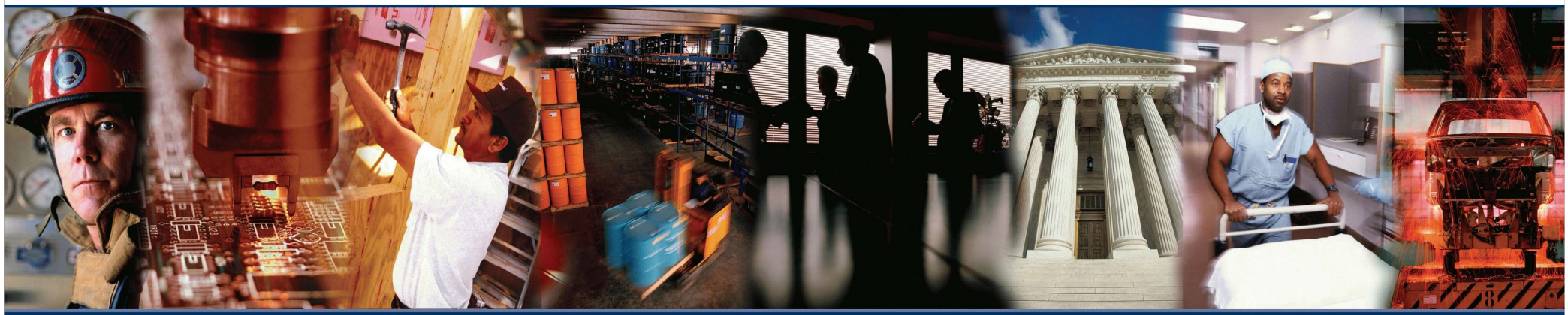
Don’t Forward That E-mail!!

What HR Needs to Know About the Attorney-Client Privilege and Work Product Confidentiality



YOUR WORKPLACE IS OUR WORK.®

Presented by

Whitney R. Brown

Lehr Middlebrooks Vreeland & Thompson, P.C.

October 27, 2026

Copyright 2026 Lehr Middlebrooks & Vreeland, P.C. All rights reserved. Reproduction or use of these materials, *including for in-house training*, without authorization of the authors is prohibited.

Caveats

- These are general guidelines based on federal law.
- This presentation is specific to the preservation of attorney-client privilege and work product confidentiality for the benefit of a corporate client.
- This presentation is further designed specifically for an HR audience.

Scope of Discovery

"Parties may obtain discovery **regarding any nonprivileged matter that is relevant to any party's claim or defense** and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit..."

-Fed. R. Civ. P. 26(b)(1).

Attorney-Client Privilege

Attorney-Client Privilege

Burden of proof?

On the party asserting the privilege.

Attorney-Client Privilege

Elements:

- Party asserting privilege was or sought to be client;
- Communication was to a licensed attorney or attorney's subordinate;
- Lawyer was acting as a lawyer for purposes of communication;
- Non-clients excluded from communication;
- Communication intended to be confidential and expected and understood to be confidential;

Attorney-Client Privilege

Elements:

- Communication primarily for purpose of obtaining (i) legal opinion, (ii) legal services, (iii) assistance in a legal proceeding;
- Communication was not for purpose of committing a crime or tort;
- The client has claimed and not waived the privilege.

Attorney-Client Privilege

If I include an attorney on an e-mail, is it automatically privileged?

No.

If I write an EOD recap to my VP, CFO, and GC with customer service information, sales data, and one legal question, is the whole e-mail privileged?

No.

Attorney-Client Privilege

Must I or my attorney write "Attorney-Client Privileged Communication" on e-mails to claim the privilege?

No.

If I write "Attorney-Client Privileged Communication" on an e-mail including an attorney, is that e-mail automatically privileged?

No.

Attorney-Client Privilege

Do I need to be worried about a lawsuit or a government investigation to make a privileged communication?

No, but the communication must seek legal advice.

Attorney-Client Privilege

If we have an in-house counsel, can my communications with them be attorney-client privileged?

Yes, but courts view such claims more skeptically than they do with outside counsel.

Attorney-Client Privilege

To whom can I forward (or whom can I add as a cc) a privileged communication without jeopardizing the privilege?

Review scope of forwarding with counsel; but, generally:

- Up the corporate chain to decisionmakers on the subject of the communication;
- Relevant portions to other corporate employees with information the attorney requests.

Attorney-Client Privilege

What about former employees?

- You should operate under the presumption that former employees (no matter how high their position) cannot be included in a privileged communication.
- A person's employment status is based on the date/time of the communication, not the event we're trying to learn about.

Attorney-Client Privilege

What about third parties?

- The insurer (in most states, if a claim exists).
  - A reservation of rights letter from the insurer may trigger limits on what you/your attorney should share. Counsel are not always copied on such letters, so be sure you let your attorney know if you receive one.
- Brokers, however, aren't exposed to shared liability.
  - Once they connect you and the insurer, they should be dropped off of communications.

Attorney-Client Privilege

What about third parties?

- Normally, if in response to litigation or enforcement action, HR consultants, payroll providers, PEOs, etc., may be within the scope of privilege.
  - At least when they are in possession of information needed for the company to obtain legal advice.

