

Generative AI and the challenge of preserving privilege in discovery

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Generative artificial intelligence (GenAI) tools are reshaping how electronically stored information is collected, reviewed, and produced in litigation. The prompts and outputs from these tools may be considered relevant documents that need to be preserved and produced in litigation. The use of GenAI tools could affect key discovery protections: the attorney-client privilege and its sibling, the work-product doctrine.

To protect these privileges, organizations should carefully evaluate how they deploy GenAI and consider implementing policies and trainings for the responsible use of such tools.

Privilege protects relevant documents from discovery

The **attorney-client privilege** protects confidential communications between a lawyer and their client made for the purpose of requesting or rendering legal advice. As courts have often emphasized, the attorney-client privilege is the oldest and most sacred exception to discovery and part of the foundation of the legal profession.

Organizations should consider implementing clear policies and training to emphasize the importance of maintaining confidentiality in privileged communications.

It encourages clients to communicate openly and honestly with their lawyers, without fear that others will later pry into those conversations. This openness allows lawyers to provide the best possible legal advice.

The **work-product doctrine** provides similar protection by shielding documents and tangible items prepared in anticipation of litigation or trial from discovery. Its purpose is to prevent clients from being disadvantaged by revealing their attorney's work or mental impressions to an adversary. As the US Supreme Court observed in *Hickman v. Taylor*, 329 US

495, 510 (1947), "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."

These two doctrines together create a protective zone that allows the attorney-client relationship to function effectively. However, the use of GenAI tools, depending on how they are used by clients and counsel, can blur or even weaken the boundaries of this zone.

Generative AI tools do not give rise to privilege

GenAI tools are obviously not lawyers, and advice from a GenAI tool is not privileged. Even if their responses resemble legal analysis, the prompts used to generate these responses are not privileged since they are not communications with legal counsel.

Some have suggested the adoption of an "AI privilege" to protect communication between users and GenAI tools. Until such a doctrine exists — and no court has recognized it — organizations should assume that GenAI interactions fall outside traditional privilege protections.

Consider an employee drafting an email to request legal advice from a lawyer. If the employee uses a GenAI tool to improve the draft for style or clarity, the interaction with the tool is not a confidential communication with counsel. However, it may reveal the substance of the employee's intended request for legal advice. Whether such a prompt and output would ultimately be treated as privileged in litigation remains uncertain.

Similarly, if an organization develops or licenses a GenAI tool to provide legal guidance directly to employees, those interactions may not be considered privileged unless an attorney reviews and validates the output of the GenAI tool.

The use of GenAI tools by counsel may have somewhat greater protection, particularly since outside counsel's data is less likely to be included in the scope of discovery, but it still carries risk. In-house counsel often serves dual roles, providing both legal and business advice. Courts have long held that the attorney-client privilege applies only to communications made for the purpose of providing legal, not business, advice.

When GenAI tools are used to create materials that blend legal and business considerations, they add another layer of complexity to an already nuanced privilege analysis and result in document artifacts that could be retained and collected in discovery. Additionally, since using GenAI to generate content does not necessarily involve the communication of legal advice to a client, the extent to which such work is privileged could be subject to challenge in litigation.

The work-product doctrine faces similar issues. In-house counsel using GenAI tools for analysis or strategy must ensure that such work is prepared in anticipation of litigation or for adversarial proceedings to be protected as work product. Like privilege, the context and purpose of the AI-assisted work will determine whether protection applies.

Privilege waiver

When a communication is deemed privileged, it is protected from disclosure to third parties unless and until the privilege is waived by the client. This waiver typically occurs when the communication is shared with non-privileged parties, destroying the confidentiality.

The standard for waiving work product is different. Waiver usually occurs when a document or item is disclosed to an adversary or when the likelihood of it reaching an adversary is significantly increased.

How generative AI tools may pose risk of waiver

Even if the input into a GenAI tool is privileged, the confidentiality of that content could be undermined by using GenAI in a way that amounts to a waiver. For example, when GenAI chatbot conversations appeared in internet search results, confidential material became accessible to the public. This example underscores that employees may unwittingly use public-facing tools that lack enterprise-grade safeguards, potentially exposing privileged information.

Waiver risks can also be more subtle. For instance, counsel might use GenAI tools to brainstorm litigation strategies. Even if these prompts and outputs are not typically discoverable, storing them in third-party systems could allow adversaries to argue that privilege or work product protection has been compromised.

Notably, the failure to provide secure, vetted tools may drive employees toward consumer-grade platforms, compounding the risk. Organizations should consider investing in enterprise GenAI tools to encourage employees to use secure tools that have been vetted to maintain confidentiality.

For these reasons, organizations should consider implementing clear policies and training to emphasize the importance of maintaining confidentiality in privileged communications.

Privilege is complex: Seek out expert advice

In practice, many factors influence the scope and application of privilege, including jurisdiction, judge, local rules, the parties' industry, the type of case, relevance, and proportionality. As the laws governing privilege were established centuries ago, applying the law of privilege to modern communications is nuanced and fact specific. Courts may reach different conclusions based on the context, the safeguards in place, and the purposes for which AI was used.

Given these complexities, it is critical for organizations to seek expert advice when developing and implementing policies for employee use of GenAI tools. In-house counsel should work with outside counsel and information governance professionals to create internal AI Use Policies and related training programs as well as defensible best practices that protect privilege while fostering innovation.

GenAI tools may pose risks to the confidentiality essential to attorney-client privilege and the work-product doctrine.

Importantly, given the fast-paced evolution of GenAI tools, these policies, trainings, and best practices should be revisited periodically to ensure that privilege continues to be protected as technological advancements change the way in which GenAI tools work and if and where prompts are stored.

Further, litigators should understand the GenAI tools that could be considered sources of relevant information in litigation, recognize the burden of reviewing GenAI inputs and outputs for privilege, and negotiate the scope of discovery accordingly.

Conclusion

GenAI tools are transforming how organizations create, store, and use information. GenAI tools may pose risks to the confidentiality essential to attorney-client privilege and the work-product doctrine. As courts navigate the implications of GenAI on privilege in the coming years, organizations should assume that certain uses of GenAI could jeopardize privilege.

To leverage the benefits of GenAI while preserving essential privilege protections in litigation, organizations should consider providing access to secure, enterprise-grade tools, implementing robust AI use policies, and training employees on confidentially storing legal advice.

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