

Preserving Privilege in Internal Communications

NELSON MULLINS RILEY & SCARBOROUGH, LLP

Association of Corporate Counsel Continuing Legal Education Presentation

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Summary of Topics

1. Investigation and Dispute Preparation
2. Cost Effective Management of E-Discovery
3. Implications of New Messaging Applications
4. Trends in Complex Litigation

Best Practices in Investigation and Dispute Preparation

- ▶ Be proactive;
- ▶ Know your regulators;
- ▶ Stay below the radar as in-house counsel and use HR;
- ▶ Consider engaging outside counsel for serious matters; and
- ▶ Prevent unwanted disclosure on the front end.

Elements of Attorney-Client Privilege

1. Existence of A/C relationship when communication made,
2. The communication confidential,
3. The communication relates to a matter about which the attorney is being professionally consulted,
4. The communication was made in the course of giving or seeking legal advice for a proper purpose (although litigation need not be contemplated), and
5. The client has not waived the privilege.

In re Miller, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2013) (quoting *State v. McIntosh*, 336 N.C. 517, 523, 444 S.E.2d 438, 442 (1994)). Federal courts recognize the same general elements. See Fed. R. Evid. 501.

True/False Hypotheticals

Labeling a document or an email communication “privileged” and ensuring counsel is copied on it entitles it to protection by the attorney-client privilege.

FALSE

Corporate counsel's attendance at an internal meeting, where legal advice was given about the meeting topic, makes the meeting and the conversations therein privileged.

LIKELY
TRUE

All of corporate counsel's draft documents
are protected under the attorney work-
product doctrine.

FALSE

“ Although it is generally accepted that corporations may assert the attorney-client privilege, applying the privilege in the corporate context ‘presents special problems. One such problem arises when an attorney serves a corporation in more than one capacity.... Business advice, such as financial advice or discussion concerning business negotiations, is not privileged. Given the variety of corporate roles and responsibilities, it is often a challenging task to decide who speaks for a corporation and whether that person's communications with corporate counsel are subject to the privilege. ”

Window World of Baton Rouge, LLC v. Window World, Inc., 2019 NCBC Lexis 54, at *26 (N.C. Super. Ct. Aug. 16, 2019).

Strategies for Identifying Communications as Privileged

- ▶ Make sure in-house counsel uses a consistent signature block on all emails - started by them, replies, and forwards;
 - ▶ Ensure that the communication is sent to counsel, and copies only people within the company with a legitimate need to know the information;
 - ▶ Label the subject line and the top of the email with a privilege legend, e.g., “PRIVILEGED AND CONFIDENTIAL: A/C COMMUNICATION”;
 - ▶ Ensure that the communication actually concerns legal analysis or advice; and
 - ▶ Do not discuss the contents of the communications with anyone else absent express approval.
- ▶ DO NOT START FROM PREMISE THAT THE COMMUNICATION IS PRIVILEGED.

Preventing Waiver

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED OR ATTORNEY WORK PRODUCT

The background features a vibrant blue color palette. On the left, a dark blue vertical band contains a bright, glowing trail of white particles, resembling a comet or a data stream. The central and right portions of the image are dominated by overlapping, semi-transparent geometric shapes in various shades of blue, creating a modern, layered effect. The overall aesthetic is clean, professional, and tech-oriented.

Cost Effective Management of E-Discovery



BEFORE LITIGATION
ARISES



SO YOU'VE BEEN
SUED: NOW WHAT?



SPECIAL
CONSIDERATIONS FOR
CERTAIN TYPES OF ESI



THIS IS EXPENSIVE!

Before Litigation Arises

- ▶ Become well-acquainted with how your company stores various types of information;
- ▶ Know who the appropriate information technology (“IT”) contacts are who can assist when ESI must be protected or produced;
- ▶ Develop a basic understanding of your company’s policies related to document retention (and know how to suspend destruction policies if the need arises); and
- ▶ Keep abreast of any issues at your company that may result in the loss of ESI, such as data breaches.

So You've Been Sued: Now What?

