

Protecting the Privilege

Strategies for Protecting the Attorney-Client Privilege and Attorney Work Product

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1. KNOW THE RULES IN YOUR JURISDICTION AND REMEMBER, NOT ALL JURISDICTIONS ARE THE SAME.

- The applicable laws and rules may vary from state to state, among the federal courts, and among different nations. Understand the rules and potential pitfalls of different jurisdictions in advance.
- To maintain the attorney-client privilege in the United States, investigations must be directed and supervised by counsel with the aim of providing legal advice to the client.
- For the work product doctrine to apply in the United States, the party must be able to show that documents and other tangible materials were prepared “in anticipation of litigation” rather than in the ordinary course of business.

2. USE DOCUMENTATION TO BUILD A STRONG FOUNDATION FOR ASSERTING PRIVILEGE.

- Prepare initial documentation that clearly states that the investigation is being conducted to obtain legal advice in anticipation of litigation for the company.
- Define and segregate investigation tasks, work products, and reporting from other potential business-related advice.
- Prepare an investigative memo or directive from the client that:
 - Directs that counsel conduct a privileged and confidential investigation to gather facts to provide legal advice to the company.
 - Identifies the litigation anticipated or the facts known that make litigation reasonably likely.
 - Identifies the lawyer(s) who will oversee and who will conduct the investigation.
 - Clearly defines the scope of the investigation.
 - Instructs the lawyer to oversee the work of the investigation team including the work of any non-lawyers assigned or engaged to assist in the investigation.
 - Describes counsel’s reporting instructions.

What is Attorney-Client Privilege?

- Protects confidential communications between attorneys and their clients.
- Communications between company employees and the company’s counsel are protected where counsel is gathering information needed to provide legal advice to the company. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
- The privilege does not extend to the underlying facts or evidence discussed by attorney and client.
- The privilege is held by the client alone and only the client may claim or waive it.

What is Attorney Work Product?

- The attorney work product doctrine protects the mental processes, thoughts, and opinions of counsel that are developed in anticipation of litigation. See *Hickman v. Taylor*, 329 U.S. 495 (1947); codified in Rule 16(b)(2) of the Federal Rules of Criminal Procedure and Rule 26(b)(3) of the Federal Rules of Civil Procedure.
- Excludes from protection materials prepared in the ordinary course of business or unrelated to litigation.
- Key factor: Whether the document or other material “can fairly be said to have been prepared or obtained because of the prospect of litigation” or whether it was prepared in the ordinary course of business.

3. PROACTIVELY MANAGE THE RISKS OF ENGAGING THIRD PARTIES.

- Third parties may be necessary to assist counsel in rendering legal advice (e.g., translator, forensic accountant).
- Communications with a non-attorney third party are privileged if they are confidential and necessary to an attorney's rendering of legal advice to a client (*Kovel* doctrine).
- The third party should be engaged and supervised by the lawyer conducting the investigation. Prepare guidelines for the team to limit dissemination of privileged information.

4. MARK DOCUMENTS APPROPRIATELY; DON'T ASSUME ALL MATERIALS ARE PROTECTED.

- Prepare guidelines for designation of work product and privileged materials. Underlying facts are not privileged but documents prepared by counsel typically are protected and should be marked as "Privileged and Confidential."
- Opinion work product is more protected than fact work product because it incorporates the mental impressions of the attorney who drafted it. Such documents should be marked as "Attorney Work Product."
- Memos that intertwine facts and mental impressions present a stronger argument for protection than memos where the facts can be easily separated.

5. JOINT DEFENSE AND COMMON INTEREST MATERIAL MUST REMAIN CONFIDENTIAL.

- The "joint-defense privilege" or common-interest rule allows for limited third-party disclosure without waiver, such as sharing of information among attorneys representing different clients who share a common legal interest, whether as defendants or plaintiffs.
- Consider entering into an oral or written "joint defense" or "common interest" agreement that includes, for example, obligations to return all joint defense materials in the event the common interest ceases or at the end of the case.
- Consider a one-way exchange of information in some circumstances. These agreements can be easier to unwind with less risk of dispute if the company decides to cooperate with the authorities or otherwise becomes adverse to the employee.

6. SHARING INVESTIGATIVE MATERIALS AND REPORTS OF INVESTIGATIONS CARRIES RISK.

- Investigating counsel and the client are often called upon to answer questions for outside auditors, prospective buyers, insurers, regulators, shareholders, or customers.
- Discussing "facts" or "process" should not raise privilege concerns. However, discussing "findings" can tip the balance towards waiver.

7. DON'T DEPEND ON "SELECTIVE WAIVER" WHEN MAKING A DISCLOSURE TO THE GOVERNMENT.

- Disclosure of privileged information to the government will risk waiving privilege as to third parties, even with a confidentiality and limited waiver agreement. Many courts have rejected the doctrine of "selective waiver," and those that have not typically require a complex factual analysis before upholding a privilege claim.
- Don't depend on selective waiver and don't underestimate the creativity of those wanting access to your documents.

Did You Know?

- Writing "this is not a transcript" at the beginning of a transcribed interview will not make it opinion work product.
- The "joint defense" or "common interest" privilege is not a separate privilege, but instead an exception to waiver of an existing attorney-client privilege.
- "Attorney work product" can be created by a non-attorney if it contains the thoughts and opinions of counsel and was prepared in anticipation of litigation.

Tips

- Know the jurisdictions your company operates in and the rules that apply.
- Some countries do not recognize an attorney-client privilege at all.
- Some countries view in-house counsel as not sufficiently "independent" from their employer; thus, no privilege applies unless outside counsel is involved.

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