

Attorney Client Privilege – What It Really Covers and How to Protect It

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Attorney-Client Privilege in New York State

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I. Source of the Privilege

A. New York Law

The statutory source of attorney-client privilege in the State of New York is CPLR § 4503(A)(1), which provides:

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government or by the legislature or any committee or body thereof.

However, the statute does not answer the basic question as to what is privileged. New York State courts continue to look to common law for guiding principles. *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991).

B. Federal Law

Federal courts look to state law regarding attorney-client privilege when state law provides the rule of decision. This means that in most instances, New York law will control a claim of privilege. Nevertheless, it is important to have a basic understanding of how the attorney-client privilege operates under federal law. When federal law controls, Federal Rule of Evidence 501 provides that federal common law governs claims of privilege. This represents a legislative effort “to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis.” *United States v. Gillock*, 445 U.S. 360, 367 (1980). Rule 501 differs from CPLR § 4503(A)(1) in that it applies to all claims of privilege, not just attorney-client privilege. *See, e.g., In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990) (holding that a clergy-communicant privilege exists under Rule 501 with respect to communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence); *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (applying Rule 501 to a reporter’s qualified common law privilege). Federal law also provides some additional protections from waiver of attorney-client privilege for inadvertent disclosures made in certain federal or state proceedings. The conditions under which these protections are applicable are set out in Federal Rule of Evidence 502. In most instances, however, the analysis of attorney-client privilege claims under federal common law will resemble the state law analysis.

II. Purpose of the Privilege

Attorney-client privilege “is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S. Ct. 2081 (1998). It “shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship” so long as the communication is “primarily or predominantly of a legal character.” *Wrubleski v. Mary Imogene Bassett Hosp.*, 163 A.D. 3d 1248, 1250–51 (3d Dep’t 2018). Privilege serves the function of promoting full and frank communications between attorneys and their clients, thereby encouraging observance of the law, and aids in the administration of justice. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348 (1985). Privilege fosters the attorney-client relationship by encouraging client candor and promotes efficiency by enabling attorney to be fully informed.

III. Elements of the Privilege

The test for identifying communications properly subject to the attorney-client privilege has been variously stated. One commonly cited and detailed test requires the following elements:

1. The asserted holder of the privilege is or sought to become a client;
2. The person to whom the communication is made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
3. The communication related to a fact of which the attorney is informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
4. The privilege is been (a) claimed and (b) not waived by the client.

Stirum v. Whalen, 811 F. Supp. 78, 81 (N.D.N.Y. 1993) (Munson, J.), cited with approval in *New York State Teamsters Council v. Primo & Centra*, 159 F.R.D. 386, 388 (N.D.N.Y. 1995).

Another common statement of the test for determining whether the privilege will protect both the client’s communication and the corresponding legal advice:

1. where legal advice of any kind is sought
2. from a professional legal advisor in his or her capacity as such
3. the communication relates to that purpose

4. is made in confidence
5. by the client, and
6. are at his or her insistence permanently protected
7. from disclosure by the client or legal advisor
8. except if the protection is waived.

United States v. International Board of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997).

C. Communication

A protected communication may be oral or written. See Edna Selan Epstein, “The Attorney-Client Privilege and the Work-Product Doctrine,” p. 47 (4th ed. 2001). Even wordless action, such as nodding, may constitute a communication. *Id.* Communication not only includes statements made by the client to the attorney, but also legal advice given by the attorney that discloses such information. See *In re Six Grand Jury Witnesses*, 979 F. 2d 939 (2d Cir. 1992); *Rossi v. Blue Cross*, 73 N.Y.2d 588 (1989).

The privilege protects only the contents of a communication from compelled disclosure. It does not protect the facts underlying the communication. *Spectrum Sys. Int’l Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991); *J.P. Foley & Co. v. Vanderbilt*, 65 F.R.D. 523 (S.D.N.Y. 1974). Facts that are merely observed by the attorney and not directly conveyed by the client are not privileged. See e.g., *United States v. Pape*, 144 F.2d 778, 782 (2d Cir. 1944) (attorney required to testify as to the presence of his client in the state and as to the type of car the attorney had observed the client driving); *Kenford Co. v. County of Erie*, 55 A.D.2d 466, 469 (4th Dep’t 1977) (holding that information obtained by an attorney from other persons and sources while acting on behalf of a client was not protected by attorney-client privilege).

D. Communication Must Be Made Between Client and Counsel

(i) Which Corporate Communications are Protected?

