

# Attorney-Client Privilege: Update for Corporate and In-House Counsel

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First Thursday CLE Program

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# Porter Hedges LLP – The Informed Choice

- Founded in 1981, Porter Hedges is a full-service law firm with offices in Houston and Oklahoma City. We provide the highest quality work across a range of industries, with particular preeminence in the energy sector. As leading practitioners, we are committed to excellence across our firm and favor an efficient, value-minded approach to serving our clients. We develop practical and integrated solutions to complex challenges that we approach with a business-oriented mindset.
- Our clients range from some of the world's largest public companies to smaller, mid-size, private businesses. Our firm reflects our clients' approach to business – entrepreneurial, collaborative, and practical.
- The firm has grown because of a disciplined approach to building depth and expertise in our core practices. The American Lawyer noted that Porter Hedges is on “an impressive growth trajectory.” Our “commitment to a strategic plan...is delivering major growth” in a highly competitive market.

# Attorney-Client Privilege

- “Attorney-client privilege” protects certain communications between attorneys and clients from disclosure.
- The U.S. Supreme Court extolled the importance of the rule in 1981, when it last addressed attorney-client privilege in *Upjohn Co. v. United States*, 449 U.S. 383. The Court explained that the purpose of the privilege “is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice.”
- The Court continued, “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”

# General Principles

- The attorney-client privilege only protects communications in which
  - (1) the client is seeking legal advice,
  - (2) the lawyer is providing legal advice, and
  - (3) the communication is made in confidence.
- The key questions to ask at the outset are:
  - Who is the client?
  - Is the client requesting, or the attorney providing legal advice?
  - Is the communication confidential?

## Who is the Client?

- The client of an in-house attorney is the company, not individuals working for the company—including the CEO. Unless there is a unity of interest between the company and the employee (such as when an officer or director is sued for actions lawfully taken by the company), the attorney does not (and cannot) represent any of the officers, directors or employees of the company with respect to their company related activities.
- As a result, any personal information given to the attorney by an employee (such as an employee's admission that she embezzled company funds) is not privileged and not protected from disclosure. In fact, the attorney is ethically obligated to report that information to the company if the information involves conduct harmful to the company.
- But entities only act through people, so the question becomes which individuals working for the company are clients for the purposes of applying the attorney-client privilege. Courts generally use two tests: (1) the Control Group Test and (2) the Subject Matter Test.

## Is the Client Requesting, or the Attorney Providing, Legal Advice?

- The privilege may only be invoked when the attorney is acting in her capacity as an attorney—giving, and addressing requests for, legal advice with respect to the implications of some issue or a proposed course of conduct.
- Increasingly, the person serving as in-house attorney advises her company on legal matters while also participating in the entity's business. Sometimes this is obvious, such as when an in-house attorney also holds a formal title as compliance officer, financial officer, or otherwise. Often, however, the miscellany of an in-house attorney's day-to-day work is less clearly defined, and a person whose sole job title is purely legal will often find herself providing feedback on operational matters or participating in conversations and communications that are not—or are not purely—legal in nature.
- This mixture of duties often forms the basis for challenging a communication's privileged nature.

## Is the Communication Confidential?

- Even if a communication occurs between an attorney acting as legal advisor and a person within the Client Group, it will not be privileged if the parties do not act in a manner that indicates they intend the communication to be confidential.
- Where circumstances indicate a lack of confidentiality, and, similarly, where confidentiality is later breached, privilege will not attach.
- Again, the in-house attorney must give careful thought to the circumstances and environment in which legal advice is sought or provided. Often, this requires reminders (and training) for management, directors, and others, about what communications are intended to be protected and how to ensure protection attaches and endures. This can be especially challenging for communications exchanged over email, text, instant messaging, and the like.

# Is the Communication Privileged – The Split in the Circuit Courts’ Interpretation

- In *In re Grand Jury*, the Ninth Circuit joined the Second, Fifth, and Sixth Circuits in adopting the “primary purpose” test. Under this test, “the scope of the attorney-client privilege is defined by the purpose of the communication.” In effect, courts must determine the “primary purpose” of the communication. If that primary purpose is to provide legal advice, then attorney-client privilege attaches. Otherwise, the communication is not protected by the privilege.
- The D.C. Circuit adopted the “significant purpose” test when analyzing dual-purpose communications. When he was on that Court, Justice Kavanaugh applied the “significant purpose” test in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). Under this framework, courts must ask, “Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?” In other words, “if one of the significant purposes of the [communication] was to obtain or provide legal advice, the privilege will apply.”
- The Seventh Circuit is the only federal appeals court to reject both tests in the context of tax advice. In the Seventh Circuit, attorney-client privilege never attaches to dual-purpose communications that involve tax advice.



