AN OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE AND COMMON PRIVILEGE ISSUES

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Clients depend on their lawyers to provide advice confidentially and to protect that advice from disclosure to the fullest extent permitted by law. In many instances, it is easy to determine whether a particular communication is privileged and confidential. There are other instances, however, when the scope of protection is not as clear. This uncertainty arises, in part, because applying the attorney-client privilege raises intensely fact-specific questions. As a result, courts have reached different, sometimes conflicting, decisions when determining the scope of protection provided to confidential and privileged communications.

Although this fact-intensive nature of privileges makes bright-line rules difficult, there are useful guidelines and best practices that attorneys can follow. This paper provides a brief overview of the attorney-client privilege and some of the common privilege questions that arise for in-house and transactional attorneys.

I. Overview of Attorney-Client Privilege

The attorney-client privilege protects communications between a client and his attorney in two key ways: (1) by prohibiting the attorney from disclosing the communications, and (2) by protecting the client from being compelled to disclose the communication in legal proceedings. In Texas, the privilege is governed by Rule of Evidence 503. The Rule provides that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.” The basic elements of the attorney-client privilege are:

- a communication;
- made between privileged persons (i.e., attorney, client or agent);
- in confidence; and
- for the purpose of obtaining or providing legal assistance for the client.

The purpose of the privilege is the promotion of unrestrained communication and contact between the lawyer and client in matters in which the attorney’s professional judgment is sought. The attorney-client privilege has developed from two assumptions: (1) good legal assistance requires full disclosure of a client’s legal problems, and (2) a client will reveal details required for proper representation only if his confidences are protected. But because the privilege can prevent a judge and jury from learning of otherwise relevant and admissible evidence, courts construe the privilege narrowly.
There are two fundamental aspects of the attorney-client privilege, both of which must be met in order for the privilege to apply. The first is that the communication must have been made for the purpose of obtaining legal advice, rather than business or other advice. The second is that there must be an expectation that the communication will not be disclosed. If either of these fundamental aspects is missing, the attorney-client communication is not privileged.

II. When a Lawyer Wears Two Hats: The Special Role of In-House Counsel.

The attorney-client privilege applies to all attorneys, whether they work “in-house” or outside of an organization. However, in-house attorneys often fill multiple roles in an organization, and those roles may require that they give legal advice, business advice, or both. Because communications are protected only when an attorney is acting in a legal capacity, whether a communication with an in-house attorney meets all of the requirements of the attorney-client privilege is not always straightforward. Both in-house attorneys and their clients must be careful not to assume that communications are privileged simply because they were made to someone in the legal department, or because an attorney was present when they were made. In addition, communications made for business rather than legal purposes are not protected by the privilege. In order to be privileged, a communication must satisfy two requirements: (1) the in-house counsel must have been acting in his role as an attorney; and (2) the advice given must be legal, not business, advice. Courts will look carefully at a case to make sure that an organization did not assign an in-house attorney to a project merely so that privilege might be asserted over otherwise non-privileged communications.

III. Who Is the Client?

As stated above, a communication is privileged only if it is between an attorney and his client (or his client’s agent). Accordingly, both in-house counsel and outside counsel should always be mindful of who is the client. Texas Rule of Evidence 503 defines a “client” as “a person, public officer, or corporation, association, or [any] other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.” When representing an individual, identifying the client is typically easy. However, when the client is an entity, the question can be more difficult to answer.

While corporations and other entities can only speak or act through their officers, directors, or employees, it is important to understand that some communications between an entity’s employee and the entity’s counsel may not be privileged. The starting point for determining which person can have privileged communications on behalf of a corporation is the United States Supreme Court’s decision in Upjohn Co. v. United States. Prior to Upjohn, federal courts employed the “control group” test to determine whether the attorney-client privilege applied in the corporate context. Under the control group test, the communications of an employee to the corporation’s lawyer are privileged only if the employee “is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney . . . .” In Upjohn, however, the Supreme Court modified the analysis to include the
broader “subject matter” test. The subject matter test contains three major components: (1) the person making the communication to the attorney must have been an employee of the corporation at the time of the communication;\textsuperscript{17} (2) the communication was made at the direction of a corporate superior in order to secure legal advice from counsel;\textsuperscript{18} and (3) the communication was within the scope of the employee’s corporate duties.\textsuperscript{19} Now most courts, including Texas state courts, apply the broader subject matter test.