Corporations are entitled to the benefit of the attorney-client privilege, when communications otherwise meet this standard. However, not every communication between a corporation’s attorney and a corporate employee may meet this requirement. Courts historically relied on one of two tests to determine the applicability of the privilege in the corporate context: the “control group” test and the “subject matter” test.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court rejected the control group test. The corporation’s general counsel in *Upjohn* conducted an internal investigation of payments made to foreign officials. As part of the investigation, the general counsel sent questionnaires to all foreign managers regarding the payments. As part of a subsequent investigation, the IRS demanded the production of

the questionnaires. The *Upjohn* Court held that the communications by the employees were covered by the attorney-client privilege, even though not made by members of the control group. Applying factors akin to the subject matter test, the Court held that the communications were made for the purpose of obtaining legal advice from counsel, and the employees knew they were being questioned for that purpose. The subject matter test is now the preferred test and is applied in the Second Circuit.

As a result of *Upjohn*, New York courts have repeatedly found that interviews of a corporation's employees by its attorneys as part of an internal investigation can be protected by the attorney-client privilege, which even extends to the attorneys' summaries and notes pertaining to the interviews. See, e.g., *Gruss v. Zwirn*, 2001 U.S. Dist. LEXIS 79298, at *10–11 (S.D.N.Y. 2011); *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 71 (S.D.N.Y. 2010); *Robinson v. Time Warner*, 187 F.R.D. 144, 146 (S.D.N.Y. 1999).

(ii) Individual Employee or Corporation as Client?

The privilege in corporate client/attorney communications ordinarily belongs to the corporation. However, at times it may be unclear whether the legal advice is being given to the employee personally, or to the corporation as an entity. The Third Circuit, in *In re Bevill, Bressler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986), listed five factors to guide the determination of who "owns" the privilege in those cases. These factors are routinely applied in New York. See *United States v. International Bhd. Of Teamsters*, 119 F.3d 210 (2d Cir. 1997). The Court will look at whether:

- (1) the employee seeking to assert a personal attorney-client privilege with respect to communications with corporate counsel can show that the employee approached counsel for the purpose of seeking legal advice;
- (2) the employee made clear to counsel that the employee was seeking legal advice in the employee's individual, rather than representative, capacity;
- (3) the employee can demonstrate that corporate counsel, knowing that a possible conflict could arise, nonetheless saw fit to communicate with the employee in the employee's individual capacity;
- (4) the employee can prove that the conversations with corporate counsel were confidential; and
- (5) the employee can show that the substance of the conversations with corporate counsel did not concern matters within the company or the general affairs of the company.

Typically, the corporation's interests are best served by it owning the privilege, and thus being in control of whether it can be waived. The problems that can arise when an employee can lay claim to the privilege is illustrated in *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009). That case involved a claim of privilege asserted by a corporate CFO Ruehle in his criminal prosecution to suppress statements that he made to corporate counsel during the course of an internal investigation into alleged stock-option backdating. Because it had not been made clear to Ruehle that his discussions with corporate counsel were not made in the context of personal representation, the District Court found that the interview statements were privileged and corporate counsel had therefore breached its duty of loyalty to Ruehle by disclosing those statements to others for the benefit of the corporation (the court reported corporate counsel to the State bar for possible disciplinary action). While on appeal the privilege ruling was overturned because it was found that Ruehle knew his statements would be disclosed to outside auditors. Nevertheless, the case demonstrates one of the problems with not providing clear "warnings" at the outset of investigatory interview as to the purpose of the interview, counsel's role, and who "owns" the privilege.

(iii) Successor Companies

Ownership of the attorney-client privilege is also a relevant consideration in the context of successor companies. One illustrative case is *Gary Friedrich Enters., LLC v. Marvel Enters*, 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154; 2011 WL 2020586 (S.D.N.Y. May 20, 2011). At issue in that case was whether Marvel could assert attorney-client privilege as a successor company. Quoting *Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123, 133 (1996), the Court held that "[w]hen ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners turns on the practical consequences rather than the formalities of the particular transaction." *Id.* at *13. The central inquiry for courts considering the practical consequences is whether the business operations of the predecessor corporation are being continued. Thus, because Marvel had continued the business operations of its predecessor, the attorney-client privilege remained intact—even through numerous corporate reorganizations and mergers.