# Treatment of Dual Purpose Communications by the Tenth Circuit and Oklahoma Courts

- The Oklahoma Supreme Court and the Tenth Circuit Court of Appeals have not clearly adopted a test, but federal district courts in Oklahoma have generally applied the “primary purpose” test.
- *Lindley v. Life Investors Insurance Company of America*, 267 F.R.D. 382 (N.D. Okla. 2010) is often cited by district courts in Oklahoma. In that case, Judge Cleary explained when the primary purpose of a communication is legal in nature and the business portions of the communication are distinct and severable and their disclosure would not indirectly reveal the substance of the protected legal portion, the communication—redacted of the privileged portions—should be produced. However, when the primary purpose of a communication is to provide legal advice and the legal and business purposes of the communication are inextricably intertwined, the entire communication is privileged.
- To make determinations regarding the primary purpose of a communication, courts often conduct in camera review of any documentary communication. They also rely on affidavits from in-house counsel explaining the purpose of the communication and on privilege logs submitted by the party claiming attorney-client privilege.

# Considerations For In-House Counsel In Wake Of U.S. Supreme Court's Refusal To Address Privileged Treatment Of Dual-Purpose Communications

- Earlier this year, the U.S. Supreme Court heard arguments in *In re Grand Jury*, a case involving a law firm specializing in international tax issues, including the practice of advising clients on the tax consequences of expatriation.
- This raised the alarm regarding whether it would issue an opinion impacting how the attorney-client privilege should apply to “dual-purpose communications” or communications between attorneys and clients that discuss both legal and non-legal business advice.
- On Jan. 23, 2023, the Court threw out the case with a one line per curiam opinion, noting: “The writ of certiorari is dismissed as improvidently granted.”

## Primary Purpose or Not in Determining Application of Privilege

- The case stemmed from a district court's application of the attorney-client privilege to documents prepared by a tax law firm and one of its in-house accountants for a client implicated in a criminal investigation.
- At issue was whether courts should consider the "primary purpose" of dual-purpose communications in determining whether the privilege applies or instead whether it was sufficient that legal advice was at least one of the purposes of the communication, even if not primary, in deciding the privilege's applicability.
- In affirming the district court, the Ninth Circuit noted that a communication can often have more than one purpose and agreed with the majority of jurisdictions that where that is the case, the court should look at the "primary purpose" of the communication to determine whether the attorney-client privilege applies.
- On petition to the Supreme Court, the law firm argued the Court should have applied instead the test articulated in *In re Kellogg Brown & Root, Inc.*, a 2014 D.C. Circuit opinion authored by Justice Kavanaugh, in which the court articulated a different test that the attorney-client privilege should apply if obtaining or providing legal advice was a primary purpose rather than the primary purpose.

## Implications for In-House Counsel

- By abandoning its review of the case, the Supreme Court has left open the question of when the attorney-client privilege will be applied in cases involving dual-purpose communications.
- This refusal to intervene potentially has critical implications for how in-house and outside counsel communicate with their clients.
- Attorneys for corporations, non-profits and other organizations often need to keep business considerations in mind when rendering legal advice to their clients.
- Clients routinely seek legal advice for both legal and business reasons, often over a wide variety of digital channels, such as Zoom, Slack, Microsoft Teams, email and text message.
- In addition, clients and attorneys frequently work with non-attorney advisors and consultants to discuss the legal and business implications of various decisions. This is particularly true in heavily regulated industries.
- All of these factors greatly increase the prevalence of dual-purpose communications between attorneys and their clients.

