

It Depends

By Shari Claire Lewis

**B**ased on educated predictions, we must advise our clients as to the steps they can take, at the time communications take place, to avoid waiver should litigation occur at a later date.

# The Ins and Outs of Attorney-Corporate-Client Privilege

Picture three conference rooms at the corporate headquarters of Any Corporation, Inc. In the first, outside counsel is meeting with the company's CEO and general counsel to discuss acquisition of a competitor's business. Next door,

an assistant in-house counsel is attending a meeting called by the company's risk manager and IT personnel. Across the hall, the head of Human Resources is conducting individual interviews of three employees who witnessed an incident that occurred in the company's manufacturing plant. The interviews are being conducted at the request, but in the absence of, insurance-appointed defense counsel. Each meeting results in an internal memorandum summarizing what occurred. The question, "Which conversations and resultant memoranda will have privileged status if an adverse party seeks disclosure of their contents in later litigation?" The answer, "It depends."

Clients often assume that all communication involving a lawyer is privileged and, conversely, that the absence of a lawyer's direct participation in a communication is fatal to a privilege claim. However, attorney-corporate-client privilege and its cousin, the work product doctrine, require nuanced analyses. In its seminal decision on attorney-corporate-client privilege, the

Supreme Court stated, "We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so.... While such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules." *Upjohn v. United States*, 449 U.S. 383, 396 (1980) (interpreting FED. R. EVID. 501).

The uncertainty is exacerbated by often contradictory state and federal laws that may govern attorney-corporate-client privilege depending on where a lawsuit is filed. With the ever-widening geographic presence of corporations, corporate counsel may have difficulty meaningfully predicting the scope of the privilege in future litigation in an unknown forum. While each state recognizes attorney-client privilege, the details differ—and, as we all know, the devil is in the details.

Thus, those of us who counsel corporations must respond "it depends" to our clients' inquiries. We must advise as to the steps, based on educated predictions, that



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clients may take at the time that communication takes place to maintain the privilege should litigation occur at a later date.

### Elements of Attorney-Client Privilege

Broadly speaking, the four essential elements of attorney-client privilege are that

1. The person asserting the privilege was or sought to become the client of the attorney;
2. The communication was to a lawyer or his subordinate, and the communication was made to that person acting in that capacity;
3. The communication concerned a fact that was communicated to the attorney by the client, without a non-client present, for purposes of securing a legal opinion, legal services, or assistance in a legal proceeding *and* not for the purpose of committing a crime or tort; and
4. The privilege has been claimed and not waived *by the client*.

See Gergacz, *Attorney-Corporate Client Privilege* §3.03:3-6 (3rd ed. 2001) (emphasis added).

The privilege extends only to the communication itself and not to the underlying facts. See, e.g., *Brigham & Women's Hosp., Inc. v. Teva Pharms. USA, Inc.*, 2010 U.S. Dist. Lexis 31573, at \*14, (D. Del. Mar. 31, 2010). A fact does not become undiscoverable merely because it was communicated to counsel within the attorney-client relationship. It simply must be discovered from other sources.

For example, the California Supreme Court recently reversed an order directing disclosure of portions of a corporate counsel's opinion letter in which only the factual recitations were disclosed, and everything else was redacted. *Costco Wholesale Corporation v. The Superior Court of California*, 47 Cal. 4th 725 (Cal. 2009). The court held that it was the transmission of a communication as part of rendering legal advice, not the communication's content, that protected the *entire* document.

The third element, above, includes the "crime-fraud exception." Attorney-client privilege does not extend to communications advising a client how to accomplish an illegal act. However, to trigger the exception merely allege that a crime was committed, lest a mere tactical allegation defeat the attorney-client privilege. Also, advising

a client about how to defend against allegations that the client committed a crime or fraud is *not* subject to the exception, remaining privileged, as everyone is entitled to obtain legal defense advice.

