

Mythbusting the Attorney-Client Privilege (and Other Privileges)

Presenters:

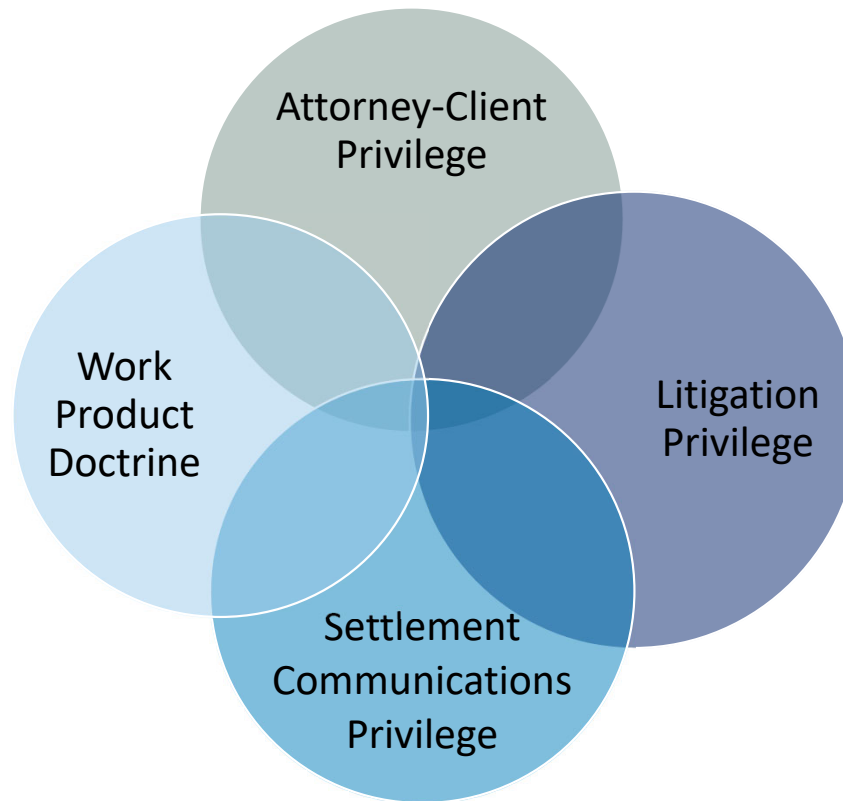
Francesco Salpietro, Jessica Farmer, Christopher DeLacy

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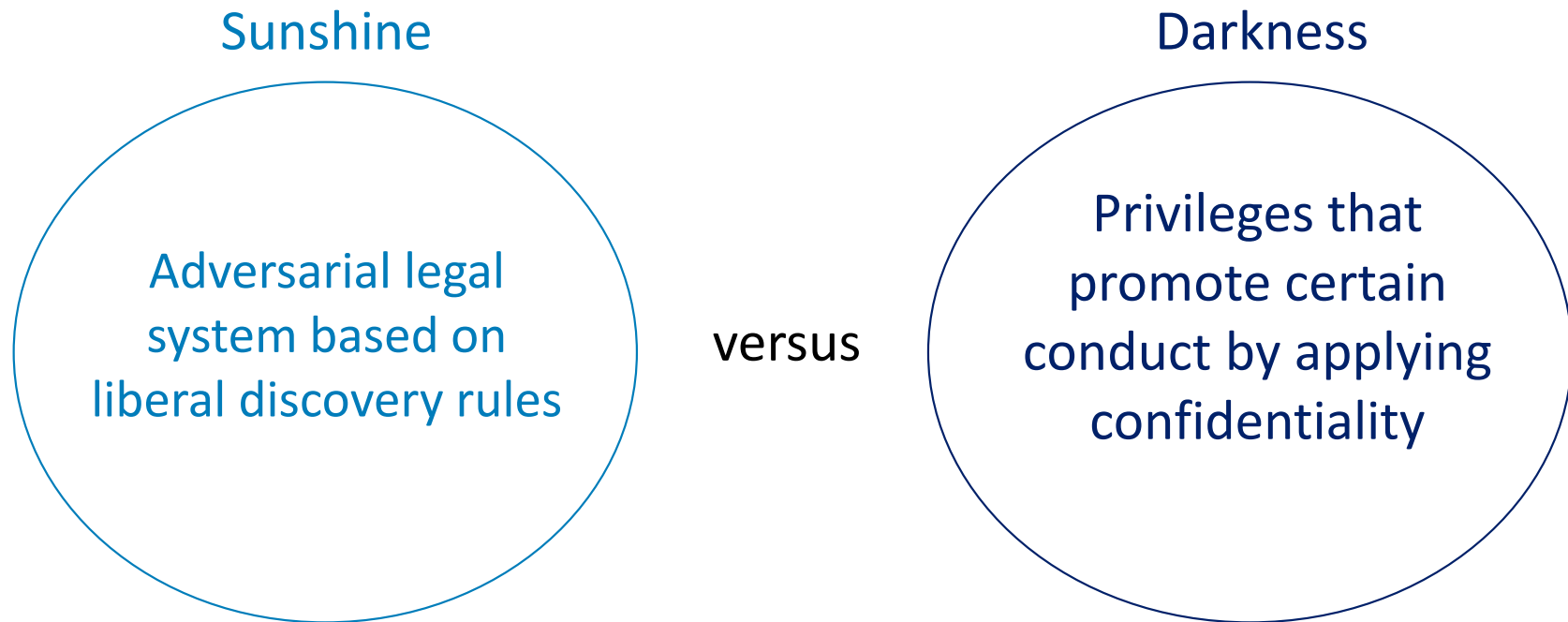
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Types of Privileges



