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## **Preserving the Attorney Client Privilege: *Best Practices & Future Trends***

*An overarching discussion on how the attorney-client privilege is defined and what it covers, and perhaps most importantly what it does not. A review of best practices and common pitfalls, and how emerging technologies and future trends will impact how companies will be required to protect their communications from discovery.*

# SPEAKERS



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Kerime is a litigator with experience in complex commercial litigation, securities litigation, and government investigations. Kerime advises clients in all stages of litigation, and has been an integral member of multiple trial teams in state and federal courts.



**ASAL  
ALIPANAH**

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Asal works in-house for H.G. Fenton Company, a real estate company located in San Diego. In her role as Legal Operations Manager, Asal is responsible for risk management, compliance, conflict management, and litigation matters.



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Valerie is a litigator who represents individuals and companies engaged in complex commercial, business, and intellectual property litigation in a variety of industries.



**CLARE  
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Clare practices in the firm's litigation section. Their practice encompasses a wide range of complex commercial litigation, including matters involving contract disputes, data privacy matters, health care, insurance coverage disputes, and construction law matters.

# Overview

## Privileged Communications are:

Made between **privileged persons**

For the purpose of obtaining **legal advice** or for the purpose of facilitating legal advice/legal services

That are **confidential**

## Overview

Who are Privileged Persons?



What is the purpose of the communication?



Are the communications being treated as confidential?

# Unpacking the Privilege – Privileged Persons

- Who is the client?
- Managerial level Employees v. Non-Managerial Employees
- Former Employees
- In-House Counsel's Legal Hat v. Business Hat
- Attorney's staff, law clerks, agents, etc.

# Unpacking the Privilege – Communications

All forms of oral and written communications may be privileged.

- In-Person Meetings
- Phone Calls
- Emails/Correspondence
- Text Messages
- Messaging Services

Conversations are privileged, not underlying facts.

- Example: A client cannot be compelled to answer the question, “What did you say or write to the attorney,” but may not refuse to disclose a relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication with an attorney.

Communications among employees about attorney advice.

## Unpacking the Privilege – Legal Advice

- Privilege does not exist for in-house lawyers merely because they are a member of the bar or titled, “counsel.” A communication is privileged only if the dominant purpose of the communication is to further the objectives of the attorney-client relationship. In other words, the communication must be made for the purpose of seeking, obtaining, or providing legal assistance.
- Privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice.
- Documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice.

# Unpacking the Privilege – Confidential



Communication cannot be made in presence of non-privileged third-parties — avoid elevator or cocktail party discussion!



Communication must be made with the intent to keep it confidential — it cannot be made in presence of non-agent third-parties.



In corporate context, the presence of other employees may not waive privilege.



# Modern Day Best Practices



Digital and paper files



Email



Text Messages



Slack/Zoom/Teams



Social Media



Regular Trainings

# Waiver

## Waiving attorney-client privilege

### By voluntarily waiving privilege

Discloses to third party



Client

3rd Party

Gives up privilege



Client

# Gray Areas



In-house counsel  
communications



Investigations



Tripartite  
relationships

# Modern Trends

Hybrid workplace

Use of the cloud for data storage

Chat GPT/Open AI

Best practices



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**QUESTIONS?**





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**THANK YOU**

