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Privilege Under Pressure: Navigating Legal Communications Across Modern Platforms

Preserving Attorney-Client Privilege and Work Product Across Microsoft Teams, Slack, Text Messaging, and AI Tools

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Agenda

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I. Privilege & Work-Product Fundamentals
Texas & Fifth Circuit

II. Platform-Specific Risks
Slack, Microsoft Teams, Text/SMS

III. AI & Privilege
Risks and Case Law Updates

IV. Best Practices & Practical Safeguards

Attorney-Client Privilege in Texas

- **Tex. R. Evid. 503(b)(1):** protects "confidential communications made to facilitate the rendition of professional legal services to the client" among the client, client representatives, the client's lawyers and their representatives, and counsel for parties sharing a common legal interest.
  - The privilege belongs to the corporate client — not the individual employee or the lawyer — which controls who can waive it.
  - *Upjohn Co. v. United States*, 449 U.S. 383 (1981): rejects the "control group" test; privilege can reach low- and mid-level employee communications made to secure legal advice.
- **Dual-Purpose / Primary-Purpose Test:** where a communication mixes legal and business advice, the Fifth Circuit applies a "primary purpose" test — legal advice must predominate. Privilege does not apply where legal advice is merely incidental to business advice.
- Merely including an attorney as an email recipient does not create any protection for the underlying facts.

Work Product in Texas

- **Tex. R. Civ. P. 192.5:** protects material prepared, mental impressions developed, or communications made "in anticipation of litigation or for trial" by or for a party and its representatives (attorneys, consultants, sureties, indemnitors, insurers, employees, or agents).
  - **Core work product** (attorney mental impressions/opinions) — not discoverable.
  - **Other work product** — discoverable only on showing of substantial need + undue hardship.
- Work product can be created by the client or its non-lawyer representatives, not just attorneys — directly relevant to employees using Slack, Teams, and AI.
- **Key Waiver Contrast:** attorney-client privilege is generally waived by disclosure to ANY third party, but work product is waived only by disclosure to an ADVERSARY (or in a manner that substantially increases the likelihood an adversary obtains it).

Privilege Analyzed Document-by-Document

Shintech Inc. v. Olin Corp. (S.D. Tex. 2024)

- Privilege must be established document-by-document through specific evidence, not blanket assertions.
- Drafts, redlines, attachments, and emails are not privileged merely because counsel participated or was copied; each communication must reveal legal advice — not business edits or underlying facts.
- Nonlawyer communications can remain protected if they convey legal advice or constitute work product prepared in anticipation of litigation.
- Court rejected generalized attorney declarations; required document-specific evidence of when litigation was reasonably anticipated.

Takeaway: Copying a lawyer or labeling a document "privileged" does not make it privileged.

No Work-Product Protection for Factual Notes

Synergy Thermogen, Inc. v. Blackbrush Oil & Gas, L.P., No. 25-BC01B-0011 (Tex. Bus. Ct., 1st Div. July 2026)

- Notes taken at counsel's direction were NOT core work product because they contained only a factual summary with no attorney/representative mental impressions.
- Court ordered production because plaintiff established substantial need and undue hardship.

Takeaway: Record mental impressions and legal analysis alongside factual notes to preserve core work-product status.

Slack: Document-by-Document Analysis

In re OpenAI, Inc., Copyright Infringement Litig., (S.D.N.Y. June 20, 2025)

- Slack messages are NOT privileged merely because they sit in a "privileged" channel, were created at counsel's direction, or include in-house counsel.
- Each message requires an individualized assessment of whether its predominant purpose was to seek, provide, or communicate legal advice.
- Ties to the Fifth Circuit "primary purpose" test.

Takeaway: Channel labels are not a substitute for genuine legal-purpose communications.

Slack: Work Product Can Attach

Beneschott v. Toptal, LLC, Nos. 6D2023-3769 & 6D2023-3789 (Fla. 6th DCA)

- Slack messages are not automatically non-privileged merely because no attorney participated directly in the thread.
- Messages may be privileged or protected work product if they communicate prior legal advice, are shared with employees who need the advice, or were prepared in anticipation of foreseeable litigation — even months before suit.

Takeaway: Employee-to-employee messages relaying legal advice can still be protected.

Microsoft Teams: Privilege Risks

- Channel-based, multidisciplinary chats often do not involve counsel communicating solely with a client representative — diluting the "primary purpose" showing.
- Integration with Microsoft 365 / Copilot ecosystem expands where content lives and who can access it.
- Provider privacy terms may authorize access, disclosure, and preservation of content in response to legal process.
- Same waiver and best-practice principles as Slack apply.