### Attorney-Client Privilege Applied to Corporations

Corporations, as individuals, have the benefit of the attorney-client privilege. However, its application to attorney-corporate-client communications is complex. As a fictional entity, a corporation cannot, in and of itself, act, speak, have knowledge of facts, or perform any deed necessary to invoke the attorney-client privilege. Accordingly, the attorney-corporate-client privilege requires a factual inquiry into case-specific circumstances, such as a speaker's and an attorney's relationships to a corporation, a communication's topic and substance, and whether the communication has been treated by a corporation as confidential.

Under federal law, the attorney-corporate-client privilege must satisfy the essential elements described above and a second set of criteria, culled from *Upjohn* and its progeny. To successfully invoke the attorney-corporate-client privilege, in addition to the four elements described above, a corporation must establish that

1. The communication was made by a corporate employee to corporate counsel upon order of superiors so that the corporation could obtain legal advice;
2. The information that corporate counsel needed to formulate legal advice was not otherwise available to top-level management;
3. The information communicated by the employee was within the scope of the employee's corporate duties;
4. The employee was aware that the reason for communication with counsel was so that the corporation could obtain legal advice;
5. The employee was ordered to keep the communication confidential, and it was kept confidential; and
6. The identity and resources of the opposing party lead to the conclusion that an overwhelming public policy need will not be allowed to vitiate the privilege.

See Gergacz, *Attorney-Corporate Client Privilege* §3.03:3-6-3-7, §3.91:3-163 (3rd ed. 2001).

### The Corporate Attorney as Legal Counsel

The *sine qua non* of attorney-corporate-client privilege is that an attorney act in his or her capacity as counsel when the communication occurs. In today's corporate environment, attorneys frequently have multiple roles. For example, general counsel may sit on a company's board of directors and participate, in that capacity, in nonlegal, business communication. In his or her dual function, counsel may also engage with corporate employees on a daily basis on a wide variety of topics. Nevertheless, communications are not magically imbued with attorney-client privilege simply because a participant is admitted to the bar. Pragmatically, it is sometimes difficult to establish a clear demarcation between roles, so the attorney-corporate communication may have a "blended" legal and business purpose.

Although attorney-corporate-client privilege extends to communications involving both in-house and outside counsel, in reality, courts scrutinize communications with in-house counsel more carefully than those with outside counsel for several reasons. Outside counsel are often presumed to have been retained because of their legal expertise to provide specific legal services. On the other hand, in-house counsel often wear many hats in a company. Frequently an in-house counsel has greater awareness of the business interest of the company than outside counsel, and primarily serves those interests. Also courts have been somewhat concerned that corporations may try to use the mere presence of in-house counsel to cloak non-confidential communications in secrecy.

Analytically, it may prove useful to ask whether communications involving in-house counsel (1) are privileged because in-house counsel has provided legal services to the corporation; (2) are privileged because in-house counsel has served as the corporate speaker in communications with the outside counsel that enable the corporation to obtain legal advice; or (3) are not privileged because, despite having a legal license, in-house counsel has communicated with the directors, shareholders, a management team, or fellow employees, in a nonlegal capacity or for a purpose other than providing legal services.

### Communicating with a Corporate Client

The attorney-corporate-client relationship



is between an attorney and a *corporation*, not the corporation's board of directors, shareholders, or employees. The privilege remains with the corporation despite a change in corporate structure, ownership, or control. Therefore the person who decides whether to assert or waive the privilege may not have participated in the attorney-client communication or have a relationship with

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the actual person who communicated with an attorney on behalf of the corporation's behalf. Nevertheless, a corporation cannot communicate without human facilitators. Accordingly, counsel's communications with the corporation's human constituents will have attorney-client privilege protection if they meet the requisite criteria. Further, the corporation, not the actual corporate communicator, maintains the right to assert or waive the privilege.

