

# Attorney-Client Privilege: Best Practices for In-House Counsel

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## Introduction

- ❖ Overview of attorney-client privilege and work-product doctrine
- ❖ Areas where privilege issues commonly arise
- ❖ The special role of in-house counsel
  - Defining legal v. business advice
- ❖ Defining the client in the corporate context
  - Former employees
  - Affiliated entities, portfolio companies, and joint ventures
  - Advisors and consultants
  - Ownership of privilege post-merger
- ❖ Best practices to establish and preserve privilege
- ❖ How privilege is waived
- ❖ Attorney-client privilege around the world
- ❖ Document retention policies

## Overview of Attorney-Client Privilege

- ❖ In general, the attorney-client privilege protects:
  - a communication,
  - made between privileged persons (*i.e.*, attorney, client, or agent),
  - in confidence,
  - for the purpose of obtaining or providing legal assistance for the client.
- ❖ Attorney-client privilege developed from two assumptions:
  - good legal assistance requires full disclosure of a client's legal problems, and
  - a client will only reveal details required for proper representation if her confidences are protected.
- ❖ Construed narrowly

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## Overview of Attorney-Client Privilege

- ❖ The fundamental aspect of any privileged communication is that the communication was made for the purpose of obtaining legal advice, rather than business or other advice.
  - Legal advice should be the primary purpose of communication and there should be an expectation that it will not be disclosed.
  - Lawyer's primary role cannot be non-legal, such as giving business advice.

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## Overview of the Work-Product Doctrine

- ❖ Protects material prepared and mental impressions developed in anticipation of litigation.
- ❖ Work product creates a **zone of privacy**.
  - An anti-“free loader” rule
  - No protection for documents prepared in the ordinary course of business
- ❖ Work product is both narrower and broader than attorney-client privilege.
  - Narrower because it only applies to work done “in anticipation of litigation”
    - *But see California*
  - Broader because the privilege is not as easily waived

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## Exceptions to Privilege and Work Product

- ❖ **Crime/fraud:** Legal advice or services used by the client in furtherance of an ongoing or future crime or fraud are not protected.
- ❖ **Where an attorney’s conduct is challenged:** Where a client sues the attorney for malpractice, the client is generally said to “waive” any claim of privilege that would attach to his communications with the attorney.
- ❖ **Fiduciary exception:**
  - Originally developed for shareholder derivative actions.
  - Has been expanded to other fiduciary relationships, including those between a general partner and its limited partners.
  - When there is a mutuality of interest between an organization and the parties to whom it owes fiduciary duties, then the *Garner* doctrine may apply.
  - There must be a showing of “good cause” for disclosure.
  - Does not apply to work-product doctrine.

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