



## Protecting the attorney-client privilege while under quarantine: Five tips for protecting attorney-client privilege when using online collaboration tools

### Litigation Alert

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In February, the world as we knew it was a very different place. The stock market was posting historic highs, unemployment was at record lows and American businesses were thriving like never before. Since that time, however, the coronavirus disease 2019 (COVID-19) health crisis has claimed the lives of more than 1 million people living around the world. In addition, this pandemic has rocked global markets, sending thousands of businesses into economic distress and leading others to close their doors for good. And while the pandemic has changed the ways in which the general public lives and works, lawyers too have had to adjust to a new way of working. A majority of lawyers have transitioned to working from home, utilizing various videoconferencing and other online collaboration tools to transmit information to clients and other counsel. With the increase in remote working comes an increased opportunity for attorney-client privilege issues to surface.

In this article, we provide an overview of the emergence of online collaboration tools, discuss their potential impact on the attorney-client privilege, and offer suggestions for protecting privileged communications in the current

pandemic setting.

## Online collaboration tools

Gone are the days where clients are meeting face to face in their lawyers' offices or lawyers are just stopping by a client's office to provide in-person legal guidance. Lawyers have had to rely even more on various technologies, like collaboration tools, to provide the same level of service clients expected prior to the pandemic. Online collaboration tools are web-based applications that allow groups to work together by connecting and collaborating through an online portal that is often password protected and limits access to the team. These tools range from simple to complex, inexpensive to expensive, local to remotely hosted. The tools come in a variety of forms, but they generally provide ways for team members to collaborate in three key ways: communication, creation, and collection.

With respect to communication, many online collaboration tools provide voice, video, and instant messaging options, such as other software tools. In addition, they provide such options as shared calendars, online white boards, task lists, and other functions.

The creation of content is an area where online collaboration tools offer significant advances. As with previous programs, these tools allow for the creation of traditional documents, spreadsheets, and other content. In the past, however, one author might create a document, share the draft with others by email, receive multiple redlines back, and incorporate those redline changes and comments into the draft before finalizing. Now, online collaboration tools offer a way for multiple users to create, edit, and comment on a single document simultaneously in real time.

This is where collection comes into play. Once a file is saved to the platform, the technology makes it possible for multiple people to work on the file, at any time, without interfering with each other's changes because any user activity on the file is integrated into a new version of the document and saved separately. As a result, most online collaboration tools will save each iteration of a document as it is being created, meaning each version is collected and stored for future use.

## Attorney-client privilege and attorney work product

The attorney-client privilege has been referred to as the crown jewel of the legal profession. It protects from disclosure communications between a client and an attorney made for the purpose of securing legal advice.<sup>[i]</sup> As the United States Supreme Court has recognized, the purpose of the privilege in assuring confidentiality of such communications is to ensure "full and frank" discussions between clients and their attorneys, who are then in a better position to provide complete and effective advice.<sup>[ii]</sup> Communication between lawyers and clients is often marked "lawyer-client" privilege to readily distinguish such communication, although such labeling is not mandatory for the privilege to be applicable.

The attorney work product is a corollary to the attorney-client privilege. The work product doctrine states that an adverse party generally may not discover or compel disclosure of written or oral materials prepared by or for an attorney in the course of a legal representation, especially when prepared for the purpose of litigation. In *Hickman v. Taylor*, 329 U.S. 495 (1947), the United States Supreme Court recognized the work product doctrine and held that there is a presumption that an adverse party may not have access to materials prepared by a party's lawyers in anticipation of litigation or for the purposes of litigation. In general, there are two types of work product: opinion work product and ordinary work product. Opinion work product includes an attorney's mental impressions, attorney notes and documents reflecting strategies. Ordinary work product includes information separate and apart from legal analysis, such as transcripts of witness interviews, reports of non-testifying experts and financial records from the client.