The parameters of the attorney-corporate-client privilege create the most acute problem when counsel, acting as counsel, conducts an internal investigation *for the purpose of rendering legal advice*, in which the interests of the corporation and the individual actor may diverge. For example, counsel may investigate fraud or defalcation charges within the corporation by interviewing corporate insiders, in the course of which the insiders may divulge inculpatory information. Nevertheless, it is the corporation's prerogative to waive its attorney-client privilege for those communications despite the possible criminal or civil exposure to the person who conveyed the information.

In some circumstances an attorney may have an attorney-client relationship with both the corporation and the corporate speaker. Importantly, however, a corporate speaker should not assume dual represen-

tation exists, nor should an attorney imply that he or she represents both the individual and corporation if dual representation does not truly exist.

#### Waiver

Individuals control their own speech and acts. Therefore, to a large extent, they also control their own destiny when it comes to waiving the attorney-client privilege. Corporate clients, by nature, may have less control. Even when a corporation has a "corporate policy" to protect confidential communications, unauthorized statements may sometimes slip through the cracks. Additionally, regulatory or filing requirements sometimes oblige corporations to disclose otherwise privileged information to government entities, shareholders, and auditors.

Waiver is the other side of the privilege-policy coin. The purpose of the attorney-client privilege is to encourage full communication between client and attorney so that a client can receive counsel's fully educated advice. However, the privilege at time deprives an adversary of highly relevant information, which would have been discoverable had it not been conveyed within the sanctity of the attorney-client relationship. To prevent inequity, a corporation may not selectively invoke the privilege so that it only applies to certain communications on a subject or only for certain purposes. From this concern for inequity comes the well-worn axiom that the privilege is intended as a "shield," not as a "sword."

It is, of course, up to a client to decide whether to deliberately waive a privilege—for example, by testifying about the substance of a communication, distributing the communication beyond the attorney-corporate-client circle, or incorporating the communication into a publicly available document. Our job is to advise our clients about the potential risks that emanate from waivers, as well as their potential scope, so that they can make educated choices.

Sometimes a corporate client accidentally can waive the attorney-corporate client privilege. For example, in litigation, a corporation may seek to justify actions it took as based upon the advice of counsel. Under that circumstance, a corporation puts an attorney communication "at issue," and a court may permit an adversary fur-

ther inquiry beyond the initial, limited disclosure by the corporation. Defense counsel should carefully advise their corporate clients about an "at issue" waiver with great particularity when proposing a litigation strategy that could lead to such a result.

Sometimes waiver may result if, despite a communication's origination within an attorney-client relationship, a corporation ceases to treat it as privileged. Examples could include filing a privileged document in a general file, available to employees who would have no interest in the subject matter, or sharing privileged material with individuals deemed beyond the attorney-corporate-client relationship parameters, such as corporate employees who may have interests that diverge from those of the corporation.

Sometimes, if a privileged communication "escapes," becoming public, the escape will serve as a waiver, even if it was inadvertent or unintentional. Unintentional disclosure can occur in a variety of circumstances, such as inadvertent production of privileged material in discovery, careless treatment of privileged documents in a public space, or unauthorized employee, or ex-employee, discussion of privileged material in person, in writing, or online. Some courts determine whether a waiver has occurred based on the reasonableness of a corporation's efforts to maintain the privilege and to promptly identify and ameliorate a release mistake. Others, recognizing that when something becomes generally known, it cannot be "un-known," consider the damage done and deem the privilege waived.

#### Work Product Doctrine Distinguished

The work product doctrine is distinct from attorney-client privilege, but they are often raised in tandem. Their protections are not coextensive, therefore, you should present arguments about them independently. Briefly, the work product doctrine protects documents prepared by an attorney in anticipation of, or in the course of, actual litigation, for the purpose of analyzing and preparing a client's case. The attorney owns the work product privilege. *Sandra T.E. v. South Berwyn School District 100*, 2009 U.S. App. Lexis 28983 (7th Cir. Feb. 24, 2009).