Inherent Tension between Discovery and Privileges



Attorney-Client Privilege vs. Work Product Doctrine

	When does it apply?	What does it protect?
Attorney-Client Privilege	From attorney consultation through end of engagement.	Confidential oral and written communications between attorney and client.
Work Product Doctrine	Only when litigation is pending or reasonably anticipated.	Documents prepared or assembled by attorneys or staff/client at attorney's direction (e.g., witness statements, memos to file, fact chronologies, communications).

This is why the work product doctrine typically does not apply to corporate/transactional attorneys.

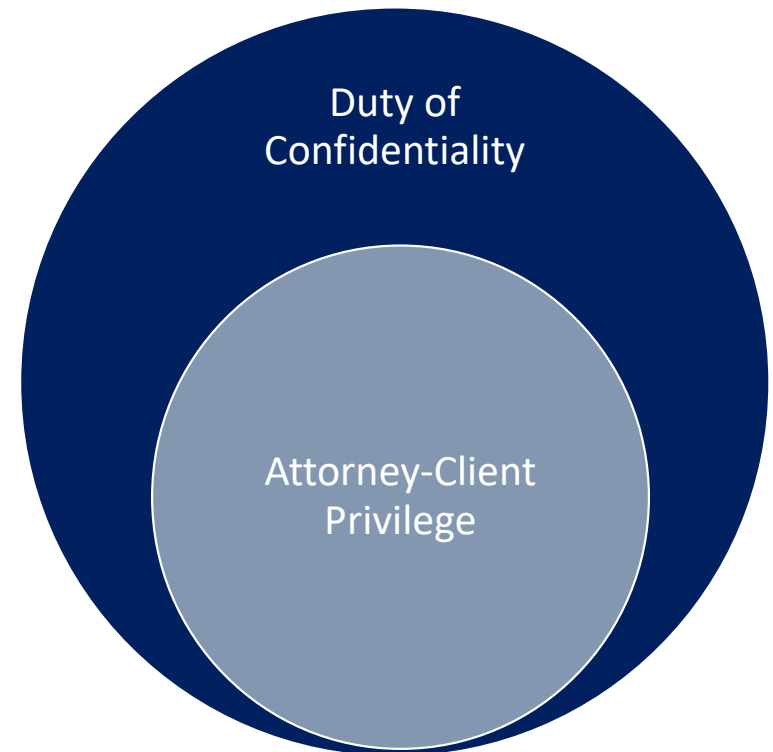
Elements of the Attorney-Client Privilege

- As a general matter, the attorney-client privilege protects:
 1. a communication,
 2. made between privileged persons (i.e., attorney, client or agent),
 3. in confidence,
 4. for the purpose of obtaining or providing legal advice.
- Make sure to check your state's applicable privilege statute and evidentiary code.

