HOW TO AVOID WAIVER OF OTHERWISE PRIVILEGED COMMUNICATIONS

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The law concerning waiver of the attorney-client privilege is mired with complexities. This article will sift through these complexities to explain the general causes of waiver and the scope of waiver once it has occurred, and will provide a brief list of best practices to avoid waiver of the privilege. Although avoiding waiver of privilege in a corporate setting may not always seem like a high priority, waiver of the privilege, especially if the waiver encompasses an entire subject area, can have disastrous consequences in subsequent litigation. It is thus crucial that corporate counsel understand how waiver occurs and undertake the necessary precautions to avoid it.

I. Disclosing Privileged Communications to Third Parties Waives Privilege

As discussed in the first article in this series, a communication must be confidential in order to gain the protection of the attorney-client privilege. Further, not only must a privileged communication be made in confidence, it must remain confidential. Texas Rule of Evidence 511 states that “[a] person upon whom these rules confer a privilege against disclosure waives the privilege if . . . the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged[.]” In other words, the privilege is waived if: (1) a holder of the privilege; (2) discloses a significant part of a privileged communication to anyone outside of the privileged relationship.

One condition for waiver to occur is that only the holder of the privilege can waive it. This means that an attorney cannot waive the privilege on behalf of his or her client unless the client has authorized the disclosure. Additionally, a former employee of a company cannot waive the company’s privilege after he has been terminated.

A second condition for waiver to occur is that the disclosure must contain a significant part of the privileged document or other communication. For example, if a party discloses a summary of a privileged document, the party probably has not waived privilege over the document. There is not a formula for determining when something constitutes “a significant part” of a privileged document and so courts apply common sense reasoning. For example, the Fort Worth Court of Appeals found that a significant part of a privileged communication relating to substance abuse treatment had been disclosed when the appellant had disclosed the majority of...
the information to third parties and had testified that she abused drugs and alcohol, that she used these substances when depressed, that she had abusive relationships with her children’s fathers, and her efforts to obtain and remain in treatment for her addictions.\footnote{8}

Another condition for waiver to occur is that the disclosure of the privileged communication must be \textit{voluntary}.\footnote{9} However, courts have not interpreted the term “voluntary” to mean a conscious decision to waive the privilege.\footnote{10} Courts will look at whether the disclosure was involuntary, was compelled erroneously, or was made without an opportunity to claim the privilege.\footnote{11} If a person obtains a document without the voluntary act of the holder or the holder’s agent, then there is no waiver.\footnote{12}

In the litigation context, a party can typically recover privileged documents that are produced inadvertently. However, the party seeking to recover the inadvertently-produced document must follow a set of procedures specified by Texas Rule of Civil Procedure 193.3(d), which will not be discussed in this article.

\section{Scope of the Waiver}

If a waiver has occurred, other non-disclosed communications could also lose protection of the attorney-client privilege depending on the scope of the waiver. Disclosure of a privileged document or communication can result in an implied waiver of other related privileged documents or communications.\footnote{13} While a party’s disclosure of a privileged document does not automatically waive privilege over all privileged materials, courts have found in some cases that disclosing a particular otherwise privileged document (or collection of documents) regarding a particular topic can result in the waiver of undisclosed privileged documents involving the same topic.\footnote{14} This is typically called “subject matter waiver.”

The party arguing waiver has the burden to relate the documents disclosed to those still designated as privileged that it thinks should be produced.\footnote{15} Determining whether a communication relates to the same subject matter as the disclosed communication is a very fact specific inquiry.

There is very little Texas case law on the topic of subject matter waiver and so it is helpful to look to how it is treated by other jurisdictions. Courts weigh factors like (1) the circumstances of the disclosure; (2) the nature of the legal advice sought; and (3) the prejudice to the parties of permitting or prohibiting further disclosures because there is no bright line test for determining the subject matter of a waiver.\footnote{16} Courts tend to limit the scope of the waiver where the communication was either produced inadvertently or where the party has merely disclosed the communication rather than affirmatively using it in their case.\footnote{17}

\section{Asserting An “Advice of Counsel” Defense Waives Privilege}

One specific application of waiver is the use of the “advice-of-counsel” defense. The “advice-of-counsel” defense asserts that a defendant was relying on the advice of their attorney when taking the action made the basis of the lawsuit. In certain corporate governance contexts, reliance on advice of counsel can be an absolute defense to claims that management breached its fiduciary duties to the company or that it engaged in some form of mismanagement. Although an appealing defense, the “advice-of-counsel” defense waives the attorney-client privilege.
The scope of waiver when a party asserts an advice-of-counsel defense is typically quite broad. A court will likely allow broad discovery of all materials that could reflect, explain, or impeach the attorney’s advice. It is thus important to think carefully and strategically before asserting an advice-of-counsel defense.

