



# The More Things Change, the More They Stay the Same: Understanding and Maintaining Attorney-Client Privilege

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Presented by Ted Holt & Brytne Kitchin



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# CEFLI Reminders:



## The Presentation Deck

- The presentation deck is available now, on this page: <https://cefli.org/webinars/>

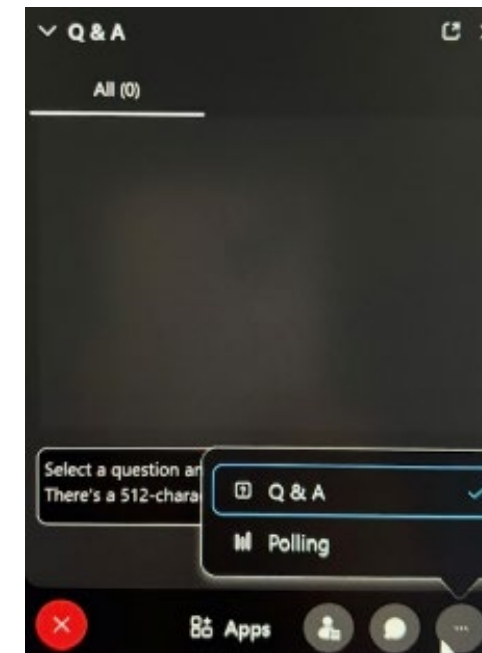
## Post-Event Communication

We will email the following information to you in the next few days:

- A link to the recording
- A copy of the slides
- A Certificate of Attendance template (to those who attended the live event)

## Questions are Welcomed!

- Please use the **Q&A Function** (not the Chat function).