Ethical Obligation vs. Evidentiary Rule

Duty of confidentiality is broader than attorney-client privilege.

- **Duty of Confidentiality**: Ethical duty that lawyers owe their clients to not reveal information relating to the representation.
 - “A lawyer shall not reveal information relating to the representation of a client . . .”
 - information ≠ confidential communication
- **Attorney-Client Privilege**: Evidentiary rule that keeps confidential communications between a client and his or her attorney secret.
 - As evidentiary matter, presumption favors compulsion to reveal relevant evidence, and burden initially falls on party claiming privilege to satisfy privilege test.
 - Determinations of privilege are highly fact dependent.



Myth No. 1

Only the board of directors and management can claim a communication as privileged.

Reality

- Most corporate employees (and sometimes third-party contractors who are hired for a privileged purpose) can invoke a privilege. **However, only those authorized to bind a corporation can waive any of the applicable privilege (including the attorney-client privilege).**
- *But see, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).*
 - **The Garner Doctrine**: Because the board and management are fiduciaries, a corporation's shareholders (*i.e.*, the beneficiaries of the fiduciary duty) may get access to legal advice that was the basis for actions taken purportedly on their behalf.
 - **Garner Test**: Shareholders must show "good cause." Courts examine multiple factors including: (1) number of shareholders making request, (2) percentage of shares represented, (3) the nature of the claim, (4) the shareholders' bona fides and (5) whether shareholders are blinding fishing

Myth No. 2

The corporation's privilege lasts forever.

Reality

- Unlike a person's privilege, a corporation's attorney-client privilege does not always survive death.
- Type of corporate "death" can matter: acquisition, dissolution, defunct business, bankruptcy, etc.

Does the Privilege Survive Corporate “Death”?

- **Individuals**: The U.S. Supreme Court and most states take the position that the attorney-client privilege survives the death of the client.
- **Corporations**: If the client is a corporation, it depends (and the analysis is always fact-specific):
 - **Dissolution**: Generally, attorney-client privilege does not survive dissolution because no person can act on its behalf. But many courts hold that continued existence of a dissolved or defunct (ceases normal business operations, i.e., windup phase) corporation’s privilege turns on whether anyone has authority to assert or waive the privilege, and there is a compelling reason to assert it.
 - **Bankruptcy**: May depend on type of corporate entity and bankruptcy chapter under which it is filed (7, 11, 13). Trustee may become holder of the privilege entitled to assert or waive it (steps into the shoes of former manager).

What about Corporate Acquisitions?

- When control of corporation passes to new management, authority to assert (or waive) the attorney-client privilege typically also passes to new management.
 - Arises when new management installed as a result of a takeover, merger, loss of shareholder confidence, or normal succession.
 - New management may waive the attorney-client privilege with respect to communications made by former officers or directors.
- **Delaware Chancery Court**: Corporate privilege transfers to surviving company unless sellers take affirmative action to prevent transfer of those privileges. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP*, 80 A.3d 155 (Del. Ch. 2013).
- The Delaware Chancery Court held that buyer could not use pre-merger attorney-client communications in post-closing litigation against the sellers because the merger agreement expressly preserved sellers' ability to assert privilege. *RSI Holdco, LLC*, 2019 WL 2290916 (Del. Ch. May 29, 2019).

✓ **Practice Tip**: To avoid any doubt, acquisition documents should expressly provide that acquiring company/new management will or will not inherit privilege.

What about Internal Reorganizations?

- The Joint-Client Doctrine (see In re Teleglobe Commc'ns Corp., 493 F.3d 345 (CA3 2007))
 - A corporation must prove a “common interest” between parent and subsidiary
 - The interest must be “identical or nearly so in order that an attorney can represent them all with candor, vigor, and loyalty that our ethics require”.
- In Robinson Mech. Contractors Inc. v. PTC Group Holding Corp., 2017 WL 2021070 (E.D. Mo. May 12, 2017), a holding company and a dissolved subsidiary retained a single lawyer – a single legal department.
 - Why? Because duties (fiduciary or otherwise) owed to subsidiaries flow back up to the Parent.
- ✓ • **Practice Tip:** Consider an engagement agreement naming all subsidiaries for outside counsel (and consider memorializing the joint-interest through internal memoranda, too).

