

Protecting Privilege?

The University of Texas School of Law
2022 Essential Cybersecurity Law

July 27, 2022

Jeremy D. Rucker

jrucker@spencerfane.com | 214.459.5880



1



Protections in General

- Attorney-client privilege protects communications between attorney and client
- Work product doctrine protects preparation for a case
- Attorney-client privilege is more fragile
- Neither the attorney-client privilege nor work product doctrine shields facts or documents simply by providing them to an attorney
- Confidentiality does not equate privilege

2

Attorney-Client Privilege

- Scope
 - Protects disclosure of confidential or sensitive communications between lawyers and clients
 - Must relate to request for, or rendering of, legal services
 - Fosters client confidence and unrestrained communication between client and attorney
 - The client is generally the holder of the privilege

Attorney-Client Privilege

- Defined
- A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
 - **(A)** between the client or the client's representative and the client's lawyer or the lawyer's representative;
 - **(B)** between the client's lawyer and the lawyer's representative;
 - **(C)** by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
 - **(D)** between the client's representatives or between the client and the client's representative; or
 - **(E)** among lawyers and their representatives representing the same client

Attorney-Client Privilege

- Upjohn v. United States
 - Attorney-client privilege applies to communications between company's employees and in-house counsel
 - Employees must communicate with counsel at the direction of corporate superiors
 - Communications must be made to:
 - Obtain legal advice for organization; or
 - Provide facts needed by attorney to give company legal advice
 - Employees must be sufficiently aware that counsel is questioning them to provide company legal advice
 - Communications must concern matters within the scope of employees' corporate duties
 - Communications must be confidential

Attorney-Client Privilege

- Additional communications
 - In-house counsel and former employees (if communications relate to former employee's conduct and knowledge gained during employment) (In re Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 526 (S.D.N.Y. 2015)).
 - Counsel and agents/consultants retained by counsel to provide legal advice to clients (United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)).

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Protecting Privilege? The Evolving Role of Attorney-Client Privilege in Cybersecurity Incidents and Responses (REPLAY)

First appeared as part of the conference materials for the 2023 First Friday Ethics (February 2023) session "Protecting Privilege? The Evolving Role of Attorney-Client Privilege in Cybersecurity Incidents and Responses (REPLAY)"