Global Attorney-Client Privilege Guide - United States

03 - Scope of privilege

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# Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Typically, the "attorney-client privilege" protection is invoked and held by the client. The client maintains the right to waive the protection by disclosing the content of the communication or making an oral communication in the presence of a third party not retained for purposes of the representation. Thus, whether the attorney or client physically possess any attorney-client privileged communication is of no consequence.

# Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Unlike many nations, and as alluded to above, all federal and state courts of the United States recognize that communications between corporations and their in-house attorneys who are active members of a bar association may be protected by the attorney-client privilege. However, the question of who can speak for the client — the corporation — is essential to determining whether a specific communication with an in-house lawyer is privileged. The rules governing this analysis vary considerably by jurisdiction in the United States.

In the seminal case of *Upjohn Co. v. United States*, the US Supreme Court considered whether the attorney-client privilege attached to written communications relating to a suspected illegal payment by a US corporation's foreign subsidiary to the foreign government to secure a government contract. The communications, which were demanded by a federal governmental agency, were between the in-house counsel of the US corporation and the subsidiary and were produced for the purposes of the investigation. The court held that the communications were privileged. Central to the court's holding were the facts that the communications concerned matters within the scope of the employees' official duties and that the purpose of the communications was to obtain legal advice for the corporation.

The *Upjohn* ruling is a variation of the "subject matter test," which is used in most states. Under that prevailing subject matter test, the attorney-client privilege attaches only when all of the following apply:

The communication is made for the purpose of giving or receiving legal advice

The employee who is communicating with the attorney is doing so at the direction of a superior

The direction is given by the superior to obtain legal advice for the corporation

The subject matter of the communication is within the scope of the employee's duties

The communication was not disseminated beyond individuals who, because of the corporate structure, needed to know its contents

A more restrictive test, which is used by a few states, is the "control group test." Under that test, whether a corporate employee's communication with in-house counsel is privileged depends on the employee's position and on their ability to take action on the corporation's behalf upon the advice of the in-house counsel. Thus, under the control group test, communications are privileged only where they come from or are related to senior management; communications between in-house counsel and lower-tier employees are not privileged in jurisdictions that follow the control group test. In practice, claims of privilege with respect to communications of in-house counsel and their corporate clients may be challenged on the grounds that the communications do not give or convey legal advice but rather deal with general business advice. The fact that an attorney is "cc'd" or otherwise receives a communication, or is present at a meeting at which sensitive discussions occur among officers or directors, will not automatically shield those communications from discovery.

Regardless of which test for corporate privilege may apply, a particular communication usually will not be privileged unless the basic criteria enumerated above are met. As a practical matter, in-house counsel of corporations that may face litigation in the United States should avoid mixing legal advice with general business advice and should take other measures to mark or identify as privileged any documents in which legal advice is given. In-house counsel should train other employees or agents of the corporation to mark or identify as privileged any documents in which legal advice is sought and to ensure against waiver by disclosure to third parties.

On a related note, privilege disputes can arise when corporate employees, directors, or officers who communicate with corporate counsel (whether in-house or retained) on behalf of the company later attempt to claim that the attorney-client privilege applies to their own communications with counsel, even though the corporation has waived the privilege. This situation may be fraught with hazard.

The US Court of Appeals for the Ninth Circuit, in the case of *United States v. Graf*, recently adopted a five-part test — one that also applies in the First, Second, Third, and Tenth Circuits — for determining the nature of the attorney-client relationship between corporate employees and corporate counsel. Under the test, individual corporate officers, directors, or employees seeking to assert a personal claim of attorney-client privilege with respect to communications with corporate counsel must affirmatively show five factors:

That the employee approached the attorney for the purpose of seeking legal advice

That, when the employee approached the attorney, the employee made it clear that they were seeking legal advice in an individual capacity

That the attorney saw fit to communicate with the employee in their individual capacity, knowing a possible conflict could arise

That the communication was confidential

That the substance of the communication with counsel did not concern matters within the corporation or its general affairs

An application of this test in the Third Circuit in the case of *United States v. Norris* raises concerns. The Court of Appeals determined that communications between a former officer of a corporation based in the United Kingdom and the corporation's counsel during an internal investigation were not protected by the attorney-client privilege with respect to the officer where the corporation had itself waived the privilege. The government, which claimed the officer had violated antitrust laws, was allowed to elicit the attorney's testimony against the officer, resulting in the officer's conviction and imprisonment for obstruction. The Third Circuit's ruling is designated as "non-precedential" (because not circulated to the full court before filing) but casts doubt on whether a corporate officer can afford to be candid with an attorney representing the corporation in an internal investigation. From both the company's and the employee's viewpoints, the Third Circuit's ruling emphasizes the importance of a lawyer's providing — and an employee's heeding — the so-called "*Upjohn* warning," wherein the lawyer informs the employee, at the start of any interview in service to the corporation for an investigation or legal matter, that the attorney represents only the company and that the communications will not be privileged.

