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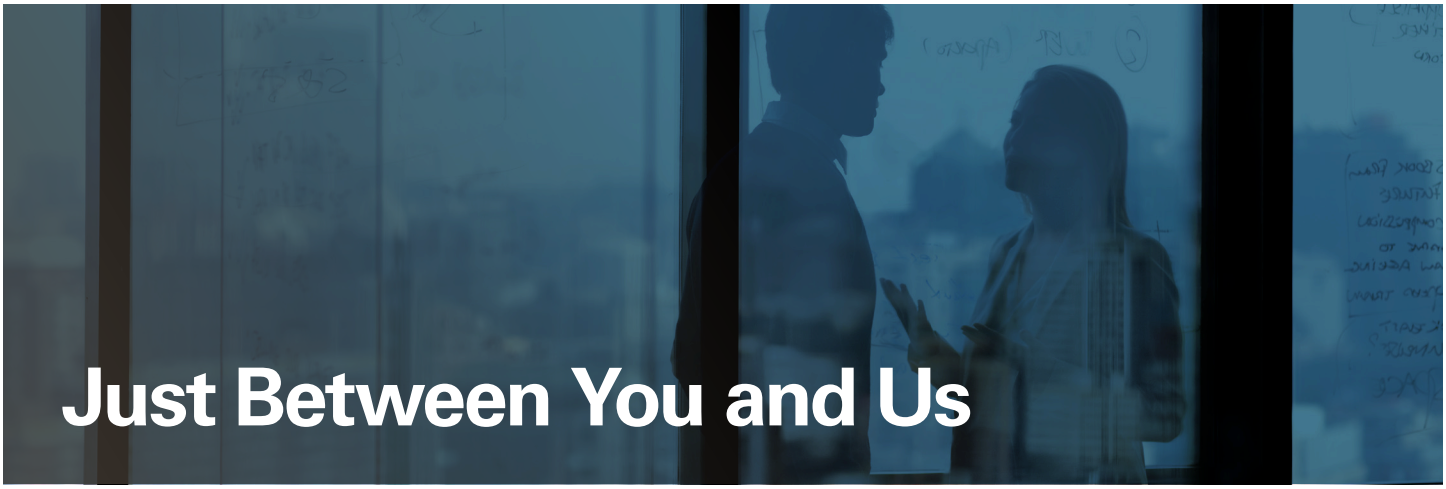

Just Between You and Us

The technical requirements of the attorney-client privilege can trip up clients who aren't careful. Here's a list of common misconceptions and real-world foot faults we've seen.

The 10 most common client misconceptions about the attorney-client privilege

Protecting corporate confidences has become more challenging in the COVID-19 world, as directors and executives work from home and other locales where it can be hard to control who is privy to discussions.

Among the most sensitive corporate confidences are communications with the company's lawyers, which are protected from disclosure to third parties by the attorney-client privilege. A client can inadvertently do things that prevent assertion of the privilege, so it is worth reviewing common misconceptions about how it works.

Four basic requirements must be met: (1) There must be a communication (2) between counsel and client (3) in confidence (4) for the purpose of seeking, obtaining or providing legal assistance to the client. Only if all four conditions are satisfied can clients refuse to turn over documents or testify about their communications with counsel.

The easiest way to grasp these rules is to review common misconceptions about the privilege:

1. *"If I copy our lawyer on an email to my fellow board members, that will make it attorney-client privileged."*

   No. Merely including a lawyer does not protect the communication. It has to meet all four requirements.

2. *"If I write 'attorney-client privileged' at the top of the email, address it to our lawyer and copy the rest of the board when I discuss the business merits of an M&A deal, that ought to work."*

   No. If the subject is the business merits of the deal, it would not satisfy the fourth requirement for attorney-client privilege. Conversations with lawyers that do not

relate to the seeking, obtaining or providing of legal advice are not protected.

3. *"I described a confidential, off-the-record call with a counterparty to our outside counsel. The back-channel conversation will be privileged and confidential, right?"*

   No. The call with the counterparty is not privileged, and recounting it to the attorney does not create a privileged communication with the lawyer unless the client asks for advice about the exchange with the counterparty or some other subject.

> *Simply cc'ing your lawyer on a note to others, even if you write "privileged" on the top of a document, will not ensure that the communication is protected.*

4. *"If it's just our outside counsel, internal counsel, the board and our bankers in the boardroom when we discuss legal issues surrounding the deal, that should be privileged."*

   The answer will vary by state. The Delaware courts have recognized that financial advice is intertwined with issues of regulation, legal structure and legal consequences, and have held that the privilege is not waived simply because bankers are present. Other states might apply the privilege more narrowly. Beware, too, that if the topics extend to issues unrelated to the deal, the best practice is to excuse the bankers from those discussions to avoid any risk of waiving the privilege.

5. *"If we have our law firm hire our PR firm to draft alternative responses to a potential activist attack, the draft releases will be privileged because the lawyers hired the PR firm."*

   No. If the PR firm's input is not required to provide legal advice, the fact that outside counsel hired it would not matter, and sending draft releases to counsel would not make them privileged. There are some circumstances in which it may be easier to protect confidences if outside counsel hires third parties, but one should not assume that the privilege will apply simply because of who hired the third party.

6. *"Texts typically don't need to be turned over in litigation, unlike emails."*

   No. In discovery, "document" is defined broadly and may cover everything from letters and emails to doodles and text messages. Most texts are written quickly, without reflection on how they may look later with the benefit of hindsight, and they are often more revealing than more formal types of communication. Hence, they can provide ammunition to adversaries in litigation. It's best for directors to avoid texting about substantive matters generally.

7. *"If I ask our attorney for legal advice in an email and our attorney responds, the existence of those emails won't be disclosed to anyone."*

   No. In litigation, the parties often must prepare lists of any communications they contend are privileged, listing the date, subject matter and participants — including third parties — in order for the other side to evaluate and possibly challenge the claim of privilege. Hence, the existence of the emails and the recipients may be disclosed even if their substance is protected by the privilege.

8. *"If we have a presentation from our litigation counsel about potential damages the company may face in a suit and a summary becomes part of the board record, I assume that remains privileged even though our auditors review the board minutes, because the auditors were not given the lawyers' presentation."*

   No. Although the report itself may be protected by the privilege, a summary such as the minutes would probably have to be turned over in discovery if it went to a third party, like auditors who were not involved in the legal advice process. For that reason, companies should consider redacting privileged portions of records they share with people outside the circle of privilege.

9. *"A lawyer was retained to advise a special committee of the board investigating potential wrongdoing by a member of management. She sent me an email with preliminary findings, which I shared with directors who are not on the committee, because they should know what's going on. I assumed that will stay privileged."*

   Not necessarily. The special committee is the client here, not the full board. Sharing the lawyer's findings with directors not on the special committee could waive the privilege, because the other directors are outside the attorney-client relationship of the special committee.

10. *"If an outside board member receives privileged email at another business email address, it remains privileged."*

    Not necessarily. Communications exchanged on third-party email systems or electronic devices may not be privileged if the user did not have a reasonable expectation of privacy. Whether there is reasonable expectation may hinge on the policies of the email provider. (Some businesses maintain the right to monitor employees' communications on their systems.) To protect the privilege, directors need to examine the policies for the email they want to use. Companies may want to give outside directors company email accounts or require them to use dedicated, secure personal email accounts for all communications related to their board work.

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