

A DIRECTOR'S PRIMER

Attorney-Client Privilege

The Basics for Directors—and Why the Rules Differ Around the World

A very high-level guide to what privilege protects, how it is lost, and why cross-border communications deserve extra caution

Boards Create Sensitive Records Every Day

Privilege can shield them from disclosure—or be lost in an instant

- **You generate them.** Board minutes, emails, investigation reports, and deliberations are exactly what adversaries seek.
- **Privilege is fragile.** Protection can be waived by a single careless forward or a third party in the room.
- **It shapes behavior.** Knowing what is—and isn't—protected changes how directors write, speak, and route questions.
- **It is not universal.** What is privileged at home may be fully discoverable abroad.

THE ONE-LINE SUMMARY

Privilege protects honest legal conversations—*but only if you protect it.*

What Privilege Protects

Four elements must line up—and it covers the conversation, not the facts

1

A communication

A communication—spoken or written—between the lawyer and the client.

2

Made in confidence

Shared privately, not in front of outsiders or broadly circulated.

3

For legal advice

For the purpose of giving or obtaining legal advice—not business advice.

4

Kept confidential

Confidentiality is maintained over time and not waived.

Key limit: Privilege protects the communication with counsel—not the underlying facts. A director cannot hide a fact simply by telling a lawyer.

Who Is the Client?

The company holds the privilege—not the individual director

- **The company is the client.** Corporate privilege belongs to the organization, and is controlled by the company—usually through management and the board.
- **Directors share it—when acting for the board.** Communications with counsel in the director’s board role are generally covered.
- **Watch the conflict.** If a director’s personal interests diverge from the company’s, company counsel does not represent the director.
- **The company can waive it.** The company—not the individual—decides whether to give privilege up.

THE “UPJOHN WARNING”

Company counsel may remind a director: ***“I represent the company, not you personally.”***

Privilege vs. Work Product

Often confused—two different protections that can overlap

ATTORNEY-CLIENT PRIVILEGE

- Protects confidential lawyer-client communications.
- Purpose is giving or getting legal advice.
- Belongs to the client; can be waived by the client.

WORK-PRODUCT DOCTRINE

- Protects materials prepared in anticipation of litigation.
- Covers a lawyer's mental impressions and strategy.
- Can sometimes be overcome by a showing of need.

How Privilege Gets Lost

Most waivers are accidental—and avoidable

Adding third parties

Looping in outsiders—or non-essential colleagues—breaks confidentiality.

Forwarding broadly

Wide email distribution or pasting advice into a deck can waive protection.

Mixing in business advice

Communications that are really business, not legal, advice are not protected.

Putting it in the record

Repeating legal advice in widely shared minutes or reports can expose it.

Disclosing to regulators

Voluntary disclosure can waive privilege—sometimes broadly.

Crime-fraud

Communications in furtherance of a crime or fraud are never protected.

How to Protect Privilege

Simple discipline preserves protection when it matters most

- **Route legal questions through counsel.** Ask the lawyer for legal advice; keep business chatter separate.
- **Mark it—but don't rely on the label alone.** “Privileged & Confidential—Attorney-Client” signals intent; it does not by itself create privilege.
- **Limit distribution.** Share on a need-to-know basis; resist forwarding and broad cc's.
- **Be careful with minutes.** Reflect that advice was received without transcribing the advice itself.
- **Bring counsel in early.** For investigations and sensitive matters, involve lawyers from the start.

A USEFUL TEST

Before you hit send, ask: *is this legal advice, who needs it, and where will it travel?*

The Rules Differ Around the World

Privilege is not the same—or even present—everywhere

UNITED STATES & U.K.

- Broad privilege for legal advice.
- Extends to in-house and general counsel.
- Well-developed waiver and work-product rules.

EU & MANY OTHERS

- Privilege often limited to outside counsel.
- In-house counsel advice may not be protected.
- Akzo Nobel: no privilege for in-house in EU competition matters.

VARIES WIDELY ELSEWHERE

- Some use “professional secrecy,” not privilege.
- Scope, holders, and exceptions differ by country.
- Assume cross-border messages may be discoverable.

Five Rules of Thumb for Directors

When in doubt, slow down and ask counsel

1

Assume it can leak

Write every email as if it might be read in court.

2

Keep legal legal

Separate legal advice from business discussion.

3

Mind the room

Third parties and broad distribution break privilege.

4

Company first

The company holds the privilege—not you personally.

5

Go global-aware

Outside the U.S., assume the rules—and protection—may differ.

Firm Lawyers

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