

The More Things Change

By TODD PRESNELL



The pandemic ushered in a panoply of behavioral changes in the workplace, ranging from virtual conferences to repetitive use of now tiresome phrases such as “these uncertain times” and “the new normal.” These changes continue to evolve as organizations grapple with permanent work from home, all-office or hybrid office solutions. In the area of corporate communications, a rising concern is whether these behavioral transformations altered lawyers’ ethical duties of confidentiality and protection measures for the corporate attorney/client privilege. The answer evokes another aphorism — the more things change, the more they stay the same.

In-house lawyers with heigh-

tened privilege and confidentiality concerns are right to express their uneasiness with communicating in a non-office, remote setting. Fewer in-person meetings necessarily increases written communications through email, texts and other messaging platforms. This inevitably includes more employees copying in-house lawyers to “make it privileged.” When considering the company’s responses to future discovery requests, the company and its lawyers have more communications to review and produce, and more communications to wrangle with over privilege objections.

The ability to schedule a virtual meeting allows — and encourages — the organizer to invite more employees. For example,

the traveling sales representatives who could not attend in-person meetings that involve in-house counsel can now join by video from a laptop computer from a hotel room or airport lounge. The increased number of attendees at gatherings where lawyers discuss legal issues raises confidentiality and privilege waiver concerns, especially when some join from unknown public places and through unprotected WiFi systems.

In contrast to these evolving technologies, the ethical confidentiality elements of the attorney/client privilege have remained static. Rules of professional conduct require all lawyers to maintain the confidentiality of their client’s information, which includes, but is broader than, client communications protected by the privilege.

The rule imposes obligations on lawyers to take reasonable precautions to prevent the unauthorized or inadvertent disclosure of privileged or confidential client information. An in-house lawyer can reasonably ask whether proper precautions exist in an atmosphere of increased electronic communications and amplified video conferences with invitees joining from wherever, sitting beside whomever.

The corporate attorney/client privilege has not changed because of workplace advancements either. It remains narrow,

protecting confidential communications made for legal advice purposes. In-house lawyers must still ensure that they have the proper attorney/client relationship with the entity that employs the employees with whom they communicate about legal issues. They should take precautions to avoid losing confidentiality by putting too many persons on an email chain, or having employees join virtual video conferences from insecure places. Lawyers should improve training so employees understand that their actions can have privilege-waiver consequences. The legal advice component requires greater attentiveness because the line between an in-house attorney's business and legal dealings within the corporate structure is likely blurrier in a world of increased written communications and virtual meetings.

If the ethical rules and the foundational elements of the attorney/client privilege have not changed, then why the heightened concern when working remotely? The concern arises because the new work environments allow greater opportunity to breach our obligations and waive privilege protections. So, while in-house lawyers should heighten their awareness of day-to-day privilege-protection protocols, they should specifically consider, or reconsider, the following five practice pointers:

- **Avoid Public WiFi Networks.** Connecting to the company's email server through unsecure public WiFi networks increases the chances of a third party gaining access to privileged communications. Ensure that lawyers and employees communicate through a secure

network such as a virtual private network or VPN.

- **Don't Over-Invite.** In-house lawyers should avoid, and train employees to avoid, the temptation to invite more personnel to a virtual meeting than is necessary. Increasing the number of attendees at a meeting that involves legal issues comes with the concomitant increase of confidentiality and privilege loss. Limit invitations to those who have a need to know the meeting's content to assist the lawyers in providing legal advice or implementing that advice.
- **Consistent Privilege Language.** With written electronic communications increasing, the need for lawyers to double their efforts to establish privilege becomes more important. Although it takes time and discipline, lawyers should label truly privileged communications with a "privileged and confidential" designation and include language instructing recipients not to disseminate the communication to others without authorization, and that it is for legal advice purposes.
- **Improve Calendar Invitations.** Consider this situation. An employee discloses during a deposition that he participated in virtual meeting that included the company's in-house lawyer. The questioning lawyer asks the employee to disclose the meeting's discussions, and the company's lawyer objects on privilege grounds. The questioning lawyer challenges whether the employee and in-house lawyer held the meeting for business or legal purposes and looks at the calendar invitation for evidence. Does the subject matter of the

invitation help or hurt the company's privilege claim? Let's make it help by including that the meeting will be confidential and is scheduled for legal advice purposes.

- **Privileged Email Attachments.** The upsurge in emails also means an increase in attachments. Remember that many courts perform a separate privilege analysis on attachments. They do not assume that attachments to privileged emails are privileged as well. Ensure that attachments to emails contain appropriate privilege and confidential designations, and other wording that helps establish confidentiality and legal advice purposes.

In sum, in-house lawyers should have legitimate concerns about privilege protection as varied forms of remote work evolve. But rules are rules, and privilege is privilege. The workplace changes have simply exacerbated lawyers' and employees' opportunity to run afoul of those mandates. In other words, the more things change, the more they stay the same. We just have to be more vigilant in protecting the privilege.



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