(iv) Disclaimer Obligation

Even apart from the privilege issue, the Rules of Professional Conduct ("Rules") in most States impose an independent ethical "disclaimer obligation" on lawyers. For example, New York Rule 1.13 provides:

When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organizations' interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

The failure to provide this “disclaimer” to the individual is not only a direct violation of the Rules, but it could allow the individual to reasonably believe, in the right circumstances, that the lawyer represents both the company and the individual. That in turn can give rise to enough of an attorney-client relationship to create a conflict, preventing counsel’s continued representation of the corporation, if the corporation’s and individual’s interests are or become adverse. See, e.g., *Catizone v. Wolff*, 71 F.Supp.2d 365 (S.D.N.Y. 1999) (putative client’s reasonable basis for believing attorney-client relationship exists is a factor in determining whether that relationship exists for conflict purposes); *Culver v. Merrill Lynch & Co.*, 1997 U.S. Dist. LEXIS 6041 (S.D.N.Y. 1997) (same). And if deemed a client for these purposes, that may preclude that lawyer from using or disclosing any information the individual provided to the benefit of her real client. See Rule 1.6(a) (prohibiting a lawyer from both knowingly *revealing* confidential information and from knowingly *using* confidential information, either to the client’s disadvantage or to the advantage of another).

E. In Confidence

“A communication is made ‘in confidence’ if the client expressly so states or if the attorney reasonably so concludes.” Edna Selan Epstein, “The Attorney-Client Privilege and the Work-Product Doctrine,” p. 167 (4th ed. 2001). Once the attorney-client privilege exists, the presumption arises that “all communications made within that context are privileged.” *Id.* at 171. See *Scott v. Beth Israel Medical Center*, 17 Misc.3d 934 (Sup. Ct. N.Y. County 2007) (No requisite expectations of confidentiality in communications with lawyer over employer email system); *Current Med. Directions, LLC v. Salomone*, 26 Misc.3d 1229A (Sup Ct. N.Y. County 2010 (same)); *Willis v. Willis*, 79 A.D.3d 1029 (2d Dep’t 2010) (using email account that is shared with one’s children to communicate with lawyer prevents communications being shared in confidence for privilege purposes).

In *In re General Motors LLC Ignition Switch Litigation*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015) (“*GM Ignition Switch Litigation*”), a district court held that interview notes and memoranda of witness interviews by an outside law firm hired by a corporation to render a report giving legal advice regarding ignition switch defects continued to be protected by attorney- client privilege notwithstanding that the corporation promised to make the report itself public. The court found that there was no indication that the corporation intended to make the communications reflected in the interview notes and memoranda confidential, that the privilege is intended to protect confidential communications and therefore the attorney-client privileged is applicable to those materials notwithstanding that the law firm’s report was made public. *Id.* at 528–29.

F. For the Purpose of Obtaining Legal Advice

In order for communications between lawyer and client to be privileged, the client must be seeking predominantly legal advice or services. *In re County of Erie*, 473 F. 3d 413 (2d Cir. 2007); *People v. Mitchell*, 58 N.Y.2d 368 (1983).

“Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from essentially professional legal services, give rise to no privilege whatsoever.” *Colton v. United States*, 306 F.2d 633, 638 (2d Cir.), *cert denied* 371 U.S. 951, 83 S.Ct. 505 (1963). Attorney-client privilege “is ‘triggered only’ by a request for legal advice, not business advice.” *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984).

The Second Circuit has consistently stated that it looks to see whether the predominate purpose of the communication was to procure legal advice. *In re County of Erie*, 473 F.3d 413, 420, n.7 (2d Cir. 2007). “When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged.” *Id.* at 421-22 (citing *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998)). If a business decision can be viewed as both business and legal evaluations, “the business aspects of the decision are not protected simply because legal considerations are also involved.” *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987); *see also Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 444 (S.D.N.Y. 1990) (privilege not extended to management advice). (The New York Court of Appeals also looks to see whether the communication is “predominately” one or the other. *Rossi*, 73 N.Y.2d at 593.)

- *In re County of Erie*, 473 F.3d 413, 422 (2d Cir. 2007) (finding predominate purpose of a communication between county attorney and county officials was to procure legal advice because the lawyer had been “asked to assess compliance with a legal obligation,” and “the lawyer’s recommendation of a policy that complies (or better complies) with the legal obligation-or that advocates and promotes compliance, or oversees implementation of compliance measures-is legal advice.”).
- *MSF Holding Ltd. v. Fiduciary Trust Co. Int’l*, No. 03 Civ. 1818, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 7, 2005) (finding no attorney-client privilege to communications with the deputy general counsel regarding whether to honor a letter of credit because the communications contained facts as to whether to pay an obligation, which is what any business executive would do, and did not allude to a legal principle or contain legal analysis).
- *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 44-45 (E.D.N.Y. 2013) *affd*, 10-CV-0887 PKC VMS, 2014 WL 223173 (E.D.N.Y. Jan. 21, 2014) (finding communications concerning advice on human resources issues, summaries of fact-related communications and instructions from outside counsel on conducting the internal investigations were not protected by attorney-client privilege because the predominant purpose of the communications related to business and not legal advice from the outside counsel).

