

# Attorney-Client Privilege Issues in M&A Transactions

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## 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

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