

Health Law Webinar

Understanding and Protecting Legal Privileges

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Attorney-Client Communication Privilege

- To establish that the protections of the attorney-client communication privilege exist, there must be:
 - communications
 - between lawyer and client
 - that are confidential
 - and remained confidential
 - made for the purpose of seeking or giving legal advice.

Who is the Lawyer?

- Corporate Counsel
- Outside Counsel
- Agents or “Representatives” of the Attorney?
 - Accountants
 - Investigators
 - Consultants
 - Patent Agents
 - Special Counsel
 - Paralegals/Staff

Who is the Client?

- Agents or Representatives of the Client
- Employees
- Consultants/Independent Contractors
- Accountants
- Appraisers

What's Protected?



- Mixing business and legal advice is the biggest risk to privilege for in-house lawyers.
 - Some courts require a “clear showing” of legal vs. business purpose.
 - Think before you email!
 - In-house attorneys should send separate emails for business and legal analyses, even on the same subject.
 - Board minutes should note when discussions are held with company counsel under privilege.

What's Protected?



- **Attorney-Client Privilege**
 - Communications must be between employees and the company's attorney in order to give or receive legal advice.
 - Information must involve matters within the scope of the employees' company duties.
 - Employees must be aware that the purpose is to facilitate legal advice to the company.
 - Communications must be designated confidential when made and must remain confidential.
- The privilege does **not** protect disclosure of **underlying facts** or non-lawyer **management communications** about the investigation.
- Merely copying a lawyer doesn't create privilege.

Common Interest / Joint Defense Agreements

- Joint Defense Agreements: primary purpose has been to facilitate efficient, effective case preparation by similarly-situated criminal defendants.
- Their use has expanded into non-criminal areas, like civil litigation and even non-litigation matters.

Waiving Privilege

- Waivers of privilege can be advertent or inadvertent.
- Inadvertent Waivers
 - Careless Disclosures (usually not curable)
 - Inadvertent Disclosures (often curable)
 - Failure to object to disclosure
- Email snafus: beware replies and forwards!

Limited Waivers

- Selective Waiver
 - Doctrine that you can choose to waive privilege as to some parties, but not others.
 - 8th circuit is very lonely in accepting the idea of “selective waiver.”
- Partial Waiver
 - Doctrine that you can waive privileged for some parts or aspects of an email or an investigation but not others.
 - Courts are more sympathetic to this concept.

Managing Third Party Communications



Use caution when disclosing investigation summaries, advice, or memos to third parties.

- Government and Government Agencies:
 - Such disclosures could waive privilege as to the entire matter.
 - Such disclosures could waive privilege as to other agencies and private parties.
 - Disclose only underlying facts.
- Auditors:
 - Such disclosures usually waive privilege.
- Insurance Companies:
 - Communications with insurers may be protected under the common interest doctrine.

Advice of Counsel Defense

- Invoking the advice of counsel defense typically waives privilege.

I never directed Michael Cohen to break the law. He was a lawyer and he is supposed to know the law. It is called “advice of counsel,” and a lawyer has great liability if a mistake is made. That is why they get paid. Despite that many campaign finance lawyers have strongly.....

— Donald J. Trump (@realDonaldTrump) [December 13, 2018](#)

The Work Product Doctrine



Understand what's protected and what isn't.

- **Work Product**

- Applies to work product created by or at the direction of company attorneys.
- Includes only documents prepared “in anticipation of litigation.”
- Weaker than privilege: Can be overcome with a showing of “substantial hardship.”
- Greater protection for attorney opinions or mental impressions.

Labelling Documents Accurately



- Investigation reports and memos should:
 - state that the purpose of the investigation is to gather information to provide legal advice
 - identify any actual or anticipated litigation or government investigations creating work product protection
- Don't “over” or “under” label.
 - Labeling everything “privileged” makes all privilege designations suspect.
 - Using the “work product” designation could trigger document preservation and litigation hold notification requirements.

Physician-Patient Privilege

- Not the same as doctor-client confidentiality.
- Elements include:
 - Context must be actual physician and patient relationship.
 - Only information actually needed for medical care is shielded.
 - Patient must have expectation of privacy.

Peer Review Protection

- Protection not privilege.
- Scope depends on the state statutory scheme.
- Public policy: encourage physician participation in quality improvement activities.

Peer Review Protection

- Two components:
 - Immunity from being liable (but not suit).
 - Privilege/protection of information.

Peer Review Protection

- Protects medical facilities' peer review proceedings.
- Which facilities depends on the statutory scheme you're using.
 - Always hospitals.
 - Sometimes other providers and/or insurers.

Health Care Quality Improvement Act (HCQIA)

- Immunity when professional review actions (i.e., actions related to privileges):
 - Reasonable belief that the action was in the furtherance of quality health care;
 - After a reasonable effort to obtain the facts;
 - After providing procedures that are fair under the circumstances; and
 - Reasonable belief that the action was warranted by the facts.
- Immunity for NPDB reports so long as the report is true, or if not, was made without knowledge of the falsity of the information contained in the report.

State Law

- All 50 states (and D.C.) have some form of peer review protection.
- All 50 states have an immunity provision.
 - Often similar to the HCQIA standards.

State Law

A health care organization, health care provider, or member of a peer review organization is not liable in damages to any person for any action taken or recommendation made regarding a professional peer review, if the health care organization, health care provider, or member of the peer review organization acts **without malice and in the reasonable belief that the action or recommendation is warranted by the facts known** to the health care organization, health care provider, or member of the peer review organization.

N.D.C.C. § 23-34-06(2).

State Law

- Nearly all states (and D.C.) also protect the discoverability of the peer review process and use of documents.

State Law

[D]ata and information acquired by a review organization... **shall be held in confidence, shall not be disclosed to anyone** except to the extent necessary to carry out one or more of the purposes of the review organization, and **shall not be subject to subpoena or discovery. No person** described in section 145.63 **shall disclose what transpired at a meeting of a review organization** except to the extent necessary to carry out one or more of the purposes of a review organization. **The proceedings and records** of a review organization **shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization.** Information, documents or records otherwise available from **original sources** **shall not be immune from discovery or use in any civil action** merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person's knowledge, but a witness cannot be asked about the witness' testimony before a review organization or opinions formed by the witness as a result of its hearings...

Minn. Stat. § 145.64, subd. 1(a).

State Law

- Exceptions (varies by state):
 - Practitioners seeking information about their own practice.
 - Use in federal court in federal question cases.

State Law

The restrictions in subdivision 1 shall not apply to **professionals requesting or seeking through discovery**, data, information, or records **relating to their medical staff privileges, membership, or participation status**. However, any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding than those brought by the professional to challenge an action relating to the professional's medical staff privileges or participation status.

Minn. Stat. § 145.64, subd. 1(a).

State Law

- Waiver:
 - Some states' statutes specifically address waiver. Some don't.
 - Some states hold that the peer review privilege cannot be waived (e.g., Tennessee).
 - Some states that the peer review protection is waivable (e.g., Missouri, South Dakota).

Presenters



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