# Considerations for In-House Counsel Going Forward

- In the absence of a resolution of this issue by the Supreme Court, companies that are based in or have operations in the U.S must give consideration to the possibility that the more permissive test will be applied in disputes.
- That is, companies should assume any future reviewing court will apply the primary purpose test in resolving privilege disputes, making it more likely that communications will not be protected but instead open to discovery and use at trial.
- Further, considering how difficult it may be for courts to determine the primary purpose of a communication, companies should brace for the possibility that courts will err on the side of disclosure.
- **So against this backdrop, here are some suggestions for how in-house counsel consider communicating to maximize the potential that the attorney-client privilege will apply:**

# 1. Involve attorneys in critical legal communications.

- Companies may contend that communications outside the purview of company counsel nevertheless are protected because they are occurring at the direction of company counsel or somehow are otherwise being conveyed in connection with legal services. For example, communication between a company and investigations vendor, which has been retained at the direction of outside counsel, may cover substantive communications that later could be used against the company.

While in-house counsel cannot be expected to participate in every communication, they should plan to join calls of sufficient importance, especially those which could create exposure if later discovered and used.

- Further, when communications occur over email or devices, attorneys should be included in the communications to maximize any future finding of privilege.

## 2. Structure communications to protect privilege.

- Use language that makes clear that the communication is primarily about a legal matter.
  - For example, use language such as “What are the legal implications of X” instead of “What are your thoughts on X?” or “Are we good to go on Y?”
  - Similarly, replies or follow-up communications can clarify the purpose of the communication (e.g., “Here’s my legal analysis on X”; “I did some legal research into Y”; “Thank you for providing the background on how X product/team operates – It helps inform the legal analysis on Z.”).
- Calls and email communications should be conducted with the requisite formalities to help ensure the application of privilege.
- For oral communications, attorneys should state at the outset that the purpose of the call is to provide legal advice and that the communications should be treated confidentially.
- Counsel should memorialize these communications contemporaneously in written notes. These same ideas should be included in communications that occur in writing.

### 3. Prepare employee guidance and training about handling communications.

- Educate clients and business teams about the distinction between business advice and legal advice and why, in view of this recent decision, the distinction matters.
- Employees should be instructed about the company's expectations about the treatment of discussions relating to legal matters and the consequences of failing to handle them properly.
- Counsel might consider requiring employees to either involve attorneys, or else consult attorneys where a question of doing so exists, and memorialize the requirements in guidance and training materials.
- Do not assume that merely cc'ing an attorney on an email will make it privileged. Rather, address the email directly to legal counsel. To whom the email is addressed does not determine whether the privilege applies, but addressing it to counsel, in connection with other factors, may weigh in favor of protecting the communication and demonstrate a primary legal purpose.



## 4. Restrict communications outside of email, telephone, and audio and video Conferencing.

- Companies already should be on high alert about the perils of company communications occurring over applications, like WhatsApp or Signal, used on hand-held devices.
- The SEC, DOJ and other government regulators have recently exhibited great interest in these types of communications and are cracking down on banks, financial companies, healthcare-related entities and others that fail properly to preserve company related communications.
- The privilege issue provides an additional impetus to handle these types of communications with care. The less formal and more quickly communications are prepared and sent, the greater the risk that employees will breach the sort of guardrails discussed above. Companies are at a place where they likely already are considering the risks of such communications and how to handle.
- Privilege concerns should be added to the mix – if not top of mind.

## 5. Watch to Whom and What is Communicated.

- Reduce the risk of privilege waivers by not forwarding sensitive communications beyond the legal team and those internal “clients” that need to receive it.
  - Add notations that signal a primary legal purpose, e.g., “attorney-client communication,” or “privileged and confidential.” Such notations are especially important for in-house counsel and could be included in the legal team’s signature block, when applicable.
- In the case of sensitive communications, do not commingle business and legal advice whenever possible, and make clear that such sensitive communications should not be forwarded without first checking with the attorney. Instead, address business and legal issues in separate emails. If business issues must be discussed in an email that gives legal advice, make clear that the business discussion is the context for the legal advice.

## 6. Build and Enforce Good Email Habits.

- Separate legal and business advice in an email.
- Control the copies.
- Restrict the ability to forward, copy or reply all to email.
- Take clear, consistent steps to indicate when email is privileged.
- Avoid creating long emails.
- Use caution when communicating with outside Directors.
- Avoid signing affidavits and sworn statements.
- Remember that facts are not privileged – only legal advice.
- Understand the limits of the work-privilege doctrine.
- Keep your Bar License current.

Thank you!

Next Meeting: Oct. 5, 2023  
Best Practices for Organization Compliance  
With State and Federal Laws

We will cover public corporate entities, private corporate entities and governmental agencies.

Questions to:

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