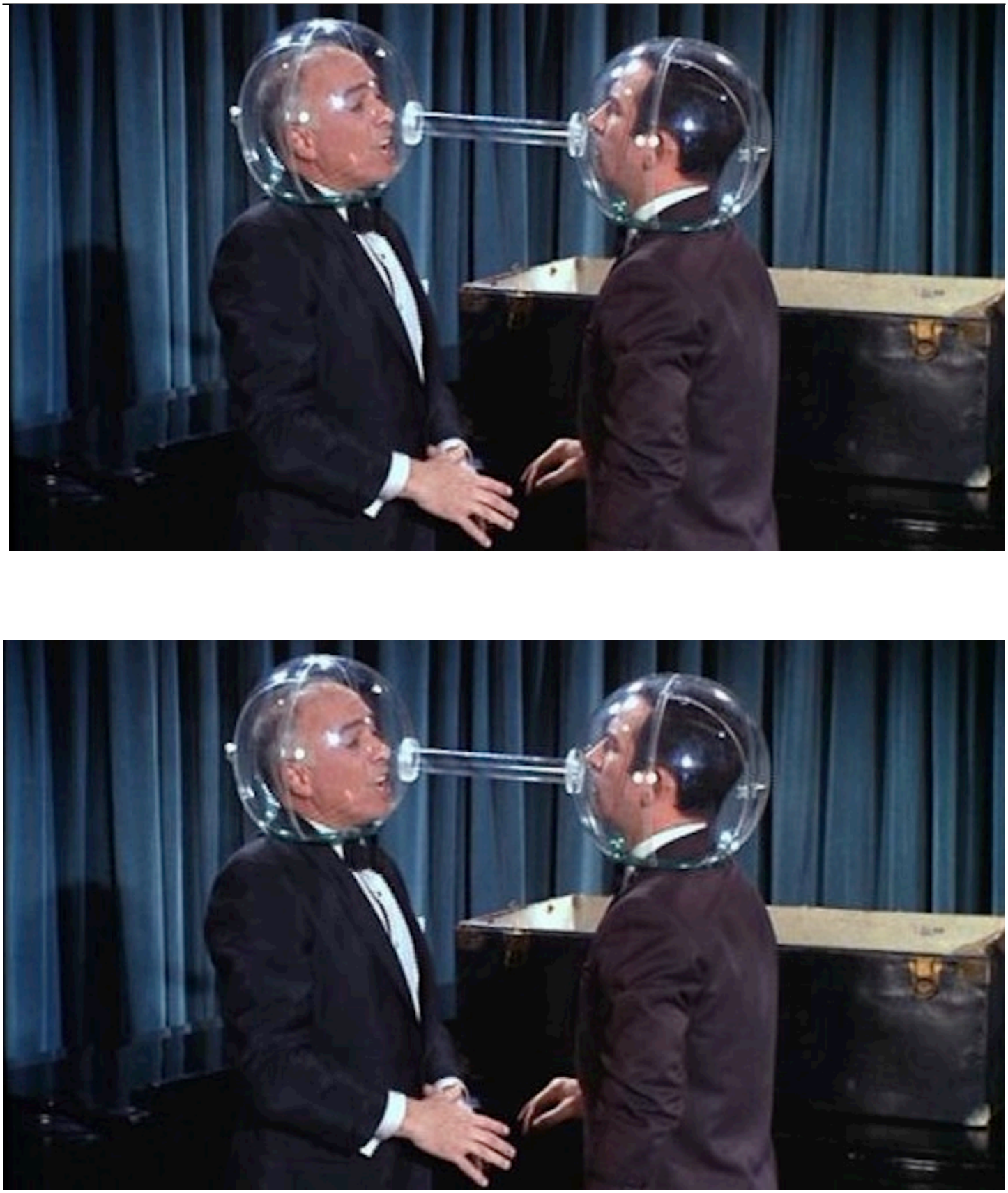
ACC DOCKET
INFORMED. INDISPENSABLE. IN-HOUSE.

An In-house Counsel’s Guide to Protecting the Attorney–Client Privilege

Compliance and Ethics



The portable 'Cone of Silence' from the 1960s television series *Get Smart*. Credit: Michael Coté, Flickr

The attorney–client privilege, codified in Rule 501 of the Federal Rules of Evidence, is the oldest common law privilege for confidential communications. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice

and advocacy serve public ends and that such advice and advocacy depend upon the lawyer's being fully informed by the client. The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable her to give sound and informed advice.