IV. Best Practices to Avoid Waiver

Corporate counsel should be mindful of how privileged documents are treated because waiving privilege—or even litigating over whether privilege has been waived—can impact litigation strategy and cost. There are several precautions that corporate counsel should take to minimize these risks:

- Clearly label every privileged document as an “attorney-client communication.” Documents prepared with respect to pending or anticipated litigation should be marked accordingly;
- Segregate privileged documents into their own separate files;
- Requests for legal advice and responses should be designated as such, and documents should expressly note that an attorney is acting in a legal capacity;
- Keep privileged and business email communications separate. If parties outside the privileged relationship need to be included in a conversation, begin a new email chain rather than simply forwarding an email that could contain privileged information.
- Instruct personnel that all legal matters, particularly investigations, must be managed by an attorney.
- Have an attorney conduct all legal discussions. The mere presence of an attorney is not enough to invoke privilege.
- Establish policies to limit access to privileged materials.
- Shred privileged documents when they are no longer needed, rather than simply discarding them.
- Structure your legal organization so as to make it easy to distinguish when in-house counsel is acting in a legal capacity.
- Draft board meeting minutes so as to clearly indicate that legal advice was discussed, that counsel was attending in the role of legal advisor, and that the portions of the meeting discussing legal advice were intended to be privileged.
V. Conclusion

The focus of attorney-client privilege discussions and articles is often on whether privilege protection has been created in the first place. It is equally important, however, to be cognizant of how to prevent waiver of the privilege from occurring. Waiver generally occurs when the holder of the privilege, be it the party or authorized counsel or agent, voluntarily discloses the privileged communication to a third party. Once privilege is waived as to a communication, the privilege can be waived as to all communications on the same subject matter. To avoid waiver, corporate counsel should clearly label privileged documents, keep privileged communications separate from non-privileged communications, and be attentive to what communications and documents are being disclosed to third parties.

ENDNOTES

1 TEX. R. EVID. 511(1).
2 In re Ford Motor Co., 211 S.W.3d 295, 301 (Tex. 2006).
3 Id.
4 See Carmona v. State, 941 S.W.2d 949, 953 (Tex. Crim. App. 1997) (stating that “the power to waive the attorney-client privilege belongs to the client or his attorney or agent both acting with the client’s authority.”)
5 See In re Mktg. Investors Corp., 80 S.W.3d 44, 50 (Tex. App.—Dallas 1998, orig. proceeding) (holding that the employee’s right to assert the privilege terminated when he left the company; the current management had the sole responsibility to assert or waive the privilege).
6 TEX. RULE OF EVID. 511(1); see also In re Monsanto Co., 998 S.W.2d 917, 925-26 (Tex. App.—Waco 1999, orig. proceeding) (holding that the defendant’s oral description of the privileged document was not a disclosure of a “significant part” of the privileged document and thus did not waive privilege).
7 Id.
8 See In re W.E.C., 110 S.W.3d 231, 247 (Tex. App.—Fort Worth 2003, no pet.).
10 Id.; see also Freeman v. Bianchi, 820 S.W.2d 853, 861 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) (stating that the term “voluntary” is not interpreted to cover only disclosures that are made intentionally and knowingly).
11 TEX. R. EVID. 512; Freeman, 820 S.W.2d at 861.
12 Gass v. Baggerly, 322 S.W.2d 426, 430 (Tex. Civ. App.—Dallas 1960, no writ) (finding the privilege was not waived by inadvertent disclosure to the opponent).
13 Berger v. Lang, 976 S.W.2d 833 (Tex. App.—Houston [1st Dist.] 1998, pet.denied) (quoting Terrell State Hosp. v. Ashworth, 794 S.W.2d 937, 941 (Tex. App.—Dallas 1990, orig. proceeding)) (holding that the defendant disclosed a significant part of the information contained in a privileged letter so as to effect a waiver of his right to confidentiality of such information).
14 Marathon Oil Co. v. Moye, 893 S.W.2d 585, 590 (Tex. App.—Dallas 1994, orig. proceeding) (finding that party arguing waiver had not overcome the prima facie showing of privilege by generally alleging there had been subject matter waiver).
15 Id.
17 See Parkway Gallery Furniture, Inc. v. Knittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987); see also In re Sealed Case, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982).

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