

# Preserving Privilege: Considerations to Maintain Client-Attorney Confidentiality

By Clifford Thau and Marisa Antos-Fallon of Vinson & Elkins, LLP

*Attorney-client privilege — which protects from discovery confidential legal advice shared between a lawyer and a client — is often misunderstood, resulting in the waiver of legal protections for sensitive information. To help avoid all too common mistakes that can destroy this critical legal protection, Clifford Thau and Marisa Antos-Fallon of Vinson & Elkins, offer the following practical guidance and key considerations.*

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## Make Sure the Communication Is Privileged

There are four key factors required to establish attorney-client privilege: it must be (1) a communication (2) between privileged persons (an attorney and a client, or in some cases, an agent), (3) made in confidence, (4) for the purpose of obtaining or providing legal assistance for the client.

## Keep It Confidential

In most cases, a communication won't be considered private (and privilege will be waived) if a third party is present or is given electronic access to documents. To help guard against "inadvertent disclosure," be mindful of third parties who may be present in a meeting or on a conference call or who may receive a forwarded email chain. Third parties may include the government, potential investors, lower-level employees, or opposing parties.

## Protect Communications With Advisors

There are exceptions to the rule that sharing information with third parties waives privilege. For example, privilege can be maintained when an accounting firm or public-relations advisor is providing information necessary for counsel to provide legal advice. Generally, if crisis management, public relations firms, or cybersecurity experts are retained to assist counsel in providing legal advice, outside counsel should engage the crisis-management and public-relations firms directly. The engagement agreement should specify that the purpose of their work is to assist counsel in providing legal advice.

## Clarify Business vs. Legal Roles

Because many in-house lawyers have both legal and business roles, communications protected by attorney-client privilege might not always be clear. Therefore, it is important to document when the purpose of a communication is to provide legal advice. This can be reflected in meeting minutes, and by prominently marking all written materials containing legal advice or requesting legal advice as "confidential" and "attorney-client privileged."

## Take Technology Into Account

From texting to email to file sharing, technology has changed the ways in which attorneys and clients communicate — and it has also created new potential pitfalls in the process. The casual dissemination of information — shooting a text message to a third party without careful consideration of its contents — can risk waiving privilege.

The ease and ubiquity of email pose particular risks. Mistakenly hitting “Reply All” and including third parties on a privileged communication or attaching a privileged document to an unprivileged communication with a third party are common errors that risk waiving privilege. Recently, a New York court held that a CEO waived privilege over personal communications sent through his employer’s email system. The court reasoned that the employer “owned” all emails on its system” and that therefore the CEO could not reasonably expect that his emails were private.

## Know Your Jurisdiction

Protections for privileged communications vary from state to state, so always check the law in your particular jurisdiction. This is even more critical when operating internationally; generally speaking, there are more protections in the US for communications with in-house counsel than the EU, UK and other parts of the world.

## Conduct Ongoing Training

It is important to regularly remind employees what constitutes a privileged communication and how to best protect that information. For example, employees should be reminded to mark email communications requesting or communicating legal advice as “confidential” and “attorney-client privileged.” It is also important to explain that purely business communications with in-house attorneys are not privileged, and that copying an attorney on an otherwise nonprivileged email does not make that discussion privileged.

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## **ABOUT THE AUTHORS**

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