Takeaway: Create dedicated, access-restricted legal channels; keep substantive legal advice out of general business channels.

Text Messages: Continuous Streams

We the Protesters, Inc. v. Sinyangwe (S.D.N.Y. 2024)

- Parties agreed to collect/review all texts in the same chain on the same day when any message hit an agreed search term.
- Court held plaintiffs could not unilaterally redact non-privileged, non-responsive texts from same-day chains merely for irrelevance.
- Because text chains mix unrelated topics, parties should negotiate clear protocols on the unit of production, redactions, and sensitive content.

Takeaway: Negotiate ESI/text protocols BEFORE collection.

Best Practices for Protecting Privilege: General

- Separate legal advice from business discussions; make privilege a per-message decision.
- Seek agreement on discovery protocols before collecting messages.
- For drafts/redlines, keep legal comments separate from business comments.
- Do not assume counsel-directed notes are core work product — record mental impressions.
- Act immediately on inadvertent disclosure (FRE 502(b) / Tex. R. Civ. P. 193.3(d)); use 502(d) clawback orders.

Best Practices: Platform Hygiene (Teams / Slack / Text)

- Create dedicated, access-restricted channels for legal matters; limit membership to need-to-know.
- Label privileged channels/messages (e.g., "Legal" or "ACP" in channel names); open legal threads with a "confidential and legally privileged" banner.
- "Pin" a privilege-purpose reminder as the first message in a legal channel.
- Keep legal advice off general business channels; route sensitive matters to counsel deliberately.
- Train employees on when/how to loop in counsel and on the limits of labeling.

Caveat: Labeling alone is not dispositive — *Shintech* and *In re OpenAI* rejected reliance on "privileged" labels; pair labels with genuine legal-purpose communications.

Privilege Logging & Legal Holds for Modern Platforms

- Preserve and collect Slack/Teams/text data under legal hold; build platform retention and hold capabilities BEFORE litigation arises.
- Negotiate ESI protocols governing the unit of production (e.g., same-day chains), redactions, and sensitive content.
- Log privileged chat messages individually rather than by channel.
- **Spoliation anchor:** FRCP 37(e) — sanctions where ESI is lost because a party failed to take reasonable steps to preserve it.

Takeaway: Preservation is a front-end design problem, not a litigation afterthought.

Why AI Tools Create Unique Privilege Risks

- **AI tools are now embedded in in-house workflows:** contract review, due diligence, regulatory research, drafting, and meeting transcription.
- **The core tension:** AI's usefulness depends on feeding it detailed inputs—but those very inputs can destroy confidentiality and hand adversaries a waiver argument.
- AI does NOT change privilege law; it multiplies the hidden routes to waiver (third-party disclosure, data retention/training, vendor access, discoverable prompt logs).
- **The overlooked risk:** business-side employees using consumer AI for legally sensitive questions before in-house counsel is involved—creating discoverable records outside any privilege framework.

Takeaway: Privilege survives AI only with governance and lawyer control.