# CEFLI Antitrust Reminder:



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# Introductions



**Ted Holt**

**Chair, Insurance**

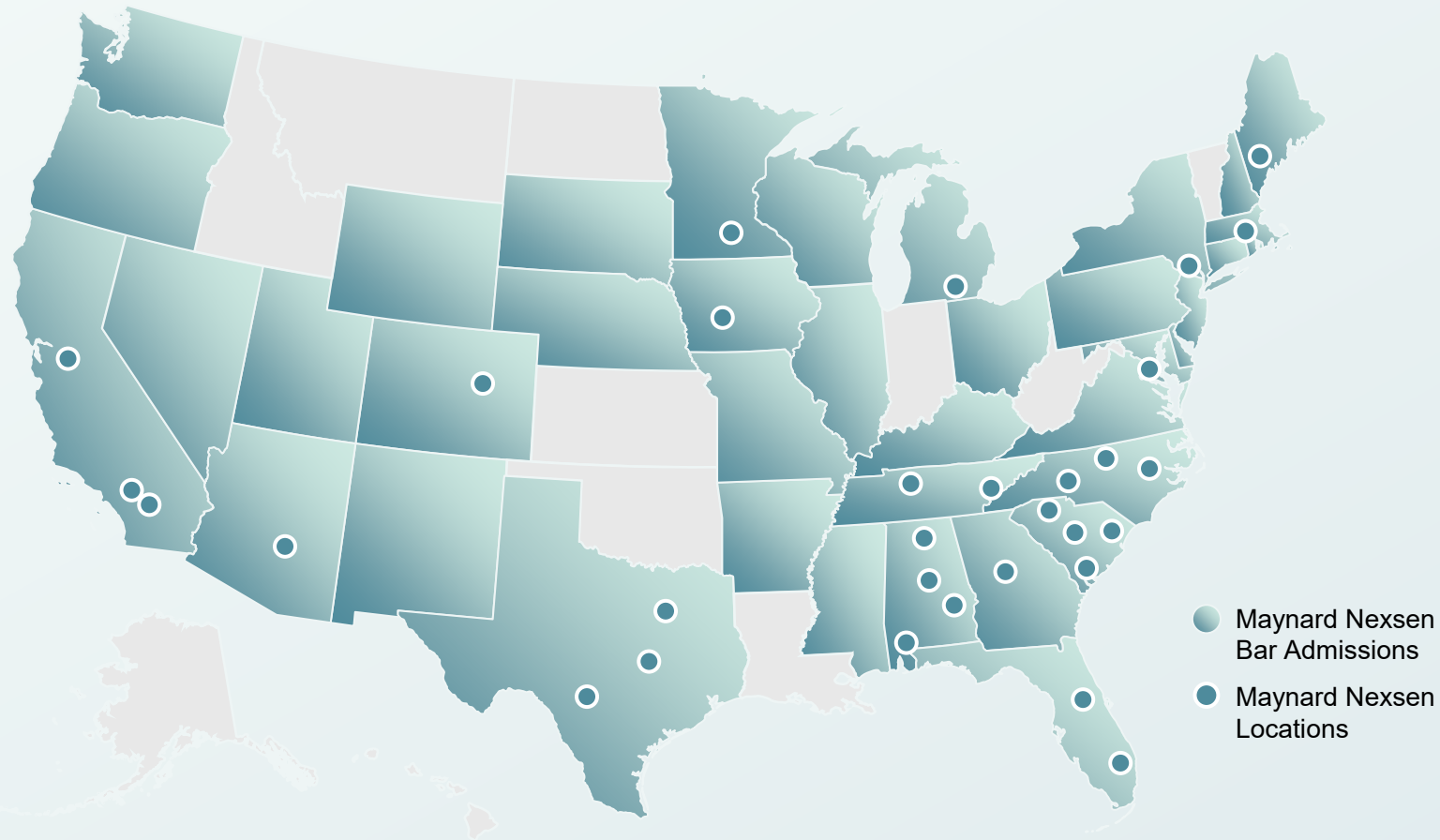


**Brytne Kitchin**

**Shareholder, Insurance**

## Our Firm

- Nearly 600 attorneys
- 31 locations coast to coast
- Robust practice groups serving more than 80 industries and areas of law
- Clients span both the public and private sectors
- A client-centered “team-approach” business model designed to foster deep, ongoing relationships
- Unique client service offerings:
  - NP Strategy, a media relations and crisis communications firm
  - Nextra Solutions, a team providing technology and eDiscovery solutions for legal challenges



# What We'll Cover

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1. How to recognize the potential pitfalls of inter-organizational communication.
2. Attorney-client privilege and the nuance of its application to inter-organizational communication.
3. Best practices for internal communication—with or without legal counsel.

# Potential Pitfalls

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**“This airplane is designed by clowns, who in turn are supervised by monkeys.”**

**– Boeing Pilot (2016)**

# Potential Pitfalls

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- **Litigation Risk**—How might this communication impact the organization if taken out of context in legal proceedings?
- **Regulatory Risk**—Could this communication be interpreted as intentional disregard of regulatory requirements?
- **Reputational Risks**—What potential effects could this communication have on the organization's reputation among industry peers, customers, and regulators?

# Attorney-Client Privilege: What is it?

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- Protects the confidentiality of communications between lawyers and their clients.
- Three necessary elements:
  - Confidential communication
  - Between a client and their lawyer
  - Made for the purpose of obtaining legal advice
- **Does not extend** to the disclosure of underlying facts

# Attorney-Client Privilege: The Corporate Context

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- 5-Factor “**Subject Matter Test**”
  - Adopted by most states.
  
- “**Control Group Test**”
  - Still used by some states, including Illinois.

# Attorney-Client Privilege: Subject Matter Test

- Communications between employees and in-house or outside counsel to secure or provide legal advice.
- Employees communicated with counsel at the direction of superiors.
- Communications concern matters within employees' scope of employment.
- Communications were considered confidential when made and were kept confidential.

# Attorney-Client Privilege: Control Group Test

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- Confidential communications between employees and in-house or outside counsel to secure or provide legal advice.
- Communications were considered confidential when made and kept confidential.
- Only applies to communications made by employees in the upper echelon of corporate management.

# Poll Question #1

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Courts presume in-house attorneys are providing legal advice when they communicate with other employees.

- True
- False

# Presumption of Privilege: In-House vs. Outside Counsel

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- Courts presume that purpose of communication with **outside counsel** was to obtain legal advice.
- Same presumption **does not apply** to communications with in-house counsel.
- **Primary Purpose Test**: Organization must demonstrate that the **primary or dominant purpose** of the communication with in-house counsel was to give or receive legal advice.

# Primary Purpose: Relevant Factors

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- Is the communication seeking or providing **legal advice** or **business advice**?
- Is in-house counsel **actually providing** or being asked to provide legal advice?
- Is the communication **limited** to employees with a **need to know**?

