

# The Legal Strategist

S. BARRETT P.C.

[WWW.SBARRETLAW.COM](http://WWW.SBARRETLAW.COM)

FOURTH QUARTER 2021

TEXAS ESOTERIC FACTS

The attorney-client privilege protects confidential communications between the client and the lawyer made for the purpose of obtaining or providing legal assistance, to “encourage full and frank communication . . . and thereby promote broader public interests in the observance of law and administration of justice.” But the privilege may not apply, it may be waived, or there may be exceptions to it.

The Amarillo airport has the 3rd largest runway in the world and is designated as an alternate landing site for the space shuttle.

The Feature Topic is a cursory review. If you would like more information on this, or any other topic previously covered in my newsletter, which can be viewed on [The Legal Strategist](#) tab of my web site, please contact my office at 713.526.1883.

Scott Barrett

FEATURE TOPIC: **MAINTAINING THE ATTORNEY-CLIENT PRIVILEGE**

Communications to or from a lawyer that don't seek or give legal advice are not privileged. So, for example, an attorney functioning as a business agent does not qualify for application of the attorney-client privilege. In-house counsel often has business-oriented duties, and business and legal advice are sometimes so intertwined that a clean distinction may not exist. Officers, directors, and employees must rely on in-house counsel to understand the difference. The predominant purpose of the communications should seek legal services for the privilege to apply. Copying in-house counsel on communications does not make them privileged.

A waiver of the privilege can occur from a variety of conduct that fails to maintain the confidentiality of the communication. Either voluntary or inadvertent disclosure to outside or non-covered recipients, professional advisors outside the privilege, and experts and consultants, can result in waiver as a matter of law. E-mails can waive the privilege and show up as litigation exhibits for lots of reasons: as a result of their high volume; due to quick and hastened responses sent without reflection; as emotional, subjective, or reactionary responses; based on the ease of “reply all” and forwarding; and given their informal nature and permanence. Any and all of these can create problems later. Social media is also prolific and similarly fraught with an invitation for waiver.

## Best Practices Checklist:

- Can communication be accomplished other than in writing?
- Is the written content anything that could be construed as improper?
- Who are the recipients, and why are they included? Is each necessary for the issue?
- Clearly identify when seeking or providing legal advice.
- Only outside counsel should retain and communicate with consultants during litigation. Retention by in-house counsel is preferable to retention by corporate management.
- Document business advice separately.
- Explain privilege limits and waiver to the client at the beginning and throughout a matter.
- Maintain privileged documents in lawyer files only, where possible.
- Would I be OK with this email if it was published in the media?

If you would like more information on this or any other topic relating to the attorney-client privilege, please contact [Scott Barrett](#) to set up a consultation.