

The Attorney-Client Privilege: Navigating Modern Concerns

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If you're like most people, you're likely not pondering the complexities of the attorney-client privilege as you're sipping your morning coffee — that is unless you suddenly find yourself working with a lawyer. While many of us have heard of the "attorney-client privilege," you might not have thought too deeply about what it means or how it works. While the privilege can be quite powerful in protecting communications between you and your lawyer, it can also easily be broken.

Representatives of companies that find themselves working with lawyers must be cautious about how and with whom they include on their communications with counsel. Especially in an age where technology is a large part of how we communicate and do our jobs, there are many considerations company representatives, and their lawyers must consider in order to protect privileged communications. Below are 5 of the more recent issues I have seen come up in the corporate setting:

1. Artificial Intelligence Assistance Tools

Put simply, do not include any artificial intelligence assistance tools on communications with your lawyer (either over email or on video calls). While these tools are useful for many purposes, they do not have a place on communications with company counsel. These sort of artificial intelligence tools could be considered "third parties," which breaks the privilege that is created between attorney and client. In the end, you are better safe than sorry – turn off any sort of AI notetaking or recording tools when speaking with your lawyer.

2. Cyber Investigations

Companies can no longer ignore the fact that data security breaches are on the rise, and bad actors aren't just targeting large companies. In the aftermath of a data breach, companies will typically hire a cybersecurity company to investigate the breach and provide feedback on how the company can better secure its information going forward. If lawsuits are filed in connection with the data breach, or even if the company is later put up for sale, the cybersecurity report is likely to be requested by the other side (whether it is the plaintiff in a lawsuit, or a potential buyer). While most companies would want to keep the cybersecurity investigation report private, it will be difficult to do so if the company did not take steps to protect the report under the attorney-client privilege. For example, the report will not be protected under the privilege if the company directly hires the cybersecurity investigators, pays the investigators as a "business expense" (instead of a "legal expense"), and does not take precautions to keep the results of the investigation on a need-to-know basis within the company. If your company is subject to a data breach, you should consult with a lawyer before hiring the cybersecurity investigators if you want to potentially keep the final report private from outsiders.

3. Outside Sourced Financial Professionals

Any communications between a company representative and its outsourced financial professional (think bookkeepers and accountants) are not privileged. This has become more of a concern in the age of email communications. Even if you copy your lawyer on an email to the company financial professional, that does not necessarily mean that the communication is privileged. Forwarding emails from your attorney directly to the financial professional is also a bad idea because it will likely break the privilege. This means that communication to your outsourced accountant should not include any legal advice or hints of legal strategy from your lawyer, and should not include any information concerning a dispute (if there is one). Consider the difference between a simple message to your accountant that states – “Please send me copies of the company tax returns for the past three years” versus “Can you send me copies of the past three years of tax returns to show that the company made no profit. My lawyer is hoping that if we can show that the company made zero profit over the past three years that the other side will drop the lawsuit without digging any further.” Both messages could end up being shared with the other side if responsive to a request for document. Which version would you rather show to the other side?

4. Public Relations Professionals

Communications between company representatives and public relations professionals, even when a lawyer is copied on the communication, are likely not privileged. There are certain circumstances where these sorts of communications may be privileged (for example, when the lawyer is asking the public relations professional for information that will help the attorney provide legal advice), however, if a company representative reaches out to a public relations professional for advice on how to unroll a negative campaign against its adversary, those messages are likely not privileged and could be revealed to the other side if responsive to a request for document. To be safe, check with your lawyer first before reaching out to any public relations professionals in connection with any sort of adversarial dispute.

5. Dispute Between Business Partners

My last note is a word of caution to co-partners (this includes co-members of an LLC, and executives or officers of a corporation). If an internal dispute arises between partners (or internally at a corporation), then any communications one partner has with company counsel is not privileged as to the co-partner. This is because company counsel represents the company; not you individually. Any emails sent between you and company counsel (even if your partner is not on the email) may be privileged to the outside world, but your co-partner would be allowed to see that email communication without breaking the privilege. Once an internal dispute arises between partners, the safest bet is to hire a lawyer that will represent you individually – and don’t spill your guts to company counsel in an email.

Overall, you are in control of preserving the attorney-client privilege. When in doubt, check with your lawyer before including someone else in the conversation. It is better to ask beforehand than suffer the consequences later on.

If you have any questions about the attorney client privilege, reach out to [Paige Zacharakis](#).