

Attorney-Client Privilege Issues in M&A Transactions

Robert F. ("Bob") Gray, Jr.

Partner

Mayer Brown LLP

713 238 2600

rgray@mayerbrown.com

May , 2017

I. ATTORNEY-CLIENT PRIVILEGE

I. Attorney-Client Privilege

Bedrock principle of legal representation: common law evidentiary privilege that protects communication between a client and lawyer made for the purpose of obtaining or providing legal advice.

A. Analysis varies by state, and by federal circuit:
“legal advice was one of the significant purposes” v. the narrower “primary purpose”

1. Federal Cts split.
2. NY and Texas – “one of the significant purposes.”

I. Attorney-Client Privilege (con't)

B. Protects communication primarily or predominantly of a legal character – rather than of a business character.

1. Was the communication made in order to render legal advice or services to a client?
2. Was the communication made in a confidential setting?
3. Privilege attaches to the entity, not individual persons.

I. Attorney-Client Privilege (con't)

C. Courts: The privilege is not meant to act as a shield to protect otherwise discoverable information.

1. Communications with in-house counsel generally scrutinized more carefully by courts.
2. Courts have warned that mere participation of in-house lawyers as they walk the line between legal and non-legal involvement doesn't automatically protect communications from disclosure/waiver.
3. Generally no privilege for in-house counsel in Continental Europe.

II. PRE-CLOSING M&A COMMUNICATIONS – GENERALLY

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Attorney-Client Privilege Issues in M&A Transactions

Also available as part of the eCourse
[2017 Corporate Counsel eConference](#)

First appeared as part of the conference materials for the
39th Annual Corporate Counsel Institute session
"Trends in Mergers and Acquisitions"