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## Explaining the Attorney-Client Privilege to Corporate Clients

By Craig Watrous – December 13, 2017

The attorney-client privilege (ACP), while a straightforward concept to corporate attorneys (especially those who litigate), is often poorly understood by the corporate client. This confusion puts the client, its attorneys' hard work, and the fundamental protections of the ACP at risk. Inadvertent waivers of the ACP can have serious, spiraling repercussions, particularly in the litigation context.

Exacerbating the potential peril, in the corporate context, more than one person needs to understand the importance of the ACP in order to fully protect it. Counsel needs to fully educate and advise those individuals in control of the company: its C-suite executives, managers, officers, directors, and other key personnel who have direct communications with counsel.

With some straightforward explanation, establishment of company protocol, and regular reminders, the corporate client's key personnel can be taught not only the vital importance of the ACP but also how to maintain and protect it.

### Memo to Clients

For the corporate attorney, the hardest part of explaining the ACP to the client often is getting started. The best place to start is a memo to all concerned parties. The following memo is drafted for the intended audience of a corporate executive and presents a succinct outline of the ACP and an abbreviated protocol on how to maintain and protect it in the corporate context.

### Draft Memo to Corporate Client

#### *What is the attorney-client privilege?*

There is often some confusion as to what the attorney-client privilege actually is and what protections it offers. It is often compared to the doctor-patient or accountant-client confidentiality obligations, but, while similar, its protections are quite different. Fundamentally, the attorney-client privilege is a law that protects communications between attorneys and their

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clients and keeps those communications confidential. The inadvertent waiver of the attorney-client privilege is relatively uncommon but potentially perilous to the company.

The attorney-client privilege is the oldest protection for confidential information recognized at common law. This privilege encourages openness and honesty between attorneys and their clients because attorneys cannot reveal (and, indeed, cannot be forced to reveal) attorney-client communications relating to legal advice. Those communications, as long as the privilege isn't waived, remain entirely confidential between the client and attorney.

*To whom does the attorney-client privilege apply?*

The privilege, which belongs to the client and not to the attorney, attaches not only to individuals but also to corporations. The attorney-client privilege creates a protection of privacy so that a company's personnel can candidly discuss and seek legal advice regarding company matters with the attorney. All of the discussions with the attorney can take place in a confidential and privileged setting.

Of course, as an innate entity, a corporation must act through its agents; it cannot speak directly to its attorneys, and, similarly, it cannot directly waive the attorney-client privilege.

*Why is it important to ensure that members of my organization do not "waive" privilege?*

The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors; however, privilege belongs to the company (as the client) and not directly to any of the company's individual officers or directors. When control of a corporation passes to new management (e.g., after a sale or merger), the authority to assert and waive the corporation's privilege passes to the new company as well. For these reasons, the attorney-client privilege should be guarded as a company asset, and it is important that the company's management personnel, officers, and directors (and any other employees who have direct communications with company counsel) are all made aware of what the attorney-client privilege is, how to maintain it, and how it can inadvertently be waived.

Although the attorney-client privilege provides insurmountable protection when applied correctly, it is narrowly construed and extremely fragile. Communications must be kept strictly confidential for the privilege to apply. If the information of attorney-client communications is disclosed to people outside the company, or sometimes even to people within the company who are not directly involved in the matter, the privilege may be compromised. If the

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company's employee recounts counsel's advice to anyone who has no role in the case (like spouses, friends, acquaintances, etc.), the employee's earlier discussions with counsel will no longer be privileged, and the confidentiality protections will be lost. As a result, such employee can be compelled to describe the conversation with counsel if called to testify in the case.

Waivers of the attorney-client privilege come into play most frequently in litigation, which is also when such waivers can be the most dangerous to a company. Once privilege is waived, even inadvertently through improper protocols or procedures, you can't get it back. The company may be required to reveal confidential attorney discussions, findings, and strategies with the opposing party. If a company is careless or simply uninformed about the attorney-client privilege, it can lead to disastrous consequences.

*How do I ensure that members of my organization protect the attorney-client privilege?*

A corporation has the opportunity every day to train its employees to be cognizant of and cautiously guard confidential information and to protect the attorney-client privilege. The privilege can be waived either intentionally or accidentally—in fact, even sharing privileged communications too widely inside the corporation can waive the privilege—so it is important to train employees about how to handle confidential information from its attorneys. Below is a general protocol the company should consider to protect and maintain its attorney-client privilege:

- Do not discuss your communications/discussions with the company's attorneys with anyone outside of the company.
- Never distribute written communications—including emails, drafts of documents with comments, reports, opinions, or documentation—from the company attorneys to anyone outside of the company.
- Never send, email, discuss, or distribute draft contracts with the company attorneys' comments on them outside of the corporation.
- Do not allow third parties (anyone outside of the company or any employees who do not need to know the information) to be present during conference calls, meetings, or discussions with the company's attorneys.
- Within the company, limit your discussions about attorney-client communications to those who have a clear need to know that is directly related to the solicitation or delivery of legal advice. The same applies to the sharing of written communications—including emails—from attorneys. Emails from the company's attorneys should never be forwarded or otherwise distributed without prior discussion with the attorneys.

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For further questions or legal advice regarding your corporation's protocol for legal communications and protecting its attorney-client privilege, give your attorney a call.

## **Modify the Draft Memo as Needed**

Counsel are, of course, advised to check their local rules and regulations and to modify and augment this outline as needed. For a full review of the ACP, see [Rule 502 of the Federal Rules of Evidence](#) and local rules. In most jurisdictions, the ACP has been comprehensively litigated, and case law abounds and should be reviewed as state principles can vary significantly.

## **A Concluding Note**

For additional reading, we suggest starting with the following materials, which are all excellent sources of information and were instrumental in preparing the general summary and memorandum above:

- Thomas E. Spahn, *An In-House Attorney's Guide to Virginia's Attorney-Client Privilege and the Work Product Doctrine* (McGuireWoods LLP 2013).
- Stephen Masciocchi, "Internet E-Mail and Encryption: Privilege, Confidentiality, and Malpractice Risks," 27 *Colo. Law.* 21 (Oct. 1998).
- Douglas R. Richmond & William Freivogel, [The Attorney-Client Privilege and Work Product in the Post-Enron Era](#), ABA Section of Bus. L. (Aug. 7, 2004).
- Daniel J. Capra, [Memorandum Re: Consideration of Rule Concerning Waiver of Attorney-Client Privilege](#) (2006).
- Jerold S. Solovy, [Protecting Confidential Legal Information: A Handbook for Analyzing Issues under the Attorney-Client Privilege and the Work Product Doctrine](#) (2009).
- Michael H. Berger, [Preservation of the Attorney-Client Privilege: Using Agents and Intermediaries to Obtain Legal Advice](#), 30 *Colo. Law.* (May 2001).

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