# Primary Purpose: Legal vs. Business Advice

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- Is in-house counsel acting as legal advisor, or in some other capacity (e.g., investigator)?
- If the primary purpose is to further ordinary business activities, it is less likely privilege would apply.
- Examples of Business Communications:
  - Pricing or cost information
  - Technical data
  - Lobbying efforts
  - Negotiation of certain contract terms

# Primary Purpose: Legal vs. Business Advice

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- It can often be difficult to assess whether something is legal advice or business advice, and some communications might contain both.
- Some questions to ask yourself:
  - Does the communication concern the **legal or regulatory implications** of a business decision?
    - **Example**: Does a new law require updates to the organization's policy forms?
  - Does the communication concern the **strategic or operational implications** of a business decision?
    - **Example**: How should the organization implement those updates?

# Hypothetical #1: What's Privileged?

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- Documents collected by the business unit and labeled “privileged”
- Timeline prepared by the business unit
- Email sent to in-house counsel

# Hypothetical #2: What's Privileged?

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- Investigative materials
- Fact that policy administration communicated with in-house counsel
- Email policy administration sent to in-house counsel
- Memo prepared by in-house counsel

# What's Not Privileged

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- The fact that an attorney was consulted.
- Conversations where the attorney is a bystander.
- Underlying facts shared with an attorney.
- Documents provided to an attorney.\*
- Communications on which an attorney is merely copied.
- Communications that include a third-party or persons without a “need to know.”
- Drafts of documents that will ultimately be sent to third-parties.\*

# Poll Question #2

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Using ChatGPT or other generative AI models destroys the attorney-client privilege.

- True
- False
- It depends

# Maintaining Privilege: Generative AI

I am an attorney. If I provide Chatgpt with confidential communications from my client about her case in connection with a question, will I be waiving the attorney client privilege?



Providing confidential communications from your client to ChatGPT or any AI platform could potentially result in a waiver of the attorney-client privilege. The privilege is designed to protect private, confidential communications between you and your client, and sharing these communications outside of a secure, confidential context may compromise that protection.

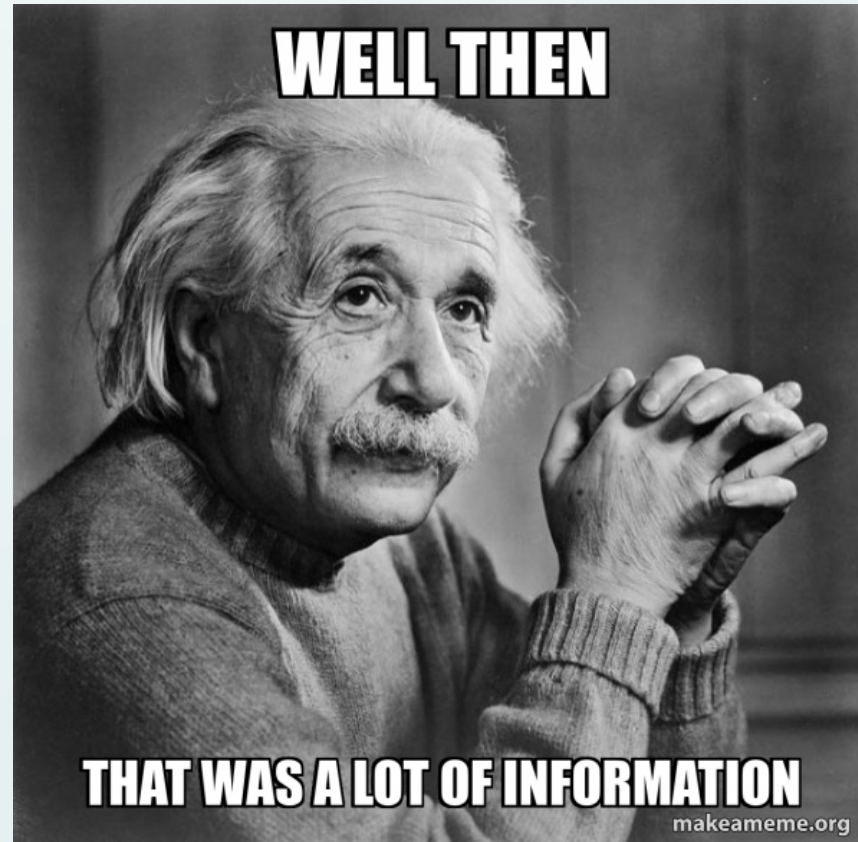
# Maintaining Privilege: Generative AI

- Anonymize or “de-identify” information provided to model.
- Ask general or hypothetical questions.
- Don’t provide sensitive or confidential information to model.

