context of board and board committee meetings. Simply having an attorney present during the meeting will not cloak the entirety of the discussion in privilege. If, however, the attorney is present at the meeting, or a portion of it, to discuss a legal matter, solicit questions, and provide legal advice, that portion of the discussion should be considered—and treated as—privileged, including in the recordation of meeting minutes.

Restrict the ability to forward, copy, or reply all to email.

If feasible, consider restricting the forwarding, copying, and replying all functions on particularly sensitive emails to minimize inadvertent disclosure. Doing so shows that the attorney and Client Group intended the communications to be confidential. Likewise, be mindful about discouraging recipients from printing privileged emails. Discourage employees from sending privileged communications to their personal or other email accounts.

Take clear, consistent steps to indicate when email is privileged.

As discussed above, it is good practice to segregate legal advice into standalone emails or separated portions of emails also containing business feedback. It is also a good habit to include indicia to readers—including potential future litigation opponents seeking to pierce company privilege—when an email is privileged. On balance, however, the in-house attorney should avoid automatically stamping all of her emails "attorney-client privilege," as the effect of doing so will be challenged to be set aside as boilerplate.[20] Hence, when composing a privileged email, take time to consider an appropriate disclaimer, such as:

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
DO NOT FORWARD. DO NOT COPY.

Avoid creating long email strings.

Email strings often cause issues when it comes to privilege because they can be forwarded amongst many recipients, resulting in a meandering series of conversations that a later challenger in litigation will argue were non-legal and, therefore, never privileged. Often, an initially privileged email at the bottom of a string is forgotten as the string grows and is forwarded outside of the Client Group, waiving privilege.

[20] *See Anderson v. Trustees of Dartmouth College*, 2020 WL 5031910, at *2 (D.N.H. Aug. 25, 2020).

When receiving an email seeking legal advice, the in-house attorney should consider sending a new and separate response email, marked privileged, with a proper lead-in sentence addressed only to those who actually need or sought the legal advice.

Use caution when communicating with outside directors.

Most outside directors have other business interests and many are employed by other companies. This means they often have and use personal email accounts or accounts provided by other companies. Engaging in communications using "other" accounts poses a risk of the communications not being privileged if the communication is deemed to not be confidential. [21] In-house attorneys and the directors they engage with should understand what information is intended to be privileged and how best to convey the information, mindful that "other" accounts may not come with any expectation of privacy or confidentiality.

Healthy habits to avoid or mitigate this risk include providing directors with dedicated company email addresses used exclusively for company business and/or utilizing any of the cloud-based portals designed for securing board communications. If directors insist on using their employers' or other business interests' email, communications to them must show clearly show it as board related business (preferably in the subject line), must be clearly identified as privileged and confidential, and should be separated into a secured (i.e. password-protected) folder, to the extent possible.

Avoid signing affidavits and sworn statements.

Signing affidavits and other sworn statements on behalf of the company, such as verifications to discovery responses, may subject an in-house attorney to deposition or other discovery into the factual basis on which the statement or affidavit was made. A business person familiar with the facts or the process for compiling the discovery responses, rather than the in-house attorney, should sign the verification or affidavit to prevent waiver of attorney-client privilege, when possible.

Remember that facts are not privileged.

In-house attorneys should remember, and teach others that facts, even if transmitted in a privileged conversation, may not be privileged. Likewise, documents do not automatically become privileged simply because they are transmitted to, or received from, an attorney or attached to an otherwise privileged email.[22]

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[21] *In re WeWork Litig.*, No. CV 2020-0258-AGB, 2020 WL 7624636 (Del. Ch. Dec. 22, 2020) (finding two employees of Defendant who sought advice from Defendant's counsel regarding Plaintiff via third-party Sprint's email servers had no reasonable expectation of privacy over the emails).

[22] *AM General Holdings, LLC v. The Renco Group, LLC,* C.A. Nos. 7639–VCN, 7668–VCN, 2013 WL 1668627, at *3 (Del. Ch. Ct. 2013) (holding that attachments to privileged emails "do not independently earn that protection").

Understand the limits of the attorney work product doctrine.

The work product doctrine, while not covered by this article, may protect certain communications and documents that fall outside of privilege. But the work product doctrine is narrow and only applies to materials or communications made "in anticipation of litigation or for trial."[23]

In-house attorneys must keep their bar licenses current.