Myth No. 3

An attorney taking a deposition cannot compel the witness to disclose which documents she reviewed with her attorney to prepare for the deposition.

Typical Exchange at Deposition

- Q: Mr. Jones, did you do anything to prepare for today's deposition?
- A: Yes. Yesterday I met with my attorney for several hours.
- Q: Did you review any documents during that meeting?
- A: Yes.
- Q: What documents did you review?
- You: **Objection! I am instructing the witness not to answer because the question calls for attorney work product.**

Reality

- **Most courts hold that this type of objection is not proper.**
 - Attorney-Client Privilege? No, because selecting documents is not a “communication.”
 - Attorney Work Product? No (in most jurisdictions). Majority view is that “the mere selection and grouping of information by counsel for a deponent to review does not automatically transform otherwise discoverable documents into work product.”
 - A discussion of **how** the document was used – including whether it leads to a legal conclusion (vs. **outlining a sequence of events**) will likely be considered privileged.
 - **What if one of the documents is itself attorney work product?**
 - Protection may be waived
 - Except for pure opinion work product, “any work product protection [is] lost when the witness specifically relie[s] on the document in preparation for his deposition.”
 - If document refreshed the witness’s recollection, general rule under Federal Rule of Evidence 612 is that opposing party may “cross-examine the witness about it,” even if work product.
- ✓ **Practice Tip:** (1) When preparing for a deposition, do not review just a few “hot” documents. Instead, be more balanced and comprehensive. (2) Be careful about using work product materials when preparing.

Myth No. 4

The attorney-client privilege protects all communications between a client and the attorney.

Reality

- **Even though a relationship has formed for the purpose of seeking legal advice, many communications between client and lawyer are not privileged.**
- **Examples of non-privileged communications:**
 - Business, scientific, public relations, or other types of non-legal advice
 - Whether *legal* advice is sought is fact-intensive requiring communications to be viewed separately
 - Communications about client's schedule, availability for a deposition or other administrative matters
 - Lawyers present at corporate meetings and engaged in non-legal corporate business (no legal advice)
 - Courts are wary of “funneling” sensitive, but non-legal, documents to/through corporate lawyers with copy to non-legal personnel, and then claiming all documents are privileged
 - Transmittal emails or letters that do not reveal client confidences
 - Attorney observations such as client's appearance, coherence, etc. (does not involve communications)
 - Any advice from a lawyer for the purpose of committing (or hiding) a crime will not be privileged.

Reality (Cont'd)

- **More examples of non-privileged communications:**

- Preexisting documents—created independent of relationship—that lawyer gives to or receives from a client
- Reports regarding status of litigation and containing purely factual information
- Identity of client
- Location or address of client
- Billing information that does not reveal attorney mental impressions (time expended, general nature of work, etc.)

✓ **Practice Tip:** Don't be overzealous when preparing privilege logs - an in camera review may be conducted. And under Rule 26 (certification as to the factual and legal basis for privilege assertion) and Rule 37 (compelled discovery) sanctions and fees must be imposed by the court. If it's a close call, always refer back to elements of the privilege.

Myth No. 4 (Cont.): Are facts privileged?

- **Generally, No.**

- While facts themselves are not privileged, a confidential attorney-client communication that includes or discusses facts may be privileged if it otherwise meets the necessary elements.
- Underlying facts are independently discoverable, but a party is not entitled to discover privileged communications concerning legal advice simply because the documents also contain facts.
- Privilege protects a client from disclosing whether she communicated facts to her attorney.

✓ Practice Tip: If a deposition question or a discovery request would require the client or attorney to reveal what the client told the lawyer or what the lawyer told the client about facts related to a transaction or a litigation matter, the question/discovery invades the attorney-client privilege.

Myth No. 5

All internal 'law firm' communications relating to a client matter are privileged.

Reality

- **Narrow Rule:**

- Attorney-client privilege protects confidential communications from the client to the attorney.
- All other communications (attorney-to-attorney) receive protection only to extent that they reveal the substance of confidential client communications.

- **Broad Rule:**

- Communications from an attorney to a client are privileged if they contain legal advice, or would reveal, directly or indirectly, the substance of a client confidence.
- Under this approach, attorney's responsive communication is protected whether addressed or sent to the client, agent of the client, agent of the attorney, co-counsel, or simply placed in a file for later reference.