| Specific Scenario  | De-Identified Question for Model   |
|--|--|
| <p>An Illinois resident, Jane Smith, purchased life insurance from Acme Insurance Company in 2024. She didn’t disclose she smoked a pack of Marlboro Reds per day. After she died of lung cancer, we ordered her medical records and saw that her physician had been advising her to stop smoking for years. Did we waive our right to rescind the policy?</p> | <p>Under Illinois law, can an insurer rescind a life insurance policy based on a material misrepresentation on the application, if the life insurer would have known about the subject medical condition had it ordered medical records during underwriting?</p> |

# How to Maintain Privilege In Real Life

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# Best Practices: Our Top 5

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## The Careful Communication Test

- Less is more; be precise and concise in written communications.
- Avoid making conclusory or categorical statements, drawing legal conclusions, attempting to restate legal advice, or making comparisons to other matters.

## The Careless Test

- Some risk in overusing “privileged” when marking documents, especially when documents contain no communications that would be protected by privilege.

## The Need-to-Know Test

- Limit recipients to only those who need to know.

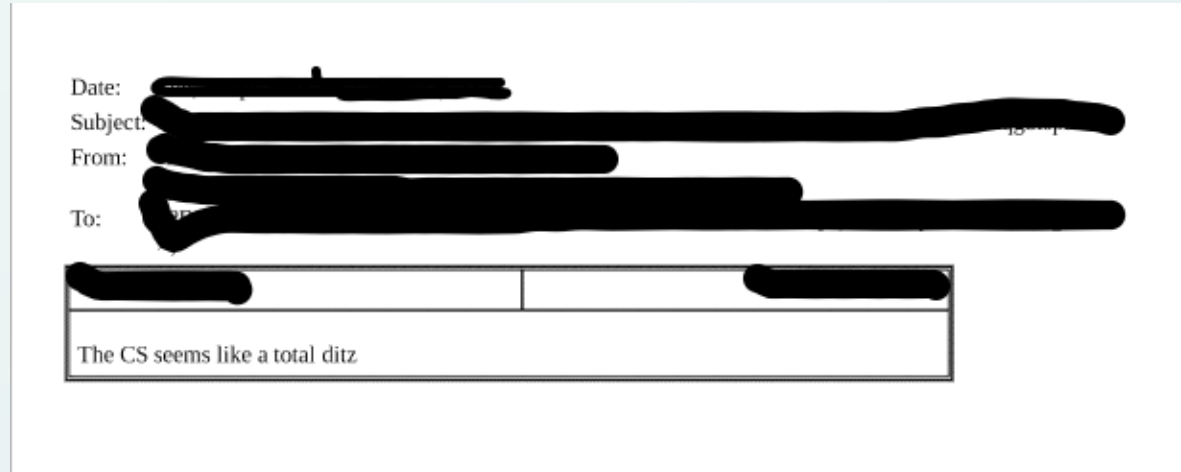
## The Press Test

- Would you want to read the communication on the front page of the New York Times (or your TikTok For You Page).

# Best Practices: If In Doubt, Leave It Out



# Best Practices: What Not To Do



# Best Practices: What Not To Do

From: [REDACTED]  
Sent: Thursday, [REDACTED]  
To: [REDACTED]  
Subject: RE: Case Info. [REDACTED]

He passed away WHAT???

RE: Case Info. [REDACTED]

 To: [REDACTED]

Yep a doodle! Passed away, kicked the bucket, bought the farm...BUT did this BEFORE he could sign the policy receipt so...

RE: Case Info. [REDACTED]

 To: [REDACTED]

That sucks LOL

Warm regards,

Angie: This is Angie

Beth: Hey, it's Beth. So, the times when you're saying your review between 4/1 and 4/9, he got state disability from California . . . **You know California approves on a gym note.**

\* \* \*

Angie: The issue we are going to run into is that [the insured's treating physician] has said that the guy has been disabled from the day he started seeing him until today.

Beth: Okay.

Angie: And the letter [the treating physician] provides – **I thought this guy was maybe bullshitting** – he was in the intensive group for a while, but I honestly think there is something more to the story.

Angie: **I think he is a perpetrator**, and he was prescribed Narcan so there is a reason people are prescribed Narcan.

\* \* \*

Beth: I got the same impression

Angie: Yeah, **I think he might be an abuser . . . but there is nothing to document that.**

\* \* \*

Angie: Yeah. **Well, I don't like this guy.** I think there is something going on.

# Questions?

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3. CEFLI's materials are not filed for CLE or CE with any State Bar or other organizations. In the event you plan to self submit for CE or CLE with the organizations you are involved with, the following slides may be helpful.



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# Thank You

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