As codified in FED. R. CIV. P. 26(b)(3)(A), documents and tangible things prepared by a party or its representative in antici-

pation of litigation or for use at trial may not be discovered, *unless* they would be otherwise discoverable, and the adversary seeking disclosure can demonstrate “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” By definition, work product protection extends beyond attorneys to any qualifying document prepared by a party or its representative.

The dual purpose of the work product doctrine is to protect an attorney’s thought processes and mental impressions and prevent a lazy adversary from obtaining the benefit of the work performed by a more diligent adversary. *See* Gergacz, *Attorney-Corporate Client Privilege* §7.04:7-5-7-6, §7.10:7-12N7-13 (3rd ed. 2001). Accordingly, even if an adversary meets its burden of substantial need, FED. R. CIV. P. 26(b)(3)(B) requires that a court *must* protect against disclosure of the attorney’s “mental impressions, conclusions, opinions, or legal theories....”

As with attorney-client privilege, courts more carefully scrutinize the application of work product protection to in-house counsel’s work than to outside counsel work. In-house counsel’s multiple roles weakens the assumption that in-house counsel’s documents were prepared in anticipation of litigation, rather than in another capacity. *See* Gergacz, *Attorney-Corporate Client Privilege* §7.20:7-27-7-26 (3rd ed. 2001).

## Recent Developments

A recent Supreme Court decision about appellate review of adverse privilege orders, the 2008 amending of the Federal Rules of Evidence, and a change to FED. R. CIV. P. 26(b)(5)(B) are important for counsel to understand when considering the attorney-corporate-client privilege.

### Appellate Review of Adverse Privilege Orders

Recently, the Supreme Court reaffirmed “the importance of the attorney-client privilege, which ‘is one of the oldest recognized privileges for confidential communications.’” *Mohawk Industries, Inc. v. Norman Carpenter*, 130 S. Ct. 599, 606 (Oct. 5, 2009) (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)). It stated, “By assuring confidentiality, the privilege encourages

clients to make ‘full and frank’ disclosure to their attorneys, who are then better able to provide candid advice and effective representation.” *Mohawk Industries*, 130 S. Ct. at 606 (citing *Upjohn*, 499 U.S. at 389 (1981)). Elaborating further, the Supreme Court wrote, “This in turn, serves ‘broader public interests in the observance of law and administration of justice.’” *Id.* Despite this ostensibly enthusiastic endorsement of the policy rationales for the attorney-client privilege, the Supreme Court’s decision functionally relegated it in favor of efficient judicial administration.

In *Mohawk Industries*, the Supreme Court addressed a conflict among the circuits about whether a litigant could immediately appeal an adverse ruling concerning the attorney-client privilege under the “collateral-order doctrine.” The Court concluded that a litigant could not because the disclosure of arguably privileged material could be adequately redressed on appeal of the final judgment, at which time the court could exclude the material from a retrial of the case.

In the underlying case, defendant Carpenter claimed that he had been wrongfully discharged as a result of an email that he sent to a Mohawk human resources employee, alleging that Mohawk employed undocumented workers, and his refusal to recant that claim during his meeting with Mohawk’s counsel concerning an unrelated class action that alleged that the company hired undocumented workers to artificially deflate prevailing wages. In the class action, Mohawk disclosed facts concerning Carpenter’s termination, including the result of Mohawk’s lawyer’s investigation, demonstrating that Carpenter had been fired because he had, himself, attempted to hire an undocumented worker, as well as the company’s conclusion that Carpenter’s claims were “pure fiction.” Carpenter sought discovery in his wrongful termination litigation concerning his meeting with Mohawk’s counsel and the company’s termination decision. Mohawk claimed that the documents were privileged. The district court agreed with the Carpenter’s assertion that Mohawk had waived the privilege through its disclosure in the class action. The district court declined to certify its decision for interlocutory appeal, but, recognizing the serious impact of its waiver finding, stayed discovery while Mohawk Industries sought other

avenues of review. A collateral order appeal to the Eleventh Circuit was dismissed for lack of jurisdiction, and the Supreme Court accepted the case.