IV. **When the Client Is an Entity, the Privilege Belongs to the Entity.**

When the client is an entity, the privilege belongs to the entity, not to the individual employees who participated in the communication.\textsuperscript{20} As the Supreme Court explained in *Upjohn*, this distinction is an important one, especially in situations where the entity and its employee later become adverse or have different views on whether to waive privilege over a communication. If a company’s employee confides in the company’s lawyer under the mistaken belief that the lawyer is actually representing the employee, the company runs the risk of having a court suppress the employee’s communications from evidence.\textsuperscript{21} And in circumstances where the client and company later become adverse in litigation, a court may find that the company’s lawyers should be disqualified for having a conflict of interest.

Accordingly, corporate counsel should take steps to avoid the situation where an employee confides in his company’s counsel on the incorrect assumption that the employee controls the privilege. To avoid that situation, counsel should provide an “*Upjohn* warning” to employees when taking statements from those employees in connection with a representation of the company. The central purpose of an *Upjohn* warning is to ensure that the employee understands that the lawyer represents the corporation, not the employee. In giving the warning the lawyer should take care to ensure that the employee understands the following:

- That the attorney represents the corporation, not the employee;

- That the communication with the attorney is covered by the attorney-client privilege, but the privilege belongs to the company, not to the employee; and

- That the company may decide to waive the privilege and disclose the information from the individual employee to third parties, including the government.\textsuperscript{22}

The cautious corporate counsel will give this warning before soliciting statements from a company’s employee and make a written record of the warning. *United States v. Nicholas* demonstrates the importance of providing an adequate *Upjohn* warning and of making a written record of it. In *Nicholas*, the United States District Court for the Central District of California suppressed evidence in a criminal trial in part because there was not sufficient evidence that an *Upjohn* warning had been given.\textsuperscript{23} The employee testified that he did not remember receiving a warning. Even though the company’s lawyers testified that they had disclosed to the employee that they represented the company, the court held that the lawyers’ testimony was not sufficient in the absence of a contemporaneous written record. Furthermore, the court held that even if the alleged disclosure had been
given, it was inadequate because the lawyers never explained that they were not the employee’s lawyers, that the employee should consult with an attorney, or that any statements made by the employee could be shared with third parties.  

V. Common Attorney-Client Privilege Questions

While any form of private communication can be privileged, privilege questions most frequently arise for in-house attorneys in the context of notes, drafts, and email communications. This section discusses common issues to consider when determining whether such communications are privileged. Note that this article focuses only on the attorney-client privilege, and that the attorney work-product doctrine and other privileges may provide broader protection over such communications when they are applicable.

A. Are an Attorney’s Notes Privileged?

Whether an attorney’s notes are privileged depends on the purpose of the notes and the people present for the communication. Generally, an attorney’s notes will be privileged if (1) they were taken for the purposes of providing legal advice; and (2) only the client was present. For example, notes taken during a meeting with the client to discuss the terms of the agreement are privileged if the primary purpose of the discussion is to provide legal advice. On the other hand, handwritten notes and memos to the file are privileged only if they reflect privileged communications with the client; such notes and memos typically will not be privileged if counsel’s thoughts are not actually communicated to the client.

B. Are the Client’s Notes of Communications Privileged?

Whether the client’s notes of communications with his attorney are privileged depends on the purpose of the notes and the people present during the communication. In order to be privileged, the notes must reflect communications either (1) with counsel for the purpose of receiving legal advice; or (2) with the client for the primary purpose of receiving legal advice. For example, notes of communications with an internal team that are not related to legal advice are not privileged. Notes of communications that involve third parties such as opposing parties, outside consultants, etc., are generally not privileged. However, the Delaware Chancery Court recently observed that the presence of an investment banker when a client and its attorneys discussed legal matters did not destroy the privilege.

C. Are Emails Between Client and Counsel Privileged?

An email between a client and his attorney is privileged if only the lawyer and the client are on the email and it was made for the purpose of providing legal advice. An email between a client and counsel is not privileged if anyone besides the lawyer or client is on the email, such as investment bankers, accountants, etc. The email will also not be privileged if the email is not made for the purpose of receiving legal advice. For example, if clients are merely copying the lawyer on internal discussions of business terms, the email will not be privileged.
D. Are Drafts of Agreements/Documents Privileged?