Practice Tip: Try to structure exchange of information in response to client-initiated communications that can later be pointed to as the applicable underlying request for legal advice.

Reality (Cont'd)

- **This myth extends to in-house counsel.**
 - An in-house lawyer's "client" is considered to be the legal entity – and not the corporations' individual officers, directors, employees or stakeholders
 - While in-house counsel and outside counsel have capacity to receive privileged communications with their clients, A/C privilege does not automatically apply because you are talking to a lawyer
 - Courts look at the employee and the subject matter of the communication in determining whether the attorney-client privilege applies
 - To fall within attorney-client privilege protection, the communication must generally be within scope of the employee's responsibilities to the corporation, and the element of the A/C privilege must apply

Reality (Cont'd)

- **Including in-house counsel in a conversation does not, itself, create a privilege.**
 - “[A] party cannot simply “cc” their attorney to privilege a document—they must be communicating with their attorney in order to receive legal advice.” *In re Facebook, Inc. Consumer Privacy User Profile Litig.*, 655 F. Supp. 3d 899 (N.D. Cal. 2023).
 - These emails are, in most cases, neither work performed by the in-house attorney, nor work prepared at the direction of the in-house attorney.
- “Later in the chat, an employee asks about using Quip (a collaborative tool for editing documents and spreadsheets) for sensitive information... The following exchange occurs:

[Employee 1] (3/20/2018 16:43:39 PDT):

>Just ensure that if it's very sensitive you ask a lawyer for guidance in the Quip and privilege it

[Employee 2] (3/20/2018 16:44:53 PDT):

>How does one ‘privilege it’?

[Employee 3] (3/20/2018 16:45:22 PDT):

>With the presence and approval of an attorney[.]

Dkt. No. 1088-13 at 2.

Myth No. 06

**Draft documents
prepared by attorneys
for clients are
privileged.**

7.	Advertising and Publicity	LR
	a) Producer agrees to furnish a complete press kit including generic artwork for heralds and window cards electronically, if applicable. Presenter agrees to follow the Producer's instructions and properly distribute and display all materials without alteration. Producer also agrees to furnish, if prerecorded television and radio commercials. ~~Presenter agrees to use only the press materials, heralds, artwork, window cards, photographs, television and radio commercials furnished by Producer. Presenter agrees that all such materials and commercials shall be used only for the purpose of advertising the Play/Musical and, if requested, shall be returned to the Producer immediately upon completion of the Engagement. Presenter agrees that Producer shall have the right to approve the contents of all advertising and publicity materials. Presenter shall contact Producer for approval of any advertising and/or publicity materials. Presenter wishes to modify or alter (with the exception of localization).~~ Presenter agrees to indemnify Producer by reason of Presenter's breach of the provisions of this paragraph. In the event Presenter alters, omits, adds to or does not print any of the billing or other program copy or other copy as provided by the Producer, Presenter shall be liable for any penalty or liability imposed upon the Producer by all third parties including Actors' Equity Association provided proper notification of such breach has been received by Presenter. However, no casual or inadvertent failure to comply shall be considered a material breach, nor subject to the indemnity in this paragraph, if Presenter promptly makes best effort to corrects any such failure upon written notification of the Producer. Presenter agrees to indemnify and hold Producer harmless from and against any and all liabilities, claims, losses, causes of action, and expenses (including attorney's fees and disbursements) arising out of any breach of the foregoing undertaking, including, without limitation, any penalties imposed by any union. Producer agrees to make commercially reasonable efforts to discuss with any union the least amount of penalty possible on	10-15-14
	which shall not be unreasonably withheld Presenter agrees to place and pay for all advertising expenses (unless otherwise agreed in the ad publicity services required for the proper fulfillment of the engagement (advertising commissions, if any). Presenter agrees to obtain Producer's approval of the minimum and maximum dollars per playing week to be allotted to advertising. In a time line mutually agreed by both parties, Presenter agrees to submit the advertising budget and the advertising schedule for Producer's approval. Advertising expenses will be reimbursed only for documented print, radio, digital, and television advertising expenses for single ticket sales, (including production costs) and transportation for Company members to/from local press events. No other expenses including but not limited to, per diem, relocation for advertising and/or	JP 10-7-14
	due to breach or default by Presenter	JP 10-7-14
	LR 10-15-14	LR 10-15-14

