

■ MILWAUKEE CLE WEEK

Ethics & Emails: Protecting Privilege and Avoiding the Dreaded "Hot Bad" Document

■ **FOLEY**
FOLEY & LARDNER LLP



Presenters



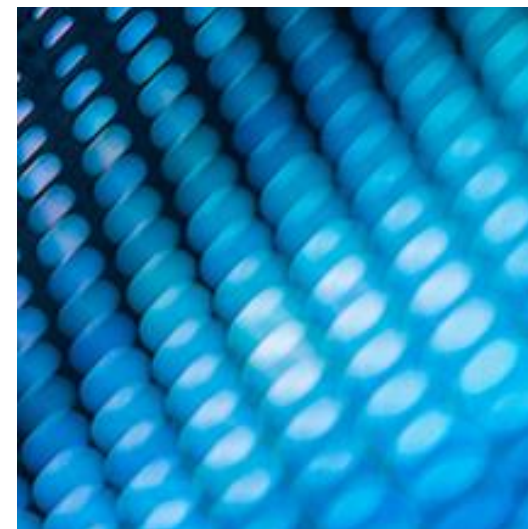
Nathan Imfeld
Partner | Milwaukee



Markus Johnson
Associate | Milwaukee

Agenda

- Attorney-Client Privilege Primer
- Ethics Rule Implications
- Identifying Documents as Privileged
- Managing Employee Communications
- Key Business Takeaways
- Questions



Attorney-Client Privilege Primer



Attorney-Client Privilege Primer

- In general, a “privilege” is a rule of evidence that protects certain kinds of confidential communications from disclosure or use in court. See, e.g., Fed. R. Civ. P. 26(b)(1).
- The attorney-client privilege protects **communications** made in **confidence** between an **attorney** and a **client** for the **purpose of seeking or rendering legal advice**. See, e.g., *Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612 (7th Cir. 2010).
- The purpose of the attorney-client privilege is to encourage the open and candid disclosure of information between the attorney and the client. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

Attorney-Client Privilege for In-House Counsel

- The attorney-client privilege applies to in-house counsel. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
- But courts frequently have applied greater scrutiny to claims of privilege involving in-house counsel.
 - “Courts have not been consistent in applying the privilege to corporate communications, nor do they consistently answer the question of who is the client for purposes of attorney-client communications in corporations.” Sarah Bricknell & Christina Norland, *In-House Corporate Counsel and the Attorney-Client Privilege*, 87 Corp. Prac. Series at A-48 (BNA 2007).
 - **“Courts have also showed a bias against in-house counsel** when deciding whether or not to apply the attorney-client privilege to the in-house lawyers’ communications with their client.” *Id.*

Attorney-Client Privilege for In-House Counsel

- In-house attorneys are often responsible for tasks that go beyond serving as the company's attorney, often creating murky attorney-client privilege issues.
 - For example, in-house counsel may be called upon to give business advice as opposed to legal advice.
 - See *Solis v. Milk Specialties Co.*, 854 F.Supp.2d 629, 632 (E.D. Wis. 2012). (“[W]here the purpose of the communications is to secure business advice, rather than legal advice, the attorney-client privilege does not apply.”)
- Accordingly, employees should take extra care to maximize the protections of the privilege when communicating with in-house counsel.
 - If the communication with in-house counsel is not for the specific purpose of obtaining legal advice, that communication will not be privileged.

Ethics Rule Implications



Ethics Rule Implications

- The evidentiary privilege is related to, but differs from, the attorney's duty of confidentiality owed to the client.
- **SCR 20:1.6 – Confidentiality**
 - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- The ethical duty to treat as confidential information relating to the representation of a client is broader than the evidentiary privilege.

Ethics Rule Implications

- The confidentiality rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Cmt. 3 to Rule 1.6.
- Rule 1.6 does not contain an exception for information that is public or generally known.
- “[I]nformation about a client’s representation contained in a court’s order, for example, although contained in a public document or record, is not exempt from the lawyer’s duty of confidentiality.” ABA Formal Opinion 480 (Mar. 6, 2018).

Who is the Client?

- The client is not the individual who is communicating with the attorney; the client is the **corporation**.
- SCR 20:1.13 – Organization as Client
 - “(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
* * *
 - (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7.”

Privilege Dos and Don'ts

- **DO** make it clear when you are seeking or providing legal advice. While the e-mail doesn't have to say this specifically to protect the privilege, it helps.
- **DON'T** assume an e-mail is protected by putting a "privileged" label on it.
- **DO** avoid mixing business and legal discussions, if possible.
- **DON'T** assume an e-mail is privileged just because in-house counsel is sending or receiving it.
- **DO** consider whether the presence of a third party (such as an accountant) is necessary for seeking or providing legal advice. If not, the communications may not be privileged.
- **DON'T** send e-mails to third parties unless necessary. Forwarding an e-mail discussion with a general counsel to a third party may destroy the privilege.

Identifying Documents as Privileged



In-House Counsel's Dual Roles

- Communications seeking or providing business advice are **not** privileged.
 - *Washtenaw Cnty. Emps. Ret. Sys. v. Walgreen Co.*, 2020 WL 3977944 (N.D. Ill. July 14, 2020) (“[A] non-privileged communication containing business advice or information, or containing something other than legal advice, does not suddenly become cloaked with the privilege simply because the sender chose to copy an in-house lawyer on it.”).
 - *Dolby Lab’s Licensing Corp. v. Adobe Inc.*, 402 F. Supp. 3d 855 (N.D. Cal. 2019) (“Communications with in-house counsel may relate to business rather than legal matters, and in-house counsel's business advice is not protected by attorney-client privilege.”).