- In *Koumoulis*, the court found that the outside counsel's role was not just as a consultant primarily on legal issues, but that she was an adjunct member of the human resources team because of her involvement in: helping supervise and direct internal investigations; instructing human resources personnel on what actions (including disciplinary actions) should be taken, when to take those actions, and who should perform them; instructing the defendant company what facts and behavior should be documented and how it should be documented; drafting written communications to the plaintiff responding to his complaints; and drafting scripts for conversations with the plaintiff about his complaints. *Id.*
- The outside counsel's communications were considered to be more human resources/business related and not providing legal advice because the attorney would tell human resources employees exactly what questions to ask during interviews and what statements to make during meetings, including on routine human resources topics like improving job performance, customer interaction and communication skills. *Id.* at 45.
- *Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 547, 552, 553-55 (S.D.N.Y. 2013) (holding, in an employee gender discrimination class-action, that a data field within defendant's human resources database regarding employee compensation, identified as "Diversity Objects," was protected by attorney-client privilege because the "Diversity Objects" category was created at the request of in-house counsel in order to respond to inquiries regarding "legal risks that might be posed by the tentative compensation decisions that the managers within [human resources] had proposed" and it did not matter that the information was communicated to in-house counsel in a database rather than in another format.
- *GM Ignition Switch Litigation*, *supra* at 530 (the court observed, "Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line", in holding that interview notes and memoranda of those interviews prepared by the outside law firm that was hired expressly by corporation to give legal advice regarding ignition switch defects continue to be protected by attorney-client privilege notwithstanding that the firm also gave business advice).

(i) Importance of Making Purpose Clear

It can be important expressly to provide to those being interviewed the "legal advice" purpose of the communication:

- *Cruz v. Coach Stores Inc.*, 196 F.R.D. 228, 231 (S.D.N.Y. 2000) (an employer's failure to make employees aware that they were being questioned so that the corporation could obtain legal advice rendered the attorney-client privilege inapplicable).
- *Martin Lewis v. Wells Fargo & Co.*, 266 F.R.D. 433, 444 (N.D. Cal. 2010) (“[M]emoranda from Wells Fargo’s in-house counsel to individuals in the Compensation Group and Human Resources formally requested information relating to the job duties of employees holding specific positions. These documents are clearly marked as privileged and further explain that all information collected is subject to privilege.”).
- *Deel v. Bank of Am.*, 227 F.R.D. 456, 461 (W.D. Va. 2005) (questionnaires related to FLSA audit were not protected by the attorney-client privilege as employees who completed the questionnaires were not sufficiently aware that the questionnaires were being completed for the purpose of obtaining legal advice; it stated that its purpose was for the bank to remain competitive and reward its employees and that it was part of a routine check. the questionnaire never suggested it was being used for purposes of seeking a legal opinion).

IV. Third Parties Acting at the Direction of an Attorney

The privilege may extend to protect communications between the client and the agent of an attorney if the communication is confidential and made for the purpose of obtaining legal advice from counsel. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (information provided to an accountant by a client at the behest of his attorney is privileged to the extent that it is imparted in connection with the legal representation); *United States v. Kovel*, 296 F. 2d 918 (2d Cir. 1961) (communications between accountant and counsel retained to assist counsel in providing legal advice is privileged); *Carter v. Cornell University*, 173 F.R.D. 92, 94 (S.D.N.Y. 1997) (finding privilege applicable to communications by employees to college dean where interviews in question were conducted “at the request of counsel and for the exclusive use of counsel in rendering legal representation”), *aff’d*, 159 F.3d 1345 (2d Cir. 1998).

Although this rule seems easy enough to apply, the recent case of *Galasso v. Cobleskill Stone Prods., Inc.*, 169 A.D.3d 1344 (3d Dep’t 2019) illustrates instances in which the privilege does not apply. Galasso sued Cobleskill Stone for wasting corporate assets and self-dealing. Prior to commencing the action, Galasso hired a valuation firm to measure the worth of the stocks he held in Cobleskill for estate tax purposes. When Cobleskill sought the report, Galasso objected based upon attorney-client privilege. Despite Galasso designating the valuation firm’s engagement and report as confidential from the inception of their relationship, the Court nevertheless concluded that, because the report was for estate tax purposes and Galasso only commenced the action against Cobleskill after the report raised concerns, the report was not protected by attorney-client privilege.

