

# Protecting Legal Privileges in a Digital World

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# Overview



Common  
Misconceptions



Privilege Basics:  
A Refresher



Data Breach  
Considerations



Litigation  
Considerations

# Common Misconceptions

# Correcting Common Misconceptions

- **Saying it is privileged doesn't make it so**
- **Merely copying an attorney on an email does not make it privileged**
- **Super secret, proprietary information is not excluded from the scope of investigations or litigation**
- **Lawyers who also serve a business role/function are not always acting as lawyers or providing legal advice: difficult lines**



# Privilege Basics

A refresher.

# Attorney Client Privilege

The intricacies of attorney-client privilege are funny. But not "ha-ha" funny. More "psych, you're not protected" funny.



# Attorney Client Privilege

Four key elements required to establish the existence

of the privilege:

- (1) a communication;
- (2) in confidence;
- (3) made between privileged persons;
- (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.



# Who Is A Privileged Person?

**Privilege attaches to communications between the Company's attorneys and the Company's:**

- Directors and Officers;
- Management (the "Control Group"); and
- Maybe lower-level employees who have relevant information that the attorney needs to provide legal advice to the Company
  - *Upjohn Co. v. United States*, 449 U.S. 383 (1981), rejected the "control group" test

# Who Is A Privileged Person?

## *Upjohn* Factors – privilege attaches when:

- 1) Communications with lower-level employees occur at the direction of superiors;
- 2) Communications are with an attorney acting in a legal capacity;
- 3) Information is not available from “control group” management;
- 4) Information relates to matters within the scope of the employee’s duties; and
- 5) Employee is aware that he or she is providing information in order for the Company to obtain legal advice



# Who Is A Privileged Person?

**Agents:** non-lawyers working for in-house attorneys (such as employees in compliance, audit, and risk management)

## **Privilege extends to an agent's communications only if:**

- agent's involvement is **necessary** to provide legal advice and
- agent is acting under the direction of the attorney

**Practical Tip:** Documents prepared by a non-lawyer agent should state the agent's role in assisting the attorney, and in-house attorneys should be copied on all of the agent's communications, especially email

# Who Is A Privileged Person?



**What about a former employee?**



**Communications that take place during the time of employment do not lose privileged status when employee leaves the company**



**Courts are split on post-employment communications, with some saying that there is no privilege because they are not acting within the scope of their employment**

## Primary Purpose: Legal Advice

Privilege attaches only if the “primary” or “predominant” purpose of the communication to or from in-house attorney is legal, rather than business

While the number of lawyer or non-lawyer recipients is not dispositive, it can be evidence of the communication’s purpose

A communication that is non-legal or mixed purpose does not become privileged simply because one or more lawyers are included on the communication

**Materials “that are prepared *in anticipation of litigation* or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” (emphasis added)**

**Fed. R. Civ. P. 26(b)(3)(A).**



# Work Product



Extends to both written and oral information transmitted to the attorney as well as any material reflecting the attorneys' mental impressions, opinions, conclusions, judgments, or legal theories.



It can be a shield and a sword - the date selected for when litigation is "anticipated" to trigger the protection may also become the date when you are obligated to preserve evidence



Standard for waiver is different than attorney-client privilege

# Data Breach Considerations

# Target Privilege Decision

- Communications with Target's Data Breach Task Force (DBTF) and Verizon held privileged
- DBTF created at the request of Target's counsel to educate counsel about aspects of the breach to enable counsel to provide informed legal advice to Target
- Communications were protected because they were essential to counsel's understanding of the complex technical issues involved – necessary details for providing legal advice
- Takeaway: Early engagement of counsel will enable outside counsel to engage a forensic team clearly distinguishing this work from any forensic work being done for business purposes.



# Key Cases

## ***In re: Experian:* Forensic report protected under work product doctrine where:**

- Outside counsel retained the forensic firm.
- Forensic firm investigated and prepared report for outside counsel in anticipation of litigation (even if dual purpose).
- Full forensic report was not shared with the IRT.

## ***In re: Premera:* Forensic report not protected where:**

- Company hired forensics vendor before breach & outside counsel.
- Scope of work did not change after counsel was retained; only reporting (to counsel) & labeling communications (“privileged”, “work-product” or “at request of counsel”) changed.

## ***In re: United Shore Financial Services:* Attorney-client privilege waived for investigation-related communications where:**

- Findings were disclosed in discovery requests, and
- Relied upon for affirmative defense.

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# Tips for Creating and Maintaining Privilege

1. Engage outside counsel first and have outside counsel retain the forensics team.
2. Make clear in the engagement agreement that:
  - The vendor reports to outside counsel
  - The services are being provided to “assist outside counsel in rendering legal advice in anticipation of litigation”
  - Outside counsel will exclusively determine scope of work and the vendor’s deliverables
3. Guard against a “substantial need” argument to overcome work product protection
  - Outside counsel should ensure the forensic firm conducts its investigation based on documentation that can be provided to an adverse party for an independent investigation.
4. Think Critically About Internal and External Disclosure
  - Insurance carriers, regulatory agencies, affiliate companies, incident response team, IT department
  - Disclosure is not a waiver if the disclosure is “consistent with maintaining the secrecy against opponents.”
  - Any disclosure increases the risk of waiver
  - If an appropriate business decision, reduce the risk through redaction, having a confidentiality agreement in place or, if appropriate, entering into a common interest agreement

# Litigation Considerations

# Litigation Challenges

- **Large volumes of ESI makes identification of protected information expensive and burdensome**
- **Short time frames for production**
- **Legal and technical solutions needed to protect against inadvertent production and waiver**
- **Work product creates unique challenges**
- **Lawyers playing dual roles (business and legal)**



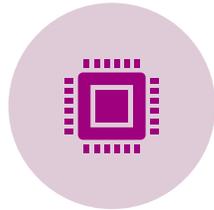
# Most Common Pitfalls



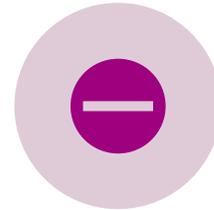
Forwarding legal advice to others who break the privilege



Assuming communication is protected



Failing to leverage technology



Lack of 502(d) Non-Waiver Order



Work Product v. Legal Hold

# Tips for Protecting Information

- **Train employees on privilege and confidentiality issues**
- **Beware of pitfalls of over-designation**
- **Email footer notices: useful or not?**
- **Know your role: Business? Legal?**
- **Develop document management policies to protect confidential information: limit access & distribution**
- **Track lists of attorneys and roles (internal and outside counsel)**
- **Limit distribution lists**
- **Meetings v. Email**



# Protecting Privileges in Discovery

- **Understand data sources & data management practices (and educate litigation counsel)**
- **Identify names and email addresses of lawyers and those who work for/with them (in-house, outside counsel, co-counsel, etc.)**
- **Specify privilege log requirements in ESI Protocol**
- **Get 502(d) Order**



# Leverage eDiscovery Protocol Orders

- 502(d) Non-Waiver Protections
- Presumptively Privileged documents
- Categorical or objective/metadata privilege logs
- Logging of most inclusive email strings/threads
- Production formats that allow for easy identification of redacted documents
- Procedures for resolving disputes



# Practical Guidance

- **Document process to protect privileges**
- **Use near dupes; concept clusters; and email threads to help identify privileged docs**
- **Stop and think: do the numbers sound right? Would you expect more privileged documents?**
- **Use statistical sampling**
- **Filter by email domain**
- **Understand benefits and risks of search terms**



# Questions?

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