

# PRACTICE TIP SHEET

## Preserving Privilege: Best Practices

One of the foremost duties of an attorney – and that attorney’s staff – is to protect privileged information from disclosure. Paralegals and other legal support staff have a crucial role to play in recognizing and protecting privileged information.

**Definition.** Privilege is an evidentiary rule that permits attorneys and their clients to withhold their communications from discovery. When we talk about privilege in the context of civil litigation, we generally mean two things: attorney-client privilege and attorney work product protection.

Attorney-client privilege can be asserted to protect communications made between a client and his or her attorney while seeking and/or providing legal services. Guidance for applying privilege can be found in states’ evidentiary codes, or in federal or state case law.

Similarly, most materials prepared by an attorney in preparation for litigation and trial are protected from discovery. [Federal Rule of Civil Procedure 26\(b\)\(3\)\(B\)](#) requires that the court “must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” This generally includes an attorney’s research, memoranda, and drafts.

An attorney must withhold from disclosure or production all documents and information fitting into either of these categories.

**Privilege as it applies to legal staff.** In most circumstances, attorney-client privilege covers direct communications between clients and paralegals and other staff, in that privilege is not waived if appropriate staff members are privy to the privileged communications. Further, work product prepared by a paralegal is protected right along with that prepared by attorneys.

In an early case providing the elements for the application of privilege, it was understood that a privileged communication might be made either to “a member of the bar of a court, or his subordinate.” (*United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950)(emphasis added)). Recent case law has made clear that the communications of a client to a paralegal authorized by an attorney to assist him or her in the client’s representation are also privileged. *See, e.g., Samaritan Foundation v. Superior Court*, 844 P.2d 593, 599 (Ariz. Ct. App. 1992) which reads, “We hold that a lawyer does not forfeit the attorney-client privilege by receiving otherwise privileged client communications through the conduit of a properly supervised paralegal employee.” Or *see, Wal-Mart Stores, Inc. v. Dickinson*, which states:

We believe that the privilege should apply with equal force to paralegals, and so hold. A reality of the practice of law today is that attorneys make extensive use of nonattorney personnel, such as paralegals, to assist them in rendering legal services. Obviously, in order for paralegals, investigators, secretaries and the like to effectively assist their attorney employers, they must have access to client confidences. If privileged information provided by a client to an attorney lost its privileged status solely on the ground that the attorney’s support staff was privy to it, then the free flow of information between attorney and client would dry up, the cost of legal services would rise,

and the quality of those same services would fall. (*Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 804-805 (KY 2000)).

However, note this cautionary tale from a very instructive New Jersey district court case: The court ruled that communications between an in-house paralegal and company employees were not protected, as the paralegal routinely provided *her own* independent advice and opinion, as opposed to passing along the legal advice of in-house counsel. Her communications were “not inherently privileged merely because she [was] a legal employee.” (*HPD Laboratories, Inc. v. The Clorox Company*, 202 F.R.D. 410, 415-17 (D. N.J. June 8, 2001)).

What guidance can we glean from these cases?

**Best practices for paralegals related to privilege:**

- Always cc your attorney on all your direct written communications with a client.
- If you're relaying a message from your attorney, or your email contains or requests any information that is privileged or protected, it's a good practice to reference PRIVILEGED COMMUNICATION in your subject line.
- Use caution in copying third parties on any communications with clients, as this could risk waiving privilege. The rule of thumb is that a client's family members and/or agents are usually not covered by privilege, whereas an attorney's agents and employees are usually covered by privilege.
- Be very careful about the email auto-complete address function, as this is a very common source of inadvertently misdirected confidential emails. Consider turning it off!
- Identify your memoranda or other written reports to your attorney describing your activities or research as "Work Product Prepared at Attorney's Request," or any words to that effect.
- Take extra care with preparing document productions in discovery. It often falls to paralegals and other staff to assure that privileged documents are not inadvertently disclosed in production.
- If you do find that a privileged document has been produced, bite the bullet and inform your supervising attorney immediately. Delay in notifying your opposing counsel of the inadvertent disclosure could result in a waiver of privilege as to the disclosed material.