When employing experts and consultants to assist, it is important to ensure that they are integrated carefully into the legal team. All communications need to be of a legal nature related to the relevant issues, and written communications between the attorney and consultant need to describe the assignment as being directly related to the client representation and should indicate that they are confidential and attorney-client privileged. If the expert has been retained prior to litigation, as was the case in *Galasso*, efforts must be made to cloak that expert and any report generated as being in anticipation of litigation.

It is also important to note that using non-lawyers to “lead” an investigation can undermine the privilege claim, even if counsel may provide some advice along the way. See *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012).

V. Waiver of the Attorney-Client Privilege

There are many ways in which attorney-client privilege can be waived, whether intentionally or inadvertently. The party asserting the privilege, besides having the burden of establishing the applicability of the privilege, also has the burden of showing that there has been no waiver of the privilege. *Spectrum Sys. Int’l Corp.*, 78 N.Y.2d at 377.

A. At Issue or Advice of Counsel Waiver

The attorney-client privilege can be waived if the communication itself is “at issue” in a matter. This occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information.” *Nomura Asset Capital Corp. v. Cadwalder, Wickersham & Taft*, 62 A.D.3d 581, 582 (1st Dept. 2009).

Put differently, “[a]ttorney-client privilege can be waived if the privileged communications are placed “at-issue” in the litigation and a party asserts reliance on counsel as a defense to justify its actions. *Windsor Secs., LLC v. Arent Fox LLP*, 273 F. Supp. 3d 512, 520 (S.D.N.Y. 2017) (denying request for disclosure of communications protected by attorney-client privilege where those communications would not be used as evidence). Courts will find that privileged communications were put at issue where “[i]t would be unfair for a party who has asserted facts that place privileged communications at issue to deprive the opposing party of the means to test those factual assertions through discovery of those communications.” *Id.* at 518. However, merely consulting with counsel about a decision is not sufficient to find an at-issue waiver. *Kleeberg v. Eber*, 16-CV-9517, 2019 U.S. Dist. LEXIS 80428; 2019 WL 2085412 (S.D.N.Y. May 13, 2019).

To avoid this waiver, conversations with employees, particularly concerning particular actions to be taken by the company, must be carefully crafted, and the decision-making process must be handled in such a way that the attorney’s advice does

not become the lynchpin of the determination being made.

B. Waiver by Disclosure

Disclosure of a privileged document generally waives attorney-client privilege “unless it is shown that the client intended to maintain the confidentiality of the document, [and] that reasonable steps were taken to prevent disclosure.” *New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172 (1st Dep’t 2002). While the privilege may be preserved where disclosure is to a third party acting at the direction of the attorney, as discussed above, this is an exception rather than the rule. Thus, disclosing information to consultants and experts who assist in litigation must be done with serious deference to the requirements necessary to preserve the attorney-client privilege.

It is also important to consider the potential impact of the use of technology on the attorney-client privilege. While the mere use of cyber technology does not, in and of itself, waive the attorney-client privilege, these means of communication are more susceptible to actual interception or misdirection (inadvertent or otherwise) than more traditional methods of communication, and in an extreme case actual interception or misdirection may affect the privilege. Compare Illinois State Bar Ass’n Formal Opinion 90-7 (1990) (absence of reasonable expectation of privacy when using mobile communications equipment could waive attorney-client privilege) with Cal. Evid. Code § 952 (“a communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.”); N.Y. C.P.L.R. § 4547 (same).

Perhaps the most significant risk to the privilege comes not from cyber communications per se but from utilizing inappropriate “systems” for communication purposes. A number of courts have recognized that an individual’s otherwise privileged information loses that privilege when it is maintained on the individual’s employer’s computer and/or email system and explicit policies undermine any claim of employee privacy. *E.g., Scott v. Beth Israel Medical Center, Inc.*, 17 Misc. 3d 934 (Sup. Ct. New York County 2007); see also *Holmes v. Petrovich Development Co., LLC*, 119 Cal. Rptr. 3d 878 (2011); *In re Asia Global Crossing, Ltd.*, 322 BR 247 (S.D.N.Y. 2005); *Long v. Marubeni America Corp.*, 2006 WL 2998671 (S.D.N.Y. 2006); *National Economics Research Associates v. Evans*, 2006 Mass. Super LEXIS 371 (Superior Court 2006); *Transocean Capital v. Fortin*, 2006 Mass. Super LEXIS 524 (Superior Court 2006); *Garrity v. John Hancock Mutual Life Ins. Co.*, 2002 WL 974676 (D. Mass. 2002); but see, *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54 (2009), (finding the privilege not lost due to the narrowness of the employer’s policy). Presumably sending confidential communications over any shared-access system poses similar risks.

