



Attorney-Client Privilege, Work Product Doctrine and Smart Communication: Pointers and Pitfalls

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Today's Roadmap

- 1. Refresher on Basic Legal Privileges**
- 2. Document Retention and Legal Holds**
- 3. Smart Communication**

Refresher on Basic Legal Privileges



Why It Matters

The **attorney-client privilege** and **work product doctrine** protect potentially damaging documents from disclosure to third parties before and during litigation and government investigations.

What is the Attorney-Client Privilege?

The attorney-client privilege protects from disclosure to third parties:

- **Confidential communications**
 - Requests for legal advice
 - Disclosure of facts to your attorney
 - Requests by the attorney for information needed
 - Legal advice provided the attorney
- **Between an attorney and client**
- **Made for the purpose of obtaining or providing legal advice**

What is Not Covered by the Privilege?

- The privilege protects the communication, not the facts.
- Communications motivated by business rather than legal concerns
- Historical documents.
- Most uncommunicated corporate documents.
- Lawyer-to-client communications not disclosing or based on client confidences (e.g. you're not seeking legal advice).
- Paralegals cannot be used to establish the privilege.

What is the Work Product Doctrine?

- **Protects from disclosure to third parties documents and tangible things that are both:**
 - Prepared by or at the direction of an attorney.
 - In anticipation of litigation.
- **The document's "primary purpose" must relate to litigation.**
- **There must be a tangible risk of litigation; broad general legal risk does not suffice.**
- **Any client "representative" can create protected work product (but, work has to be under the direction of counsel).**
- **A lawyer's participation helps when developing documents.**

How to Maintain Privilege

- **Do not discuss legal issues in public.**
- **Do not CC or BCC third parties on otherwise privileged email.**
- **Do not forward an email to third parties.**
- **Do not relate the information contained in a privileged email or show the email to third parties.**
- **If an employee does not "need to know" about the legal communication, do not copy them.**
- **Do not include outsiders in otherwise privileged meetings.**
- **Merely including a lawyer does not make an email, phone call or meeting privileged.**

Other Practical Tips

- Label privileged documents, but don't overdue.
- Keep privileged documents separate.
- Confidential does not mean privileged.
- Train employees.
- Outside the US, these privileges may be different. Be cognizant of international communications.



Protecting Environmental Reports

- **Can I protect:**
 - Reports submitted to the Government
 - Internal EHS Compliance Audits
 - Phase I Reports
 - Phase II Reports

Example—Government Information Request.

- What to do?
 - Call your attorney to seek legal advice.
 - Decide who will be part of the control group.
 - Attorney sends a legal hold letter relating to documents.
 - Kick-off teleconference to discuss how information will be managed and what the information request is seeking.
 - Gather information at the direction of counsel.
 - Respond to the request with your attorney's assistance (all drafts are protected under either attorney client privilege or the attorney work product doctrine).

Record Retention

- Be aware of both your corporate policies and regulatory requirements
 - Comply with both, but if the regulation is longer than your corporate policy, the regulation controls!
- Absence of records:
 - Regulatory violation
 - Can result in negative inference in enforcement or litigation – either implied or express
 - “If you didn’t record it, it didn’t happen. If you did record it, it happened exactly as written.”

Legal Holds

- When an actual or likely claim is received by a company, a “legal hold” may be implemented to prevent destruction of documents, including emails.
 - Should come from company lawyers.
- Even if there is no legal hold but you know of an actual or likely claim, do not delete emails or try to hide documents. It is often illegal, most likely will be discovered, and the “cover-up” has significant implications.

Smart Communication

BE SMART ABOUT WHAT YOU PUT IN WRITING AND HOW – IT LASTS FOREVER

Our communications are often only intended for the recipients to review. However, if things go south, reviewers can include:

Your superiors

Your colleagues

In-house counsel

Outside counsel

Regulators

FOIA Requesters

Opposing counsel

Judge

Jury

Media

The general public

Competitors

Future employers

How bad can it get?

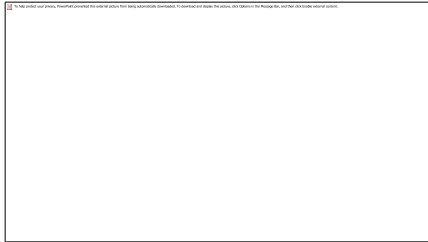
- Volkswagen Emissions Investigation
 - While discussing emissions testing, key US manager said in an email: “We should decide whether we are going to be honest. If we are not going to be honest, then everything stays as it is.”
 - Led to criminal charges.
- Fen-Phen Litigation
 - “Can I look forward to my waning years signing checks for fat people who are a little afraid of a silly lung problem?”
- There are hundreds of examples of less egregious or antagonistic communications being used in this manner.

Smart Communication Pitfalls

- Written communication often lacks proper context, especially text and instant messaging.
 - Sarcasm and jokes **do not** translate well and can be seized upon and manipulated by opponents.
- Written communication can be easily forwarded and attributed.
- Written communications persist – “delete” does not always delete.

Smart Communication Pointers

- Limit written communications – pick up the phone, especially for sensitive communications.
 - But treat voicemails like written communications.
- Stay in your lane. Avoid speculation, especially about issues outside your expertise.
- Think, write, review closely.
- Check the recipient list! Avoid blind carbon copies.
- Metadata.



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