A draft of an agreement or document is privileged if the draft is created by or for attorneys and it is shared only between the attorney and the client. Such a draft is not privileged if the draft is made by business people and relates to business terms or the draft is shared with someone outside the confidential relationship.

VI. Conclusion

The attorney-client privilege is critical to protecting a lawyer’s legal advice. Clients depend on their lawyers to protect that advice. In determining whether a particular communication or information is protected, the facts matter. There are some basics to protecting information that every lawyer needs to know. However, there will be times when it is unclear whether information is protected. In all cases, lawyers should take steps at the time advice is given to make it more likely that the information will fall within the boundaries set by the rules and case law.

ENDNOTES

1 This article focuses on the attorney-client privilege, but it is important to note that the work product doctrine may also apply depending on the factual situation, particularly where the client is involved with or in reasonable anticipation of litigation at the time of the communication.

2 TEX. R. EVID. 503(b)(1).


6 See id.


8 Id.

9 See In re LTV Sec. Litig., 89 F.R.D. 595, 601 (N.D. Tex. 1981) (in-house counsel were to be treated no differently than outside counsel for purposes of determining applicability of attorney-client privilege).

10 See TEX. R. EVID. 503(b); In re Small, 346 S.W.3d 657, 663 (Tex. App.—Waco 2009, no pet.) (“The attorney-client privilege applies only to communications which are intended to be confidential between the attorney and the client and which are made for the purpose of facilitating the rendition of legal services for the client”).

11 Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Valdez, 863 S.W.2d 458, 460 (Tex. 1993) (holding “a party may not cloak a document with the attorney-client privilege simply by forwarding it to his or her attorney”).

12 See United States v. Davis, 636 F.2d 1028, 1044 (5th Cir. 1981) (finding no privilege where attorney did not act in a legal capacity by preparing tax returns).

13 TEX. R. EVID. 503(a)(1).

14 449 U.S. 383.

15 Id. at 390.


17 Id. at 394.

18 Id.

19 Id.

See 606 F. Supp. 2d 1109, 1112 (C.D. Cal.), rev’d on other grounds, United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009). The Ninth Circuit reversed the district court’s suppression of the evidence because it found that the communications were not privileged because they were not made by the employee “in confidence” but were made for the purpose of disclosure to outside auditors. Nicholas, 583 F.3d at 609.

See United States v. Ruehle, 583 F.3d 600, 608 n.7 (9th Cir. 2009) (explaining Upjohn warnings make clear that the corporate lawyers do not represent the individual employee and that anything said by the employee to the lawyers will be protected by the company’s attorney-client privilege subject to waiver of the privilege in the sole discretion of the company).

Nicholas, 606 F. Supp. 2d at 1116.

See United States v. Ruehle, 583 F.3d 600, 608 n.7 (9th Cir. 2009) (explaining Upjohn warnings make clear that the corporate lawyers do not represent the individual employee and that anything said by the employee to the lawyers will be protected by the company’s attorney-client privilege subject to waiver of the privilege in the sole discretion of the company).

See Neuder v. Battelle Pac. Nw. Nat’l Lab, 194 F.R.D. 289, 293 (D.D.C. 2000) (providing the mere fact that clients are at a meeting with counsel in which legal advice is requested or received does not mean that everything said at the meeting is privileged; for communications at such meetings to be privileged, they must relate to the acquisition or rendition of legal services).

See Kelly v. Gaines, 181 S.W.3d 394, 419 (Tex. App.—Waco 2005), reversed on other grounds, 235 S.W.3d 179, (finding a “memo to file” was not privileged because it did not contain or refer to any communications between the party claiming privilege and his attorneys and the attorneys were not acting in their legal capacity).

See Johnson v. Sea-Land Servs. Inc., No. 99 CIV9161WHPTHK, 2001 WL 897185, at *2 (S.D.N.Y. Aug. 9, 2001) (stating, “[t]he attorney-client privilege affords confidentiality to communications among clients, their attorneys, and the agents of both, for the purpose of seeking and rendering an opinion on law or legal services, or assistance in some legal proceeding, so long as the communications were intended to be, and were in fact, kept confidential”).

See Larson v. Harrington, 11 F. Supp. 2d 1198, 1203 (E.D. Cal. 1998) (holding notes made on the client’s initiative were not privileged).

See In re Monsanto Co., 998 S.W.2d 917, 931 (Tex. App.—Waco 1999, pet. denied) (finding draft agreement not privileged because it was disclosed to third parties).

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