A lawyer has an affirmative obligation to advise a client with respect to the risks associated with using technology, including e-mail communications, especially as it relates to e-mails systems that are subject to review by a third party. ABA Formal Opinion 11-459 (2011).

VI. Non-Waiver in Special Circumstances

A. The Common Interest/Joint Defense Privilege

The common interest/joint defense privilege can really be characterized as a communal attorney-client privilege among parties who have common interests. It is practical, efficient and allows party to marshal legal talent, jointly strategize, execute consistent legal tactics and effectively “gang up” on the opposing side. It has early origins and is now commonly recognized as a way to open communications between and among multiple parties and their attorneys, so long as there is mutual consent from all clients for these communications. The elements of this doctrine are as follows:

1. The underlying material must qualify for protection under the attorney-client privilege,
2. The parties to the disclosure must have a common legal interest, and
3. The material must pertain to pending or reasonably anticipated litigation for it to be protected.

Kindred Healthcare, Inc. v. SAI Glob. Compliance, Inc., 169 A.D.3d 517 (1st Dep’t 2019) (citing *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016)).

Some best practices when creating common interest relationships with other clients and their attorneys include:

1. Making sure the subjects of communication are legal in nature and do not relate to business or other interests.
2. Memorializing the relationship in a writing to confirm everyone’s consent, waiver and understanding that all discussions and materials produced are privileged.
3. Since this is a common, joint interest, making sure all communications are designated as common interest privileged.

B. The Functional Equivalent Exception

This exception allows attorney-client communications between the client and an independent third party contractor, but only under very specialized circumstances. When determining whether the exception applies, courts frequently consider whether the consultant:

1. exercised independent decision-making on the company’s behalf;
2. possessed information held by no one else at the company;

3. served as a company representative to third parties;
4. maintained an office at the company or otherwise spent a substantial amount of time working for it; and
5. sought legal advice from corporate counsel to guide his or her work for the company.

In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 352 F. Supp. 3d 207, 212–13 (E.D.N.Y. 2019).

This exception is very fact sensitive and requires consideration of the relationship sought to be developed, the importance of the work done and the level of confidentiality necessary. Many times, as a practical matter, third parties are retained through counsel to cloak the work in attorney-client protection, since presumably if the attorney orders and directs the work, it is in furtherance of legal advice given.

HYPOTHETICAL 1

Patricia, the plaintiff in a Title VII sex-discrimination and sexual harassment lawsuit, retained an attorney while she was still employed by the defendant corporation, Cayuga Bank, Inc. One afternoon while she was at work, she decided to send her lawyer an email summary of her claim, while the facts were still fresh in her mind. She described a number of disturbing comments by her manager, Michael. She also said she believed she was denied a promotion because she was a woman. In the email to her lawyer, she also said: “I have to admit that Michael is a jerk to everyone – not just women who work for him. But I still think he hates me because I’m a woman.” When she joined the company five years ago, Patricia was informed that employee communications would not be confidential if they were written or received on computers owned by the company.

Six months ago, Patricia filed a formal complaint with the company’s head of human resources, Hugo. Hugo investigated the allegations, spoke separately with Patricia and Michael, and talked to other employees who had information about Michael’s behavior in the workplace. Hugo was troubled by what he learned, so he wrote a lengthy memo summarizing what he learned and his conclusions concerning the company’s responsibilities. He then sent the memo to the company’s in-house counsel, Isabel. After reading Hugo’s memo, Isabel advised him to meet with Michael and warn him, in the strongest possible terms, to stop using language that could be construed as creating a hostile work environment.

Michael did not heed Hugo’s warnings, and Patricia could finally take it no longer. She instructed her lawyer to file a lawsuit against Cayuga Bank and Michael. The company’s regular outside litigation counsel, Luis, represented Cayuga Bank. Before filing an answer he interviewed Michael to learn his side of the story. He did not expressly inform him that he was representing Cayuga Bank only, not Michael in his individual capacity. Michael told Luis that he found Patricia “harsh, abrasive, and shrill,” but denied sexually harassing her.

In the company’s answer, Luis raised as a defense the so-called *Faragher/Ellerth* doctrine, which allows an employer to escape liability for sexual harassment if it can show (1) the employer exercised reasonable care to prevent and correct any-harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided. Michael was represented by separate counsel in the litigation. He wrote a letter to both Isabel and Luis reminding them that his communications with counsel were confidential and covered by the attorney-client privilege. He threatened to report any lawyer who disclosed any confidential communications to the Third Department’s disciplinary committee.

