

Inadvertent Waiver of Attorney-Client Privilege

How to avoid unintentional disclosure and what to
do if it happens

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Attorney Client Privilege

The Attorney-Client privilege covers:

- Communications,
- Made between privileged persons (i.e., attorney and client),
- In confidence,
- For the purpose of obtaining or providing legal advice.

Why is the Attorney-Client Privilege Important?

- Privilege exists to encourage complete and honest communications between an attorney and client in the most sensitive and difficult situations.
- The Attorney-Client privilege enables these communications to remain confidential. If the privilege does not attach, or is waived:
 - Such communications can be used in litigation by an adversary or in an investigation by the government.
 - A litigation adversary or the government may call the author or recipients to give testimony regarding the communication in a deposition, witness interview, or at trial.
 - The communications could be published in the press or otherwise made public.

What Does Attorney-Client Privilege Protect?

- Limited to legal (as opposed to business) advice.
- Communications must be primarily or predominantly of a legal (rather than a business or personal) character.
- Application of the privilege is limited to communications and does not protect the underlying facts.
- There should be an expectation that the advice will not be disclosed to others.

How is Privilege Waived?

- Even if a communication is originally privileged, Attorney-Client privilege can be waived:
 - By disclosing the substance of the legal advice or privileged communication;
 - By sharing the privileged information with a third party (government, potential investors, data room, certain consultants, insurers)
- Waiver can be intentional or unintentional.

This Could Be You...



How to Avoid Waiving Privilege

- The privilege is not waived:
 - By disclosing that you have a lawyer or received advice on a particular issue.
 - By disclosing the mere fact of a communication's occurrence or existence, the parties to a communication, or its date (i.e. "I asked my lawyer about the contract on Tuesday).
- To avoid waiver from inadvertent disclosure,
 - Party asserting the privilege must show
 - They intended to maintain confidentiality and took reasonable steps to prevent disclosure.
 - Then promptly sought to remedy the situation once learning of disclosure.

Do's and Don'ts

- If the communication is privileged, you should keep it confidential:
 - Do not forward emails.
 - Do not provide copies.
 - Do not openly discuss with others.
- If you don't know whether the communication is privileged, you should keep it confidential until you have had an opportunity to consult with counsel.
- Communications are not privileged merely because in-house counsel is physically present or copied on the communication.

Tips and Tricks

- When emailing:
 - Write “privileged and confidential” in the subject line and header of the email.
 - Remind recipients: “Do not forward”
 - Include in-house counsel in the to: or cc: line, depending on circumstances
 - Where including in-house counsel in an email is not appropriate, make sure communications are labeled “at the direction of counsel”
 - Start a new email chain where appropriate.
- Properly identifying privileged communications and other protected materials will help both maintain the privilege or protection and reduce expenses.

Best Practices

- Be mindful who participates in discussions that potentially may be protected by the privilege.
- Exclude non-employees who are not necessary for the discussion.
- Take care when including non-employees who are not counsel, such as investment bankers and auditors.
- When in doubt, the best practice is to exclude advisors, consultants, and other third parties from the discussion.
- Always ask in-house counsel before communicating with any third party.
- Whenever in doubt, contact in-house counsel as a first step.

How to “fix” Inadvertent Waiver

- Texas Rule of Evidence 511 says: “inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d)”
- Act quickly, conduct is key and prevents further dissemination
- Negotiate for and include claw back provisions
- Seek immediate return of the information
- File declaratory action