The Supreme Court concluded that orders that deny attorney-client privilege protection should *not* be immediately appealable under the collateral-order rule. The Court found that the efficient administration of justice through the single appeal rule, outweighed the “burden” that litigants faced when their rights were only “imperfectly reparable” on appeal. The Court rejected the argument by Mohawk that since the attorney-client privilege proscribes disclosure, and not just the use of material at trial, appeal after the final judgment was no remedy at all. The Court opined that deferring appeal would not “chill” open communication between clients and their counsel, which is the privilege’s purpose. Accordingly, the Court stated that the “breadth of the privilege and the narrowness of its exceptions will thus tend to exert much greater influence on the conduct of clients and counsel than the small risk that the law be misapplied,” although the Court acknowledged that it might have decided to the contrary if faced with some evidence of gross misapplication of the privilege in the lower courts.

The Court enumerated other avenues for immediate review that it believed were feasible if a litigant confronted a “particularly injurious or novel privilege ruling.” First, a litigant could apply for an interlocutory appeal if “the issue addressed a controlling question of law, the resolution of which will advance termination of the litigation.” Alternatively, the court recommended that the aggrieved party simply defy the court order and refuse disclosure, incurring court-imposed sanctions, such as an adverse inference, preclusion from offering evidence on the subject, struck pleadings, or a finding of contempt. Sanctions would then permit “a party to obtain post-judgment review without having to reveal its privileged information” as, under many circumstances, contempt findings and other punitive rulings, would be immediately appealable, as would the underlying order. Indeed, the Court stated, “These established mechanisms for appellate review not only provide assurances to clients and counsel about the security of





their confidential communications, they also go a long way toward addressing Mohawk's concern that, absent collateral order appeals of adverse attorney-client privilege, some litigants may, experience severe hardship." *Mohawk Industries*, 130 U.S. at 608.

It is unclear, however, that deliberately courting severe repercussions will alleviate the hardship imposed on a party forced to

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choose between waiving its attorney-client privilege or defying a court's orders, both bad alternatives.

In jurisdictions that do not permit immediate interlocutory appeals of privilege rulings, eventual reversal of an adverse privilege ruling may be a pyrrhic victory, at best. Unless a court stays discovery, the contents of the privileged communications will be made known to the corporation's adversary, and potentially, the public at large, even if that adversary later cannot use it at a retrial. In this writer's opinion, it borders on flippancy to suggest that parties should simply defy court orders to invite extreme sanctions in hopes that a reviewing court will overlook their willful refusal to participate in discovery and reverse the underlying ruling on privilege. Moreover, encouraging parties to defy court orders does not seem to serve the interests of efficient judicial administration, which is the policy elevated over attorney-client privilege in *Mohawk Industries*.

#### **Fed. R. Evid. 502 and Waiver**

In 2008, the Federal Rules of Evidence were amended to add Rule 502 limiting the inadvertent waiver of attorney-client privilege and work product protection in the course of federal litigation. The committee note to the amendment indicates that it had two major purposes, which the committee hoped would facilitate predictable, uniform standards that parties could rely on to determine the consequences of disclosure.

First, the rule intended to resolve "long-standing disputes" in the courts about

when disclosure of attorney-client protected material would result in subject matter waiver. Second, the rule intended to respond to "widespread complaint" of skyrocketing litigation costs incurred to identify and segregate privileged material in light of mandatory disclosure and e-discovery. See FED. R. EVID. 502 Committee Note (citing *Hobson v. City of Baltimore*, 232 F.R.D. 228, 224 (D. Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation")).

Although FED. R. EVID. 502 does not address the substantive law of privilege or waiver, it significantly changes the concept of waiver and inadvertent disclosure, which affects both federal and state practice. Before counseling your corporate clients, you should carefully review it, if you have not already.