1. (a) Is the email from Patricia to her attorney privileged?
(b) What, if anything, should Patricia’s lawyer have done differently?
2. (a) Who is the client of Isabel and Luis?
(b) With whom may the lawyers communicate and have those communications protected by the attorney-client privilege?

(c) What is the effect of Luis's failure to ensure that Michael understood the identity of Luis's client?

(d) In light of your answer to (c), what should the lawyers tell Michael in response to his threat to report them to the disciplinary authorities?

3. Can Patricia obtain discovery of Hugo's memo? Is it protected under the attorney-client privilege? What about the work product doctrine?

4. Is Isabel's advice to Hugo privileged? What is the effect on the privilege (if any) pertaining to that communication of Luis's assertion of the *Faragher/Ellerth* defense?

5. Who has the authority to assert or waive the privilege with respect to Michael's communications with Isabel and Luis? Could the lawyers advise the President of Cayuga Bank to throw Michael under the bus, arguing that he is a bad actor and should be (and will be) terminated, but the company itself should not be liable under the *Faragher/Ellerth* doctrine?

HYPOTHETICAL 2

You are union counsel assigned to a grievance arbitration for the termination of a long-term employee at a nursing home. The employee was fired for working overtime without permission, which is against company policy. The employee claims she had no choice but to work overtime due to understaffing and scheduling problems at the facility, which led to a choice between leaving residents unbathed for the next shift -- also against company policy -- or working the overtime. The employer claims that the employee has been warned that working overtime without permission is grounds for termination and claims the termination was for just cause. The employer also makes various arguments about the employee working too slowly. There is no language forbidding overtime in the contract. You have an initial meeting with the grievant and her union rep. You inform her that you represent the union and you gather information on the case to prepare. You also discuss the case with the union rep without the member present on several occasions.

The member is a bit of a squeaky wheel, and the union representative assigned to the case makes it clear that he has a hard time dealing with her numerous and lengthy inquiries. Whenever the member calls the union rep with a concern or question (which is nearly daily), the rep "turfs" them on to you. You spend a considerable amount of time soothing and working with the member to prepare. In response to one of her questions, you mention that she and the other employees at the facility may have an FLSA claim against the employer for overtime, but you also state that your firm doesn't generally handle those matters.

The arbitration date is delayed several times due to settlement negotiations that ultimately are fruitless. Finally, you represent the union's grievance at the arbitration and the member gets her job back. However, she is not awarded the \$20,000.00 in backpay you had sought, as the arbitrator found that the member did not prove that she engaged in significant attempts at mitigating her damages.

A month later, the member sues the union for a violation of the duty of fair representation for failing to sufficiently inform her about the duty to mitigate. In discovery, she seeks to depose you about discussions you had with the union about her case specifically and conversations or memos you may have prepared for the union about the duty to mitigate in general with regard to other arbitrations. The member also sues you personally for malpractice, claiming that you did not sufficiently inform her about the duty to mitigate.

Right around the same time, the employees at the facility hire a lawyer to represent them in an FLSA suit against the employer. In discovery, the employees' FLSA lawyer and the employer both seek to depose you/seek discovery materials about various matters including:

- (a) your conversation with the member about a possible FLSA suit,
- (b) your conversations and any emails or other communications with members and union officials about working hours at the nursing home while handling other arbitrations for the union,
- (c) your conversations with members and union officials present at recent negotiations with the employer about working hours,
- (d) your conversations with union officials about working hours during negotiations where rank-and-file members were not present.

Questions:

- (1) Can you assert attorney-client privilege regarding the conversations/communications you had with union officials about the grievance outside of the presence of the grievant?
- (2) Can the grievant sue you for malpractice?
- (3) Can you assert attorney-client privilege for any of (a) - (d) above?

HYPOTHETICAL 3

Clothing maker Neon Nights, Inc. manufactures a brightly colored clothing line, used primarily by the college-aged and twenty-somethings for clubbing activities. It became so popular that one of the mainstream retailers, Tar-jay, entered into a contract for the purchase of thousands of pieces for sale in its nationwide network of stores.

Three years into a five year contract, the husband wife owners of Neon Nights began to see similar products being sold by Tar-jay in its stores, but under the name "Neon Boogie Nights – by Tar-jay!"

"We're being ripped off," the husband remarked.

"That was out product and our idea," said the wife.

They went to a lawyer who advised them they had a claim for trademark infringement.