So how can in-house lawyers best protect this important privilege? And how can they avoid potentially compromising the attorney–client privilege?

Client-Attorney Relationships are Key

Who is your client? Corporate counsel should always be able to answer that question clearly. Counsel cannot protect the attorney–client privilege unless and until both the lawyer and the client are clear on who is the client. Without question, corporate counsel represents the corporate entity. But do you also represent any affiliates? Do you also represent any constituents, such as individual officers, directors, shareholders, or employees? What seems like an easy question can be difficult in a particular application, such as in the context of an internal investigation.

When you have identified who your client is for a particular matter, be sure to communicate that to your client and any others who might incorrectly believe they are also your client. For protection of the privilege in an internal investigation context, *Upjohn* requires communication about whom corporate counsel represents. In some circumstances, it may be desirable that the communication be in writing.

In addition to knowing their clients, in-house lawyers also need to know themselves.

For example, in-house counsel should make sure their bar licenses are active. Some courts have considered the status of a corporate counsel's law license in analyzing a claim of privilege and have denied the protection where that license is inactive.

Also, you should consider your title and what impact it may have on the privilege. Many in-house lawyers have both a legal title and a business title, such as Vice President and General Counsel. When communicating on legal matters, counsel should consider using only the legal title to keep the business title from blurring the line.

The Email Trail

Email policies and procedures are another key consideration in protecting the attorney–client privilege. How often do you receive emails asking for advice and soliciting your legal opinion? If that is something that ever crosses your in box, you should consider training company employees on how to seek your advice.

For example, words like "I need your legal advice" or "request for legal advice" will go a long way to preserving the privilege and are more effective than "I have a question." Such requests should also be addressed specifically to you or an attorney on your team rather than being directed to a business person with just a cc to the lawyer. And cc's should be given their own special consideration. Emails requesting or providing legal advice should include other business people only if necessary and then only as cc's.

Attorneys also need to be aware of how to communicate when they send email.

To protect the privilege when using emails, avoid communications with an "intermingled" business and legal purpose as much as possible. In other words, you should keep privileged legal discussions and non-privileged business discussions in separate emails chains as much you can.

And speaking of email chains, counsel should consider disabling the reply all function as a means of protecting the privilege. At the very least, counsel should not let privileged discussions continue in a long email chain because, inevitably, the topic will stray and new people may be added to the email string thereby risking the privilege protection.

Also, consider that many emails sent or received by lawyers are not privileged. For those non-privileged emails, consider cutting off and not using the standard privilege language that automatically attaches to most attorneys' email. Overuse of the privilege language on obviously non-privileged communications may dilute its effectiveness when we need it to apply to important privileged communications.

Before sending out an email, consider who truly needs to see it. For ease of communication, attorneys and business people may often be placed together in an email group. What impact might communications to that mail group have on the privilege? If that mail group includes people who are not involved in a particular legal matter and do not have a reason to be included in legal communications, you should assume those communications will not be privileged. Counsel should train their team and colleagues to think deliberately about the distribution list when circulating materials intended to be privileged and to distribute them as narrowly as possible only to those with a need to know.

Policies, Resources and Written Communications

Sometimes the simple things are the most important. Just as counsel should not use standard privilege language on obviously non-privileged emails, it is worth taking the time specifically to mark written communications as "Confidential, Subject to the Attorney–Client Privilege" when they really are. Having that designation on documents and emails certainly helps during discovery as they can be sorted by the key word "privilege." And once confidential, privileged communications have been made, they must be treated and maintained as confidential in order to preserve the privilege going forward.

Also, be aware that not every international jurisdiction recognizes the privilege between an entity and its in-house counsel. For example, there is no such privilege protection under European Union law. What if corporate counsel renders advice in one jurisdiction but the ensuing dispute is litigated in another jurisdiction? To protect the privilege, corporate counsel must have the foresight to anticipate when litigation might occur in other jurisdictions and may need to research that local law to understand whether the privilege will apply.

Company policies can help make employees and other personnel aware of situations where the company expects the privilege to apply and the importance of preserving the privilege.