Confidential Work Product

Confidential Work Product

"Ordinarily, a party may not discover documents and tangible **things that are prepared in anticipation of litigation** or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)…."

--Fed. R. Civ. P. 26(b)(3)(A).

Confidential Work Product

"If the court orders discovery of those materials, **it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney** or other representative concerning the litigation."

--Fed. R. Civ. P. 26(b)(3)(B).

Confidential Work Product

Burden of proof?

On the party asserting confidentiality.

Confidential Work Product

Elements:

- A tangible thing;
- Prepared by a party or its representative (especially by or at the direction of an attorney);
- In anticipation of litigation or trial.

Confidential Work Product

A Tangible Thing

Includes (but is not limited to)

- A memo
- A signed witness statement
- A model or drawing of a workplace
- An audio recording on tape
- A digital photograph that has never been printed
- An e-mail
- A Word document containing a chronology

Confidential Work Product

Prepared by a Party or its Representative

- Includes:
  - Managers
  - Attorney
  - Private Investigator
- Could include:
  - Insurer
- Does not include (for most private corporate litigants):
  - Police reports
  - Statements a “rank-and-file” employee makes of their own accord

Confidential Work Product

Especially an Attorney

- As a general rule, *where the threat of litigation is clear*, ask your attorney before creating any non-communicative summary or model, and definitely before gathering witness statements.

Confidential Work Product

In Anticipation of Trial or Litigation

Includes (but is not limited to):

- Notice of an EEOC Charge
- Lawsuit filed
- Very specific employee threat

Excludes:

- Documents created in the normal course of business

Confidential Work Product

In Anticipation of Trial or Litigation

Gray Areas (where an attorney's leadership of the project can be a "secret sauce")

- Where there is a perennial need for review to avoid litigation. *E.g.*,
  - Analysis of whether the Organization's salaried exempt employees are properly classified (if no internal complaint, DOL investigation, etc.).
  - Handbook review.
  - Job description review.

Confidential Work Product

In Anticipation of Trial or Litigation

Gray Areas (where an attorney's leadership of the project can be a "secret sauce")

- Following an employee request where the Organization's decision might lead to litigation. *E.g.*,
  - Reasonable accommodation analysis.
  - Analysis of whether subsidiaries/related entities ought to be aggregated for purposes of determining if FMLA thresholds are met.

Confidential Work Product

In Anticipation of Trial or Litigation

Gray Areas (where an attorney's leadership of the project can be a "secret sauce")

- Following an employee request where the Organization's decision might lead to litigation. *E.g.*,
  - Reasonable accommodation analysis.
  - Analysis of whether subsidiaries/related entities ought to be aggregated for purposes of determining if FMLA thresholds are met.

Confidential Work Product

In Anticipation of Trial or Litigation

Gray Areas (where an attorney's leadership of the project can be a "secret sauce")

- Following a perceived threat of suit that's not terribly credible or likely to result in litigation. *E.g.,*
  - Investigation of a former employee's complaint of harassment where any potential claims he could bring are time-barred.
  - An employee responds to her termination by saying, "You'll hear from my lawyer!"

Confidential Work Product

Must I or my attorney write "Confidential Work Product" on documents I create after a threat of litigation to claim the privilege?

No.

If I write "Confidential Work Product" on such a document, is that document automatically and irrevocably CWP?

No.

Confidential Work Product

Can non-attorney prepared CWP ever be discovered?

Yes. If the opposing party shows:

- Substantial need for the materials;
- Unable without undue hardship to obtain the equivalent of the materials by other means.

Confidential Work Product

The Most Helpful Things HR Can Do to Protect CWP

- If you are drafting something other than an e-mail to outside counsel asking for legal advice, include:
  - Date of document creation
  - Description of threatened/anticipated litigation
- Choose your words carefully where ACP does not also apply
- Proper storage

Notes Applicable to ACP and CWP

ACP/CWP

How should I store attorney-client privileged communication or confidential work product?

- Must be stored in a way reasonably designed to stay confidential.
  - Not in a publicly available server folder;
  - Not in completely unsecured physical folders.

ACP/CWP

How should I store attorney-client privileged communication or confidential work product?

- Must not be stored in discoverable files.
  - For example, an employee's personnel file should not have a subfolder for litigation or ACP/WP and there should not be ACP or WP loose in the file.
  - If you set up an Outlook file folder for an employee, there should not be a subfolder for ACP/WP and there should not be ACP or WP within the employee's folder.

ACP/CWP

What about GenAI?

- No universal rule yet, but assume (for now):
  - Anything privileged submitted to consumer-grade (free or paid) GenAI is no longer privileged.
  - Anything privileged submitted to enterprise-grade GenAI may depend on license/terms.
    - ACP/CWP may survive a submission to a closed universe enterprise GenAI tool where the model can’t train on the input.
  - Any queries to any sort of GenAI may be discoverable.

ACP/CWP

How to double your workload and increase attorneys' fees (don't do this):

Writing notes directly on clearly discoverable documents (employee files, timekeeping records, policy documents, etc.).

QUESTIONS & ANSWERS

LEHR MIDDLEBROOKS
& VREELAND, P.C.

LABOR & EMPLOYMENT LAW

Your Workplace is our Work®

www.lehrmiddlebrooks.com