- ▶ Who, What, Where, When, & The Litigation Hold
- ▶ Focus Immediately on Electronic Evidence Gathering and Preservation
- ▶ Negotiate with Opposing Party's Counsel on ESI
- ▶ Consider Using an Outside Vendor

Special Considerations for Certain Kinds of ESI

- ▶ Internal Messaging Applications
- ▶ Text Messages

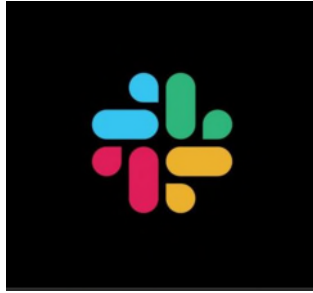
This is Expensive!

- ▶ BUT NECESSARY.
- ▶ How can you keep costs down? Be prepared and engage company employees.

Polling Break



Implications of New Messaging Applications



Recommendations

- ▶ Create and implement an effective electronic record-retention policy that covers use of ephemeral messaging applications for company communications and information;
- ▶ Train employees regarding the proper usage of ephemeral messaging for business-related communications and encourage the use of corporate versions of messaging apps;
- ▶ Monitor the use of new forms of ephemeral messages to appropriately document and preserve business communications;
- ▶ Once on reasonable notice of potential litigation, disable the automatic deletion of ephemeral communications and institute a “litigation hold” to preserve relevant documents and evidence; and
- ▶ Finally, during internal investigations, ask employees to disclose any messaging apps which they have used to conduct company business. In addition, add search terms referencing mobile messaging to any email review. Make sure that you extract and copy the device in which the information is stored upon for preservation if it is a company device.

Trends in Complex Litigation

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A Note on Modernization of the E-Discovery Process

- ▶ Drawing on Delaware caselaw, the North Carolina Business Court is laying the groundwork for North Carolina courts (and beyond) to modernization of the e-discovery process. The North Carolina Business Court is a specialized division of the North Carolina General Courts of Justice that provides a forum for complex business issues.
- ▶ A party *may* designate some cases as mandatory complex business cases under N.C. Gen. Stat. § 7A-45.4.
- ▶ And mandatory complex business cases under § 7A-45.4.

Claw-Back Provisions

10.6. Agreements to prevent privilege and work-product waiver.

The Court encourages the parties to agree to an order that provides for the non-waiver of the attorney-client privilege or work-product protection in the event that privileged or work-product material is inadvertently produced.

N.C. Business Court Rule 10.6

More Robust Privilege Logs

- ▶ The descriptions must generally be more specific.
 - ▶ Phrases like “regarding legal advice” or “relating to legal compliance” are likely not insufficient, inadequate descriptions.
 - ▶ The subject line of the email alone is also likely insufficient.
- ▶ Case Management Orders can require that parties must submit their privilege logs contemporaneously with their objections. Watch out for these provisions and set reminders if a rolling production is anticipated, as otherwise the logs could be untimely and waive the privilege.

Discovery-Related Sanctions

- ▶ Company and officer, director, or managing agent of party can be jointly and severally liable.
 - ▶ Sanctions are often allocated based on relative fault.
- ▶ Continuously failing to provide inadequate and inaccurate descriptions in a privilege log can lead to Rule 37 sanctions.
- ▶ Automatic deletion of text messages during the pendency of litigation can be sanctionable in certain contexts.

Special Discovery Masters

Former North Carolina Business Court Judge, and current Nelson Mullins Partner, Gregory P. McGuire believes that use of a special master or referee can expedite the discovery process:

“I appointed a referee to address complex discovery issues in several cases where it seemed clear that the traditional motion to compel process, which could have taken months, would cause needless delay. The referees were helpful to the parties because they allowed for quicker access to in-depth consideration of complicated relevancy, scope, and undue burden issues.”

The background features abstract, overlapping geometric shapes in various shades of blue, ranging from light sky blue to deep navy blue. These shapes are primarily located on the left and right sides of the frame, creating a modern, dynamic feel. The central area is a clean, white space.

Questions?

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