In-house attorneys must be vigilant about completing their annual CLE requirements and taking any other steps necessary to maintain their bar licenses, as communications made while one's bar license has lapsed may not be privileged.[24] Though in-house attorneys may often work in a given state without being licensed there, it is important to maintain status as a licensed attorney in order to be entitled to the attorney-client privilege.

Take quick action to address inadvertent release of privileged information.

If after following these healthy habits an in-house attorney learns that the company has nevertheless inadvertently disclosed privileged information, she should take immediate steps to retrieve the information or ask that the released information be destroyed. Most jurisdictions will protect an inadvertent disclosure, if prompt action is taken when the fact of the release is known.[25]

Know that a common interest privilege may apply federally, but not in Texas.

Many federal courts recognize some iteration of the "common interest doctrine" or "joint defense privilege." This doctrine preserves confidentiality of communications between two or more parties and their attorneys who either have a common legal interest or are engaged in a joint defense effort.[26]

At the state level, Texas does not recognize a common interest privilege between parties sharing a mutual interest and their respective attorneys, whether or not they are involved in litigation. In litigation, Texas recognizes the "allied litigant doctrine" which protects communications between a client, or the client's lawyer, to another party's lawyer, but not to the other party itself.[27] But in the business context, communications between separate parties, even if attorneys are involved, are not privileged. Consider whether a joint defense agreement or a joint confidentiality agreement should be used to keep these communications confidential.

When dealing with subsidiaries and affiliates, consider conflicts.

Communications with two or more joint clients—for instance, a company and its subsidiary or affiliate—are likely privileged.[28] But in-house attorneys should be mindful of what happens to the privilege if such

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[23] Fed. R. Civ. P. 26(b)(3); *Kent Corp. v. N.L.R.B.*, 530 F.2d 612, 623 (5th Cir. 1976); Tex. R. Civ. P. 192.5.

[24] *John Ernst Lucken Revocable Tr. v. Heritage Bankshares Grp., Inc.*, No. 16-CV-4005-MWB, 2017 WL 627223, at *1 (N.D. Iowa Feb. 15, 2017).

[25] *In re Nat. Gas Commodity Litig.*, 229 F.R.D. 82, 86 (S.D.N.Y. 2005).

[26] *See Static Control Components, Inc. v. Lexmark Int'l Inc.*, 250 F.R.D. 575, 578 (D. Colo. 2007); *In re Megan-Racine Assocs., Inc.*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995).

[27] *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52-53 (Tex. 2012).

[28] *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 472-73 (W.D. Mich. 1997).

joint clients become adverse. The analysis is similar to a conflict arising between an employee and the company. At least one court has held that "[w]hen former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable."[29]

At the state level, Texas Rule of Evidence 503(d) provides that a communication made while the two joint clients were sharing representation, may be used by either of the clients in an action between them. Fortunately, in actions against third-parties, one client may not waive the privilege of the other client.[30]

Accordingly, potential conflicts of interest should be analyzed early and regularly in the representation and the in-house attorney should, again, carefully consider who her client(s) is and ensure appropriate communication of same.

Involve outside attorneys.

It can be easier to protect the privilege when outside attorneys are involved. For sensitive and serious matters, it might make sense to involve an outside attorney early and include the attorney in email communications, presuming the outside attorney's presence is purposeful in connection with advising the company. Because an outside attorney only "wears one hat," it is much easier to confirm the purpose of the communication.

In addition, while this article is designed to provide an overview of the major questions and issues in-house attorneys should consider when analyzing company privilege issues, a myriad other circumstances and questions undoubtedly arise in the challenging day-to-day work of the company lawyer. Moreover, critical enterprise matters like how best to create and protect privilege in internal investigations, privilege issues in in shareholder derivative actions, what happens to the privilege in receivership or bankruptcy, document retention policies, joint defense agreements, and cybersecurity risks to privilege go beyond the scope of this article but warrant careful planning and execution. These issues are well suited for advice from outside attorneys who can bring a different perspective to management and the board and provide up to date case law and healthy practices for protecting privilege.

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[29] *In re Teleglobe Comm. Corp.*, 493 F.3d 345, 366 (3d Cir. 2007)

[30] *Id.* at 363.