In addition to in-house counsel, consultants to corporations may be considered "functional employees" and thereby may fall within the ambit of the test for attorney-client privilege. Nevertheless, the standard leaves many employees and outside consultants without the benefit of the protection of the attorney-client privilege when they speak with corporate counsel — an issue that counsel should, again, address at the outset of communications with such individuals.

Like the attorney-client privilege, under US federal and state laws, the work product doctrine may be extended to documents and things prepared by in-house counsel. Because in-house counsel may often act in a purely business role as opposed to a legal role, or in a hybrid advisory role that calls for a mixture of business and legal acumen, the question of whether a document was created "in anticipation of litigation" may be close.

In *SodexoMAGIC, LLC v. Drexel University*, a federal district court recently considered a similar problem in the context of the attorney-client privilege, and provided the following framework to help litigants determine whether in-house counsel acted in a legal capacity (for which the privilege would attach to a communication) or a nonlegal capacity (for which no privilege attaches):

A communication between in-house counsel and their client "for the express purpose of securing legal not business advice," is privileged. For example, a company president's instruction to in-house counsel to "draft this contract as quickly as possible," is a privileged communication.

Similarly, communications between in-house counsel and their client about draft contracts, and proposed contract language, are privileged.

However, where in-house counsel (or their nonlawyer subordinates) are acting in a purely "scrivener-like" role, their communications are not privileged. For example, a company officer's instruction to in-house counsel or a paralegal to "write these exact words" in a contract, is not a privileged communication.

# Does privilege extend to internal communications between in-house lawyers?

Communications between or among attorneys of a client remain privileged absent a waiver through the inclusion of a third party not retained for purposes of the representation. The mere fact that the communication involves in-house attorneys as opposed to outside should not negate the presence of the privilege where it otherwise applies. For instance, one example where federal and state courts might not recognize the privilege relates to communications that do not involve the provision of legal advice.

# Are foreign lawyers recognized for the purposes of privilege?

Courts in the United States, whether state or federal, may recognize communications between foreign lawyers and their clients as privileged. The attorney-client privilege may also be extended to the communications of foreign patent agents in limited circumstances. Again, the burden of proof in applying foreign privilege law, in lieu of the otherwise applicable privilege law, rests with the party asserting foreign law.

The answer to the question of whether the privilege will apply to communications of non-US lawyers and their clients often depends on whose law applies, according to the choice-of-law principles (as discussed under the Type of Privilege section). For example, if the court determines that the substantive privilege law of the foreign nation should apply, and the foreign nation does not recognize the privilege — for example, because the foreign attorney is an in-house counsel and the nation does not extend privilege to communications with in-house counsel — the US court may require disclosure of the communication. The determination of whether the communications between foreign counsel and their clients are privileged may also depend on whether the non-US attorney is a member of any bar association, either in the United States or in the nation where the attorney practices. This distinction may also drive the determination of whether the communications at issue would be protected under the foreign law being invoked, given that in many nations, the privilege is extended only to members of a national bar association.

Disputes arise over whether, and to what extent, communications with US or foreign patent agents are privileged. Although some courts have declined to recognize the privilege on the grounds that a patent agent is neither an attorney nor a member of a bar, other courts have recognized that the prosecution of patent applications constitutes the practice of law and have therefore extended a privilege.

In cases involving communications of foreign patent agents, the court may apply the so-called "touching base" approach to determine whether the communication is privileged. Under this approach, if the communication involves a foreign patent application, then, as a matter of comity, the court looks to the foreign law to determine whether that law provides a privilege; if it does, the privilege applies. However, other courts have applied a traditional balancing test to determine which nation has the "dominant interest" in the communication, considering such interests as the parties to and substance of the communication and the location where the relationship was centered at the time of the communication. Still other courts have ruled that the privilege may extend to communications with foreign patent agents related to foreign patent activities if the privilege would apply under the law of the foreign country, provided that the foreign law is not contrary to the forum's law.

# Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The attorney-client privilege generally extends to communications between the client and agents of the attorney, as long as the communication involves the subject matter about which the attorney was consulted and the attorney retained the agent for the purpose of assisting the attorney in rendering legal advice to the client.

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