Neon Nights elected to proceed with the litigation, but first contacted a local PR agency for advice on a PR strategy surrounding the lawsuit and particularly where a press release should be issued. The parties to a series of emails on the topic were the lawyer, the husband and wife owners of Neon Nights, and the executive at the PR agency.

During discovery, a dispute arose regarding the emails with Neon Nights' attorney contending that they were subject to the attorney-client privilege, while Tar-jay's attorney argued that the privilege had been waived.

The Court ruled in favor of Tar-jay that the privilege had been waived when Neon Nights included the PR firm on the email chain.

(1) Why?

Applicable Exceptions to Waiver Due to Disclosure to a Third Party:

- (a) Third party is necessary for communication between counsel and client.
- (b) Third party is the functional equivalent of an employee of a party to the litigation.
- (c) Third party is used by the attorney to aid in legal tasks.

(2) Does the work product doctrine apply to preclude disclosure?

(3) What steps could have been taken to bolster applicability of the attorney-client privilege or work product doctrine?

HYPOTHETICAL 4

You are counsel to a union involved in protracted and tense negotiations with an employer. The main sticking points, as usual, are salary and the amount of required contributions to the pension fund.

You, the union president, vice president, and four rank-and-file members are present during bargaining sessions. At certain times in between sessions you caucus solely with the union officials; at others, you caucus with the union officials and the members. In the smaller caucuses, the union president is adamant that keeping the employer in the pension fund should be a priority, as he is concerned about the signal this employer's departure will send to other employers, and he wants to keep the pension fund solvent.

At times, you are left alone with the four rank-and-file members while the union officials conduct other business. They make their positions clear to you. Two members are older, and therefore receiving the full amount of their pensions in the coming years is a priority. The third member is new, with a young family, and is very much in favor of placing the priority in

negotiations on salary and health benefits. The last member has ten years with the employer, and is vested for a pension, but doesn't believe that there will be a fund around when it comes time to collect. He's fine with pushing for increased pension contributions, but only for those in his tier of employment (determined by hire date) and not at the expense of concessions in other areas, such as salary or holidays.

During one of the caucuses at which the rank-and-file are not present, you and the union officials contact the fund's actuaries and request an analysis/forecast of the fund's health and also an opinion as to what the lowest amount of contributions could be to keep the fund in the green zone. You draft a contract based on these numbers and review it solely with the union officials.

Unknown to anyone else, the union vice-president contacts the employer one evening and has a discussion with him about what it would take to get the contract signed. The employer gives him a number on salary and pension contributions that he says he can work with. The pension contribution the employer proposes fits within the amount the union's actuaries said would be enough to keep the pension fund afloat, although it is on the low end. The vice president says he'll talk to everyone, but that he thinks that should be possible. He mentions that the union has prepared a draft of a contract but doesn't state any details about it. He doesn't tell anyone about his discussion with the employer.

At the next negotiating session, the employer presents his proposals on the pension contributions and salary, which are the same as those he gave to the vice president in their private conversation. The union caucuses and rejects the proposal, countering with slightly higher pension numbers, and staying the same on salary. The employer leaves the table, and files a charge with the NLRB for failure to bargain in good faith, citing his private conversation with the vice president. You meet with the vice president and the president to discuss the conversation the VP had with the employer. The two get into a heated argument, and the vice president resigns.

The NLRB seeks to question the vice president, but he is unreachable. You accompany the president to the NLRB to give an affidavit in response to the charge, and the NLRB attorney learns from the president's testimony about the consult with the actuaries. Based on the information he has obtained from the employer and the president's testimony, the NLRB attorney does the following:

- (a) he questions you as to the substance of the conversation between the vice president and president;
- (b) he requests the draft contract that the vice president mentioned to the employer in his conversation;
- (c) he requests the actuary's report;
- (d) he questions the president as to the content of the conversation with the actuary discussed above.

Question: Must you provide the requested information/documents (a) – (d)?

After the above matter is resolved and a contract is obtained, the two younger employees that had been present at the negotiations, unhappy with the contract, band together with those either currently unvested for a pension or on the second-tier pension plan to file a breach of the duty of fair representation claim regarding the contract. They allege that the union president prioritized high contributions to the pension plan at the expense of all else at the negotiations to the detriment of these members. Plaintiffs seek:

- (a) To depose the president and VP on what was said during any caucuses at which they were not present (but you were);
- (b) The actuary's report, which they've heard about through the grapevine;
- (c) The substance of the VP's private conversation with the employer;
- (d) The substance of your conversation with the VP and the president about the VP's conversation with the employer;
- (e) The draft contract you prepared.

Question: Must you provide the requested information/documents (a) – (e)?