Reality

- **Courts are split on whether drafts are privileged.**
- **Strict application**: If final version is or was intended to be shared with a third party, opposing counsel or publicly filed (e.g., SEC filings, proxy statements), some courts hold that prior drafts are not privileged.
 - Rule can extend to related notes, memos and emails.
 - Rule can apply even if final version was never publicly filed.
 - Look to whether there was an expectation that lawyer's services would entail publication of client's communications.
- **Broad application**: Drafts of documents and communications between an attorney and client during drafting process are privileged, and only those parts of the documents which ultimately appear in published documents are outside the privilege.
- **Hybrid approach**: Attorney-client privilege protects drafts if prepared with attorney assistance, and contains words or language that do not appear in final version, but only if provided in the context of legal advice to or from a client as to what should ultimately be disclosed.

Myth No. 7

**Settlement communications
can be withheld from discovery.**

Reality

- **Common objection to discovery requests:**

produce a privilege log with respect to the same absent an order from the Court. Additionally, as to communications in the Derivative Action concerning settlement, settlement documents are confidential and not subject to disclosure. Pursuant to FRE 408(b), such materials are not

- **While it is true that settlement communications are confidential and privileged, a party may not withhold them from discovery.**
 - Confidentiality alone is almost never a basis for withholding documents in litigation.
 - The privilege for settlement communications governs admissibility, not discoverability.

Reality (Cont'd)

- **Federal Rule of Evidence 408**

- Settlement communications are “not admissible to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement,” but are admissible for other purposes.
- FRE 408 “limits a document’s relevance at trial; not its disclosure during discovery.... Otherwise parties would be unable to discover compromise offers which could be offered for a relevant purpose, i.e., proving bias or prejudice of a witness, opposing a claim of undue delay, proving an effort to obstruct a criminal investigation or prosecution, or enforcing a settlement agreement.”

- **Admissibility is not a prerequisite to discoverability. If settlement communications are relevant to a party’s claim, a party responding to a discovery request must produce them.**
- **Note: If settlement communications were part of mediation, different rules may apply.**

Myth No. 8

Communications with a non-testifying expert are always privileged.

Reality

- **Communications with a consulting expert are NOT ALWAYS privileged.**
 - Generally, “the facts known or opinions held” by a consulting expert are not discoverable.
 - However, reports, data and information prepared by a consulting expert that are subsequently shared with a testifying expert may lose their privilege.
 - Rule 26 - testifying experts are required to disclose facts and data “considered” in forming their opinion.
- **Subject matter waiver**: consulting expert materials shared with testifying expert may waive work product protection with respect to specific material provided and could result in subject matter waiver of all information contained in the disclosed material.
 - Work product does not apply to communications that identify “facts or data” an attorney provides and the expert considers, or assumptions the attorney provided and the expert relied on.
 - Dual-hat experts (consulting experts who later become testifying efforts) – work product likely waived to the extent materials became “facts or data” that were “considered.”

Myth No. 9

The litigation privilege protects all statements made by parties and attorneys during a lawsuit.

Litigation Privilege

- **What is it?**
 - It provides attorneys with an absolute privilege to publish defamatory materials and make defamatory statements before or during a judicial proceeding, provided it has some relation to the proceeding.
- **Who gets it?**
 - Lawyers, parties and witnesses.
- **Which jurisdictions recognize it?**
 - Almost every state has adopted some version of the litigation privilege.
- **Is it limited to defamation claims?**
 - No. Over time, the litigation privilege has expanded to bar most other tort-related claims based on statements made in the course of judicial proceedings.
- **Is it a privilege for admissibility or discoverability?**
 - Arguably neither. In practice it operates as an affirmative defense or as an immunity.

Reality

- **What does the litigation privilege not protect?**

- May not protect lawyers' conduct (e.g., wrongfully filing a lien or submitting false expert witness disclosures).
- Does not apply to communications that do not relate to judicial proceeding (e.g., speaking to media about lawsuit).
- Also does not protect attorneys against:
 - Disciplinary proceedings
 - Judicially-imposed sanctions
 - Criminal prosecution (e.g., perjury or suborning perjury)
 - Malpractice claims
 - Malicious prosecution claims



Practice Tip: Be careful when sharing court-filed documents (complaint, affidavits, etc.) with the press. The act of filing the documents with the court is protected; the separate act of providing a copy to the media is not.