The rule addresses disclosure made in a federal proceeding, or significantly, to a federal office or agency. A waiver both of privilege and protection, extends to undisclosed communications or information in a separate federal or state proceeding only if (1) the waiver is intentional; (2) the disclosed and undisclosed information concern the same subject matter; and (3) the disclosed and undisclosed information "ought in fairness to be considered" together. See FED. R. EVID. 502(a). Conversely, inadvertent disclosure will not invoke a waiver of privilege in either federal or state proceedings when (1) the disclosure is inadvertent; (2) the holder of the privilege took reasonable steps to prevent disclosure; and (3) the holder took reasonable steps to rectify the error. See FED. R. EVID. 502(b).

The rule provides that disclosure in a state proceeding will not act as a waiver in a federal proceeding if the disclosure would not waive privilege or protection either under federal law or under the law of the state where the disclosure occurred. See FED. R. EVID. 502(c).

The rule applies to both federal and state proceedings by providing that a court order or an agreement by the parties that is incorporated into an order, will prevent waiver in any ensuing federal or state pro-

ceeding and that the rule controls waiver in state proceedings and federal court mandated arbitration, notwithstanding if state law otherwise constitutes the substantive law of privilege. See FED. R. EVID. 502(d)-(f). See also FED. R. EVID. 501. Finally, the rule provides broad, general definitions of attorney-client privilege and work product protection consistent with existing legal principles. FED. R. EVID. 502(g).

Notably missing from FED. R. EVID. 502 is a definitive rule about "selective waiver." Selective waiver permits a corporation to cooperate with the government by providing privileged communications, such as communications about an internal investigation, without risk that an adversary will later have the ability to discover the material in litigation. However, deeming the issue too controversial, the Advisory Committee deleted the original selective waiver provision from the rule. See *Selective Waiver Absent From New FRE 502*, Federal Evidence Review, Sept. 23, 2008, <http://federalevidence.com/print/177>.

#### **Codification of "Claw Back" Agreements**

Another amendment designed to respond to the burden of e-discovery in a fast-paced, legal environment was the change made to FED. R. CIV. P. 26(b)(5)(B) on handling privileged material that is inadvertently produced. The provision codifies the recommendation by many that parties agree to a mechanism through which they return inadvertently produced privileged material to the producing party. See, e.g., *The Sedona Principles*, 2007 Annotated Version, §10 (a): 156-160. As noted, by the Sedona Conference, however, FED. R. CIV. P. 26(b)(5)(B) only provides a mechanism to identify and return mistakenly produced privileged material, but it does not address waiver. For that, federal practitioners should resort to FED. R. EVID. 502 orders or so-ordered agreements.

In practice, both FED. R. EVID. 502 and FED. R. CIV. P. 26(b)(5)(b) may take some of the sting out of inadvertent disclosure, which results from the modern disclosure burden and the velocity with which it occurs. Although, they cannot put the "genie back in the bottle," these rules do bring some predictability to some waiver issues across different forums and geographical boundaries.

## Is the Privilege in Retreat?

Some believe that the attorney-corporate client privilege has been eroded broadly. See, e.g., William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621 (2006); Association of Corporate Counsel, *Executive Summary, Survey: Is the Attorney-Client Privilege Under Attack*, Apr. 6, 2005, available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/hackett1.pdf>; *The Decline of the Attorney-Client Privilege in the Corporate Context, Survey Results* (Association of Corporate Counsel Nov. 2005), <http://www.acc.com/legalresources/surveys/index.cfm>; then follow “3”; then follow “The Decline of the Attorney-Client Privilege.”

The decline has been attributed to many factors. For one, the first decade of the twenty-first century witnessed some of the worst corporate scandals in American history. In response, many Americans have confused a corporation’s right to confidential legal counsel with the public need for corporate transparency. The accompanying presumption has been that a corporation would not assert privilege for communications with its counsel if it had nothing to hide.

Also, new corporate regulations, such as Sarbanes-Oxley and augmented auditing requirements, have imposed new disclosure requirements, which often apply to privileged communication. At the same time, government investigators have increasingly, and according to some, too aggressively required corporations to waive the privilege as terms of agreement with the government.