Business Versus Legal Advice

- When legal and business advice are intertwined, the communication is only privileged if its ***primary purpose*** is legal advice.
 - *Bassett v. Tempur Retail Stores, LLC*, 2024 WL 3416221 (D. Mass. July 15, 2024) (“So long as the communication is primarily or predominantly of a legal character, the privilege is not lost by reason of the fact that it also dealt with nonlegal matters.”).
 - *Immersion Corp. v. HTC Corp.*, 2014 WL 3948021 (D. Del. Aug. 7, 2014) (“When the communication between an attorney and non-legal personnel primarily relates to business concerns, the communication is not within the scope of attorney-client privilege.”).

Identifying Legal Advice

- Make clear the communication is for legal purposes.
 - Attempt to send business advice in separate correspondence.
 - When legal advice is intimately intertwined with business advice, the party claiming privilege must demonstrate the communication “would not have been made **but for** the protection the privilege affords.” *Se. Pa. Transp. Auth. v. Drummond Decatur & State Properties, LLC*, 2023 WL 11893916 (E.D. Pa. Feb. 20, 2023) (emphasis added).

Make the Privilege Apparent

- Signal to reviewers that the information is privileged.
 - Include a notation for “ATTORNEY-CLIENT PRIVILEGE” on all potentially privileged communications.
- Privilege notations increase the possibility of privileged communications slipping through the cracks.
 - This is especially relevant with the rise in document review using AI.
 - AI might not detect the document as privileged unless coded as such.
- Consider incorporating template attorney-client privilege and confidentiality disclaimers into email signatures for all in-house counsel.

On Wed, Jun 14, 2017 at 7:51 AM, Jamie Rosenberg <[REDACTED]> wrote:

ATTORNEY CLIENT PRIVILEGED

(with Matthew for legal advice)

+ pgennai, chris li, matthew

Hi all,

I assume you're referring to these slides. I'm not sure if they've been updated following the discussion I had with a few folks yesterday afternoon.

Message

From: Sundar Pichai [REDACTED]
Sent: 1/26/2018 6:07:00 PM
To: Susan Wojcicki [REDACTED]
CC: Google leads [REDACTED]; Chris Dale [REDACTED]
Subject: Re: [REDACTED] - attny/client priv

Attorney Client Privileged, Confidential , Kent pls advice

Thanks for the update Susan and all the prep to be ready for this proactively. I have some feedback on the messaging and so will ping you and Chris offline to cover it.

- Sundar

Managing Employee Communications



Avoiding Dangerous Writing

- What causes dangerous writing?
 - A desire to impress
 - The urge to vent
 - Attempts at humor
 - The need to force action
 - To excuse conduct
 - Unnecessarily papering a record
- The common thread is usually a failure to recognize that writing, especially work email, is not actually a private form of communication.

Avoid Careless Admissions for Bad News

- **DANGER:** “We have problems in providing adequate supplies of product to our customers. This is entirely our fault. No doubt had the customers’ orders been fulfilled in a timely manner, their performance would be much better. After some considerable delay, we need to figure out how to address this major issue.”
- **SAFE:** “As part of our quality assurance initiative, ABC Corp. has discovered some delays in the supply of product to customers. The length of the delay is unacceptable to us. We will be proposing corrective action in the coming weeks.”

Avoiding Exaggerations

- **DANGER**: “Johnson is the absolute worst customer in the Country. We should fire that lazy bum immediately.”
- **SAFE**: “Johnson’s performance is not satisfactory, and he is not satisfying the terms of his agreement.”

Avoiding Drawing Conclusions

- **DANGER**: “No wonder our metrics are terrible—we can’t supply any customers with the product to fulfill their orders.”
- **SAFE**: “We need to continue our efforts to fulfill demand for our products.”

Avoiding Creative Writing Exercises

- **DANGER**: “This guy needs to be beaten to a pulp and left in a ditch in order to get his attention.”
- **SAFE**: “Johnson has yet to address the concerns we identified in our biannual meeting.”

Avoiding Dangerous Writing

- **DANGER:** “This proposal is bullcrap. We have been over this topic many times before and we have addressed all of these issues. I’m sick of him.”
- **SAFE:** “I disagree with his proposal.”

What Not to Say—Let Alone Write

- “Don’t worry about the contract; it’s just legal mumbo jumbo.”
- “As long as you do the job, you’ll be our partner.”
- “You’ll be the only partner we work with.”
- “Sure, that’s our official policy—but don’t worry, we never enforce it.”
- “We need the sales; sometimes you just need to lie if that’s what it takes to make it happen.”

Key Business Takeaways



Protect the Privilege

- Be cognizant of when the attorney-client privilege applies.
 - The attorney-client privilege protects communications made in confidence between an attorney and a client for the purpose of seeking or rendering legal advice.
- The company is the client.
 - The client is not the individual who is communicating with the attorney; the client is the corporation.
- Ensure the communication is for a legal purpose.
 - Courts have showed a bias against in-house counsel when deciding whether or not to apply the attorney-client privilege to the in-house lawyers' communications with their client.

How to Avoid the Dreaded “Hot Bad” Document

- Remind employees that workplace communications are not confidential.
- Train employees against writing inflammatory statements or admissions.
- Avoid unnecessarily papering harmful information.
- Limit employee communications on informal channels (e.g., Slack, Teams).
- Email and text are not the only options—pick up the phone.
- Ensure privileged communications are clearly marked as such.



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Questions?