In many respects, the attorney work product doctrine is more inclusive than the attorney-client privilege. Unlike the attorney-client privilege, which generally refers to communications between an attorney and client, the work product doctrine often includes materials prepared by persons other than the attorney, as long as they were prepared for ongoing or potential litigation.<sup>[iii]</sup>

## Protecting the privilege when using online collaboration tools

For organizations, companies, and others using online collaboration tools, communications with in-house and outside counsel can be privileged, but courts have held that the privilege applies to communications in which counsel's role was "primarily for the purpose of rendering legal advice or assistance."<sup>[iv]</sup> In making this determination, "[s]ome relevant factors courts consider ... include: (1) the context of the communication and the content of the document; (2) whether the legal purpose permeates the document and can be separated from the rest of the document; and (3) whether legal advice is specifically requested and the extent of the recipient list."<sup>[v]</sup>

Courts have taken two approaches to legal professional privilege between in-house counsel and corporate employees. Some courts have adopted the control group test, which limits privilege to communication between in-house counsel and corporate employees who have authority to control or participate in the corporation's legal affairs. Under this approach, communication from individuals outside the control group is not protected. Other courts have adopted the subject matter test, which limits privilege to communication from corporate employees for the specific purpose of securing legal advice for the corporation. Communication with in-house counsel that relates to business as opposed to legal advice will likely not be protected by privilege.

Many communications are presumed privileged, such as those in which "lawyers are examining and commenting upon a legal instrument, like a patent application, contract for a study, or the retention of experts." *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 802 (E.D. La. 2007). Similarly, "[w]hen warning letters [are] received ... from the FDA, in which alleged violations of FDA regulations [are] cited, ... the company's preparation of its responses to those warnings [a]re the equivalent of preparing pleadings in a legal proceeding" and, thus, protected. *Id.* Including "incidental" business advice generally does not void the privilege.<sup>[vi]</sup>

While few courts have addressed the attorney-client privilege or work product doctrine in the context of online collaboration tools, existing case law supports the following five suggestions:

1. **Make a clear request for legal advice** – If an online collaboration tool is being used to seek legal advice (such as by inviting in-house or outside counsel into a group to advise on a document or issue), make it clear from the outset by using phrases such as "seeking legal advice" or "for the purpose of providing legal advice." Clear statements that a client is seeking legal advice and that an online collaboration group or document contains legal advice and privileged communications can support a privilege claim.
2. **Plainly document legal issues and advice** – If attorneys are using online collaboration tools to provide legal advice to a client, they should, as with other forms of communication, document the communication as "attorney-client privileged" and provide legal support for any advice provided.
3. **Set apart non-legal topics or discussions** – To make clear that an online collaboration tool is being used to provide legal advice, make clear that any non-legal business issues or documents are provided or discussed separately.
4. **Limit group members** – Where a client is a large organization or company with legal and non-legal staff, the presence of non-legal staff on attorney communications may undermine the privilege. For this reason, if online collaboration tools are used to seek and provide attorney advice, then it may benefit the client and counsel to limiting access to those legal and non-legal team members with a direct connection to the legal matter at issue.
5. **Use "do not forward" designations to avoid inadvertent disclosure** – To prevent the inadvertent disclosure of privileged material beyond those limited team members part of an online collaboration tool, using designations such as "do not forward" and advising team members not to share beyond the team avoid diluting or weakening the privilege.

We expect more guidance from the law and our courts as privilege implications related to collaboration tools continue to develop during the COVID-19 era. With careful planning and monitoring of the various changes in legal opinions related to collaboration tools, lawyers and businesses will be able to successfully navigate this developing area of the law with confidence.

If you have any questions regarding these new requirements and their implications, please contact the author or your DLA Piper relationship attorney.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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[i] See *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962).

[ii] See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[iii] See *United States v. Nobles*, 422 U.S. 225 (1975).

[iv] *In re Riddell Concussion Reduction Litig.*, 2016 U.S. Dist. LEXIS 168457, at \*11 (D.N.J. Dec. 5, 2016).

[v] *Id.* at \*12

[vi] See *Rowe v. E.I. DuPont de Nemours & Co.*, 2008 U.S. Dist. LEXIS 81053, at \*27 (D.N.J. Sept. 30, 2008).

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