The unpredictability erodes the ability of corporations to confidently rely on privilege assertion. The cost of voluminous, fast-paced e-discovery may cause a corporation inadvertently to disclose privileged material, which can require a corporation to conduct a cost-benefit analysis to determine if fighting for privilege protection is worthwhile, sometimes even when a communication clearly was intended as confidential, and therefore, privileged. Indeed, some corporations resolve to pay in terrorism settlements in civil litigation rather than risk an adverse ruling and publication of privileged material.

## Conclusion

Privileged communication assists corporations to obtain meaningful legal advice on a variety of topics, including preventing corporate malfeasance from occurring or continuing. Maximizing privilege protection is particularly acute when in-house counsel is involved. Although the suggestions about measures that you and your clients can implement to try to preserve attorney-corporate-client privilege is not exhaustive, they offer a starting point.

- Identify attorney-client communications as such, at the outset, and make sure that every communication participant knows that these communications fall in that category. If communicating verbally, an attorney should advise others with whom he or she communicates that he or she is the corporation’s attorney and speaking in that capacity. Label written communication “attorney-client communication—privileged.” If privilege originates with in-house counsel, clearly define in-house counsel’s legal role.
- An adversary may discover e-mails, tweets, blogs or other electronic media; therefore, they are subject to the same privilege rules that apply to traditional communications. Corporations may wish to develop social media policies that limit employees’ use of social media in the workplace and prohibit employees from making unauthorized statements about corporate policies or other issues in their personal blogs or other personal social media forums.
- Handle all communication in a way that demonstrates that an attorney, or client, initially intended the communication as confidential, and as such, privileged, and that a reasonable effort was made to maintain the privilege. If communicating verbally, do not communicate in the presence of third parties or discuss a communication’s content with third parties. Likewise, judicially share written communications only with employees who need to know their contents due to their corporate roles.
- In preserving privilege, the role of a corporate employee participant is as important as that of the lawyer. Counsel should share privileged communications with corporate directors, in their

formal company roles only, not in their individual capacities.

- A corporation may develop and enforce document preservation policies that secure potentially privileged materials from casual access by unauthorized employees.
- A corporation may develop internal “protocols” about who may officially speak on behalf of the corporation on matters of controversy.
- Counsel who provides both legal and business advice should consider maintaining separate legal and business files for all work matters. In-house counsel especially should try to delineate in what capacity he or she provides advice or services in each matter, and whether that advice is of a legal or business nature.
- Counsel should become familiar with attorney-client privilege standards and case precedent in each state in which a corporation has a substantial presence and advise the corporation to meet the toughest standard.
- Counsel should assess privilege issues as soon as litigation is contemplated. Counsel may wish to explore agreements or orders as contemplated by FED. R. CIV. P. 26(b)(5)(B) and FED. R. EVID. 502 at the earliest litigation stage. Remember that you must obtain either a court order or “so ordered” agreement to bind absent third parties.
- Counsel should carefully consider and advise about the possible waiver issues that may result from following a proposed litigation strategy. While this most commonly arises in connection with “at issue” defenses, other strategies could also impact whether a corporation’s proposed strategy will result in a privilege waiver.
- An extremely aggressive, adversarial posture on attorney-client privilege and waiver against an adversary could work against a corporation. In other words, people in glass houses should not throw stones.
- When a corporation needs to conduct an internal investigation, consider forming a “special corporate investigation team” to which counsel could report and which could act on recommendations without disclosing privileged information to a potential target of the investigation.

**Waiver**, continued on page 91

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**Waiver**, from page 73

- A corporation should consider the potential consequences of decisions to waive privilege in a governmental investigation so that it can make educated assessments of the risks involved and

the potential impact it may have on subsequent actions.

And now, back to Any Corporation, Inc., and its attorney-client privilege issues:

The correct answer about which of those

communications are subject to attorney-corporate-client privilege protection is all of them, or none of them, or most accurately, it depends!