But what about Congressional investigations?

Myth No. 10

Congress formally recognizes attorney-client privilege.

Reality

- Congress does not formally recognize:
 - Attorney-client privilege
 - Work product doctrine
- **Rationale:**
 - Not bound by common law practices
 - Separation of powers
 - Inherent power to investigate
 - Article I power to establish its rules



Practice Tip: Factor Congress into legal strategies early on for high profile matters.

Myth No. 11

Congress never accepts attorney-client privilege claims

Reality

- Congress generally respects A/C privilege:
 - Will generally accept a privilege log
 - Most disputes over documents or testimony can be resolved amicably at the staff level and without a subpoena or contempt proceedings
 - Only rarely does Congress force the issue:
 - **Oversight and Government Reform and Blackwater in 2007** Letter from Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform, to Erik Prince, Chairman, Blackwater USA (May 7, 2007) (attorney-client privilege “not a valid basis for withholding information that Congress needs to fulfill its oversight responsibilities”).
 - **Oversight and Government Reform and Bank of America 2009** Letter from Edolphus Towns, Chairman, H. Comm. on Oversight & Gov't Reform, to Kenneth D. Lewis, Chief Exec. Officer & President, Bank of Am. Corp. (Sept. 18, 2009) (Chairman Towns recognized the interests served by the privilege, but ultimately denied the request, explaining that the documents “go to the heart of the issues most critical to our investigation”).
- ✓ **Practice Tip:** If you have a previously vetted document production that is responsive, offer to provide this to Congress. In many cases, this will satisfy the request and may preempt further inquiries.

Myth No. 12

A court order is required before A/C material may be produced.

Reality

- DC Bar Ethics Opinion 288:

- Rule 1.6(d)(2)(A) (Confidentiality of Information): a lawyer may reveal a client confidence or secrets only when expressly permitted by these rules or when “required by law or court order.”
- A lawyer has an obligation to make all appropriate objections to a Congressional subpoena.
- If the committee overrules the objections, orders the documents be produced and threatens to hold the lawyer in contempt for failure to comply, and if no judicial intervention is obtained by the client, then **the lawyer may comply with the directive as if it were a court order to comply with a subpoena after all appeals have been exhausted.**

✓ Practice Tip: A congressional committee will usually issue a “friendly subpoena” upon request, but this alone will not satisfy the requirements above.

Myth No. 13

If a lawyer is involved, the communication is privileged.

Reality

- Lobbying is generally not considered the practice of law – even when performed by lawyers:
 - ***In Re Grand Jury Subpoenas Dated March 9, 2001***, 179 F. Supp. 2d 270 (S.D.N.Y. 2001) (pardon case): The Marc Rich Lawyers were acting principally as lobbyists, working with public relations specialists and individuals foreign government officials, prominent citizens, and personal friends of the President who had access to the White House. They were not acting as lawyers or providing legal advice in the traditional sense.
 - ✓ **Practice Tip:** Keep lobbying and congressional investigations matters separate. A Congressional investigation should be overseen by lawyers acting as lawyers and not lobbyists. The legal matter should cover only the direct interactions with the committee investigators and generally should not stray into more routine activity that would likely be considered lobbying.

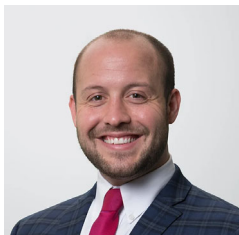
Myth No. 14

Courts will decide A/C privilege issues involving Congress.

Reality

- Courts are not keen to involve themselves in congressional matters
- **Why?**
 - Article I of the Constitution provides Congress with the authority to set its own rules
 - Speech and Debate Clause
 - Separation of powers

Holland & Knight – Contact Information



Francesco Salpietro
Partner (Corporate)
+1 215 252 9548
Francesco.Salpietro@hklaw.com



Jessica Farmer
Partner (Litigation)
+1 202 469 5222
Jessica.Farmer@hklaw.com



Christopher DeLacy
Partner (Government)
+1 202 457 7162
Christopher.Delacy@hklaw.com