For example, any policy addressing internal investigations should include a statement that they are undertaken for the purpose of obtaining legal advice. Policies that describe the company hotline and reporting procedures should include language to the effect that any resulting investigations will be

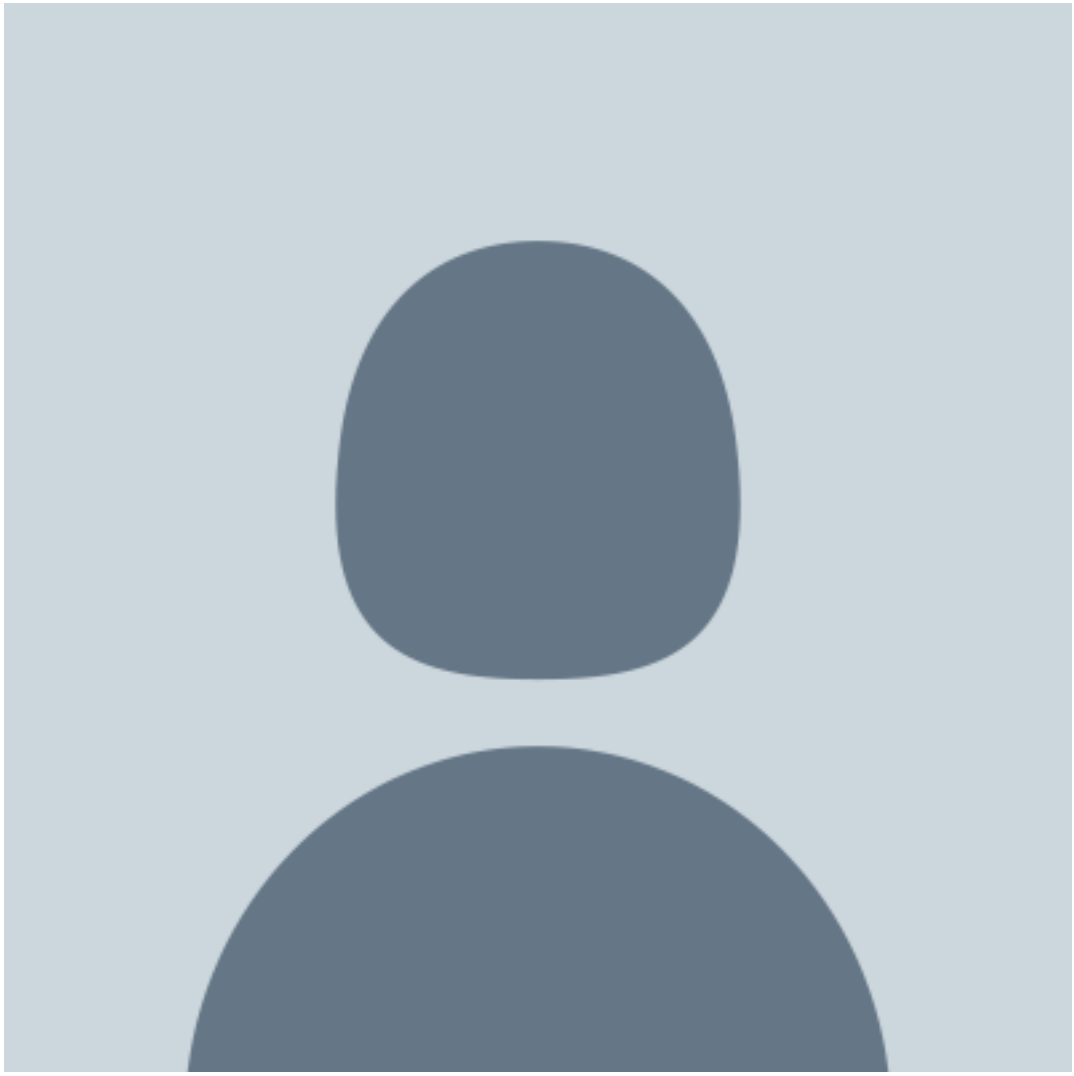
conducted at the direction of in-house counsel and for the purpose of providing legal advice to the company. Document retention policies should describe the various ways the company protects its privileged documents.

Finally, in-house lawyers should remember that they have resources at their disposal to help them protect the attorney–client privilege.

