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Understanding The Attorney-Client Privilege



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When a company faces a potential dispute, often one of the first tasks undertaken is the collection of relevant documents. These documents will typically include correspondence or other documents involving counsel. While the first instinct may be to lump all documents reviewed by or sent to an attorney as privileged, the analysis as to what is protected under Texas law by the attorney-client privilege is more involved. And it is important to educate yourself on these rules at the outset because the privileged nature of a document can be destroyed through simple missteps, even long after a communication first occurs.

Under Texas Rule of Evidence 503(b)(1):

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . . between the client or a representative of the client and the client’s lawyer or a representative of the lawyer. . . .”

This Rule lists three key elements that comprise a privileged communication: (1) a confidential communication; (2) between privileged persons (i.e., an attorney and a client); and (3) for the purpose of seeking or providing legal advice. While each of these three elements will be discussed, it is also worth noting that there is a fourth prong required for privilege not discussed in the above Rule—the privilege must not have been waived. However, that is a complicated topic unto itself, and waiver will only be discussed in passing in this article.

The first element, a confidential communication, requires that communications be kept private in order to retain its privileged status. This means the audience for the communication cannot include third parties. One common way the privilege is destroyed is through email forwarding. For example, as soon as someone forwards an email to an outside party that contains privileged legal advice, the privilege is destroyed. Or, should a third party, even innocently, participate in what are otherwise privileged discussions, that can destroy the privilege. The bottom line is that to protect the privileged nature of communications with counsel, you must ensure that third parties do not either participate in or receive the confidential communications. And that means protecting the information not only at its creation, but going forward as well.

The second element requiring that communications be between an attorney and her client (or their representatives) can be trickier than it might first appear. For example, an individual may be a lawyer, but if they are unlicensed or have taken on “inactive” status with the State Bar, that person cannot render legal advice. This analysis can also become tricky when defining who is the “client.” It is clear-cut, for example, that a CEO seeking legal counsel on behalf of a company is a privileged communication. But if the employee seeking legal advice is an entry-level accountant, the answer is less clear. In Texas, a subject matter test is employed that analyzes whether the employee has the authority to obtain professional legal services or act on the provision of those legal services. In other words, the employee must be acting within the scope of her employment in seeking or receiving privileged communications.

The third element requires the communication be “for the purpose of facilitating the rendition of legal services,” or put more concisely, “for the purpose of seeking or providing legal advice.” This element can often become murky, especially as it

relates to in-house counsel. It is not uncommon for a company's in-house attorney to also perform a role on the business side of operations. If that attorney is providing business advice, and not legal advice, those communications are not privileged. Sometimes, the distinction can be hard to draw. For example, if an in-house attorney is revising a press release, it is entirely possible that the attorney is reviewing for both business and legal purposes. In instances of greater import, such as internal compliance audits where the in-house counsel is serving as attorney, investigator, and business advisor, it may be a good idea to consider hiring outside counsel for that role to provide greater protection to privileged communications.

The attorney-client privilege is a venerated and long-standing protection for communications between clients and their counsel. However, it contains many nuances, only a few of which were touched on by this article. If there is a concern about protecting a communication you believe is privileged, it is never a bad idea to consult with outside counsel to confirm that you do not make a misstep on the path to creating and preserving privilege.

Practical Tips

- Copying an attorney or stamping a document "Privileged" does not make that document privileged.
- If in-house counsel is providing both legal and business advice, counsel should be explicit in communications when legal advice is being provided. For example, the lawyer could state, "In my capacity as legal counsel for the company. . .," before offering legal advice. When possible, it is ideal for the in-house attorney to separate the legal and business advice into separate communications, but that is not always a practical approach.
- Facts are not privileged, even when contained in a privileged document. For example, a company could not make the fact a worker was injured on the job "privileged," even if the disclosure of that information is contained in an otherwise privileged communication.
- Be wary of email—the longer the distribution list or the email thread, the more likely someone will forward a confidential communication to a third party and destroy the privilege. Be equally wary of social media. If employees use social media accounts, such as Twitter or Facebook, to post otherwise privileged information to their friends, that can destroy the privileged nature of the information. Consider adopting a social media policy for your company regarding ownership and use of social media accounts. ■