Thus, in situations where it is especially important to preserve the privilege, you should consider looping in your outside counsel.

Protecting the attorney–client privilege in an in-house environment requires sound policies and procedures, a properly trained workforce and constant vigilance from the in-house attorney. But legal departments that put in this work on the front end will find it well worth their time if and when the privilege is needed.

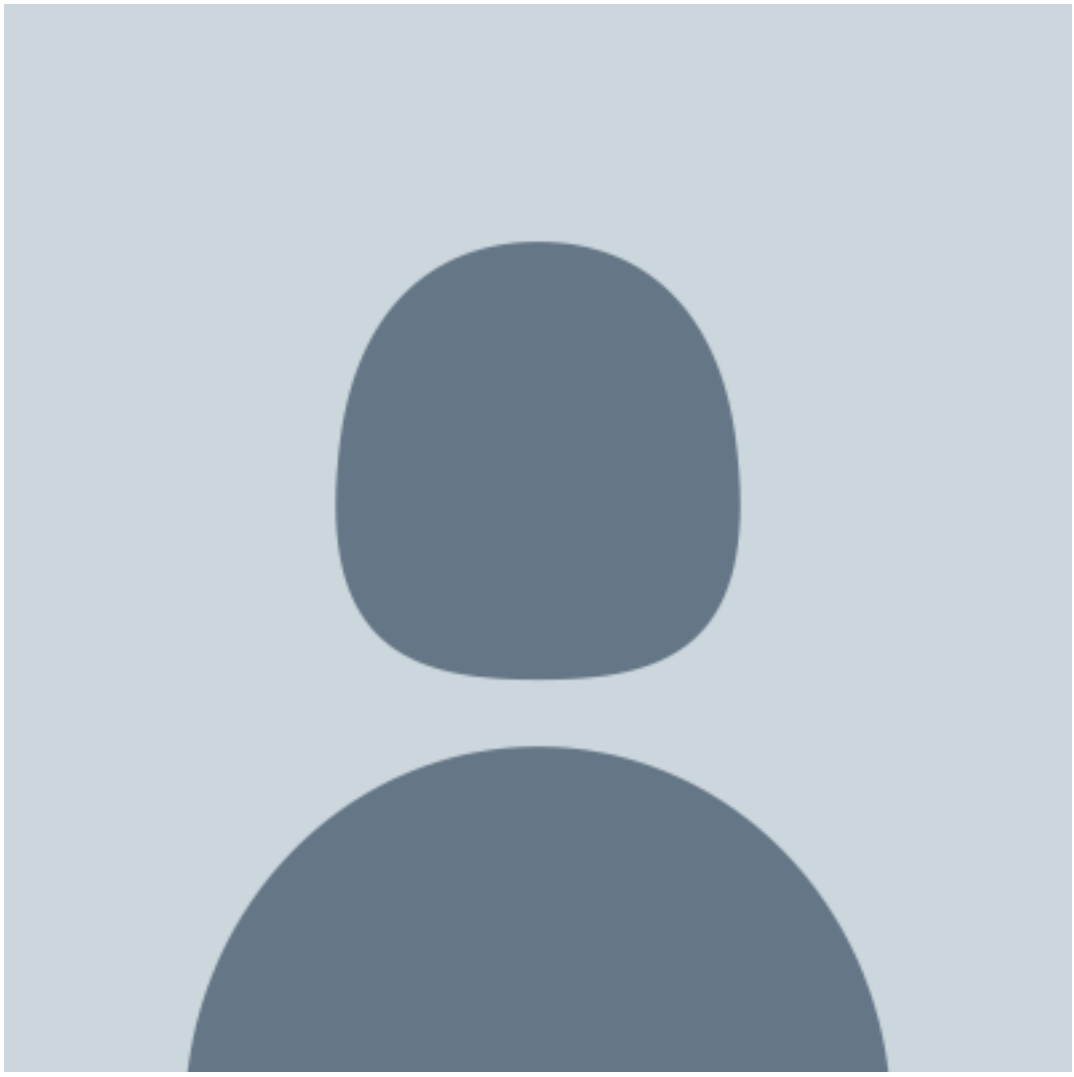
Alison Bost



Deputy General Counsel

Womble Carlyle Sandridge & Rice, LLP

Shawn Haque



Corporate Counsel

Accenture Federal Services LLC