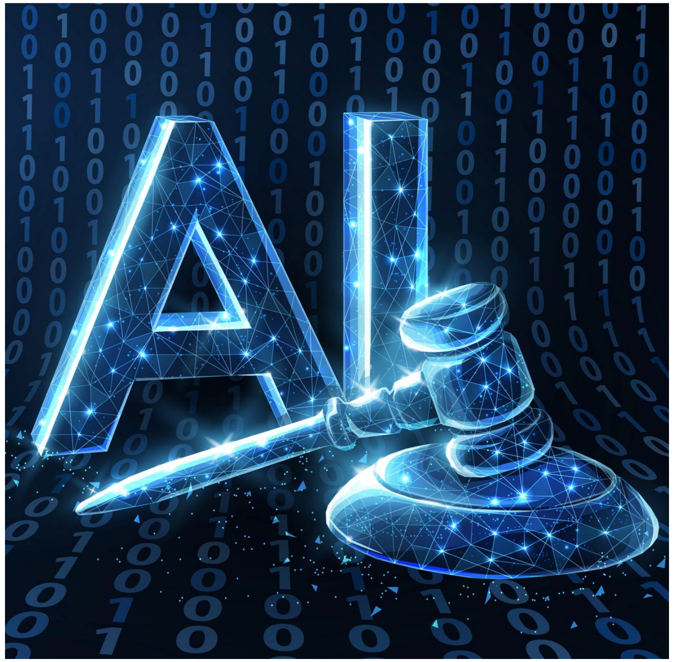
The Business-Employee Blind Spot

- **Scenario:** An engineer, operations manager, or compliance analyst encounters a legally sensitive issue—and asks ChatGPT before calling legal.
- **Why it happens:** AI is faster than waiting for in-house counsel; employees don't recognize the legal dimension; company culture rewards self-sufficiency.
- **Why it's dangerous:**
  - The prompt itself becomes a discoverable admission ("Can we be sued for...")
  - No attorney involvement = no privilege attaches from the start
  - The AI's response may be inaccurate, creating a false record of "legal advice"
  - Consumer AI Terms of Service typically allow data retention—creating a permanent record outside company control
- **This is not hypothetical:** discovery requests now routinely seek AI interaction logs, prompt histories, and outputs.

Takeaway: Every employee AI prompt about a legal issue is a potential exhibit—with no privilege shield.

AI & Privilege: The Through-Line

- **Unifying principle:**
- Consumer AI tools generally BREAK confidentiality (defeating attorney-client privilege) —
- BUT material generated at counsel's direction may still be protected WORK PRODUCT — because work product is waived only by disclosure to an adversary.



Fortis Advisors LLC v. Krafton, Inc. (Del Ch. Mar. 2026)

What Happened:

CEO of acquiring company used ChatGPT to strategize how to avoid a $250 million earnout obligation by terminating the acquired company's founders.

The Opponents' Argument:

Termination was pretextual – the CEO's AI prompts proved it.

What the Court Said:

The CEO implemented the AI chatbot's playbook to terminate the founders without cause; the AI prompts showed bad-faith intent.

Takeaway: AI prompts by employees can be powerful evidence against the company's litigation position.

United States v. Heppner
No. 25 Cr. 503 (JSR) (S.D.N.Y. 2026)

The Question Presented:

"[W]hether, when a user communicates with a publicly available AI platform in connection with a pending criminal investigation, are the AI user's communications protected by the attorney-client privilege or the work product doctrine?"

The Opponents' Argument:

That's waiver!

What the Court Said:

Information sent to GenAI <u>not</u> privileged. "An AI chatbot is not a licensed attorney... communications with a machine, standing alone, cannot give rise to privilege."

Takeaway: AI cannot form an attorney-client relationship—ever.

Morgan v. V2X, Inc., 2026 U.S. Dist. LEXIS 67939 (D. Colo. Mar. 30, 2026)

What Happened:

Pro se litigant used public AI tools to prepare litigation materials.

The Opponents' Argument:

Public AI tool waived work-product protection.

What the Court Said:

AI-assisted litigation materials may qualify as work product. Court required disclosure of any AI platform used and amended the protective order to bar AI platforms lacking contractual safeguards — effectively excluding most consumer tools.

Takeaway: AI-assisted materials may be work product, but the AI systems used may require disclosure and limits.

Tate Grp. Auto., LLC v. Legacy Auto. Cap., LLC
No. 25-BC11B-0020 (Tex. Bus. Ct., 11th Div. June 2026)

What Happened:

Company executive made queries in ChatGPT about the dispute, including by uploading case materials, to help him analyze the litigation.

The Opponents' Argument:

Use of ChatGPT automatically waived work-product protection.

What the Court Said:

Use of ChatGPT did not automatically waive; waiver ordinarily requires disclosure to an adversary. Court ordered production of non-protected portions; encouraged amending protective order to address AI.

Takeaway: AI-assisted materials protected by work product if prepared in anticipation of litigation.

Enterprise vs. Consumer AI: The Privilege Gap

- **Enterprise AI (e.g., Copilot, CoCounsel, Harvey, Legora):**
  - Contractual no-training clauses; data not used to improve models
  - BAA/DPA agreements; data residency controls
  - Audit logs retained under company control
  - Access restricted to authorized personnel
- **Consumer AI (e.g., free ChatGPT, Gemini, Claude public tier):**
  - Terms of service typically permit data retention and model training on inputs
  - No contractual confidentiality protections
  - No audit trail accessible to the company
  - Accessible to anyone—including opposing counsel who can subpoena the provider
- **The gap:** legal departments deploy enterprise AI, but business employees may default to the free consumer tools they already use personally.

Takeaway: Enterprise AI can preserve privilege; consumer AI almost certainly destroys it.

AI Use Policy

- A written AI Acceptable Use Policy is now table stakes for privilege preservation.
- **Essential elements:**
  - Approved tools list: specify which AI tools are sanctioned for which purposes
  - Prohibited inputs: privileged communications, attorney advice, litigation strategy, client confidences, trade secrets
  - Escalation protocol: "If your question involves legal risk, stop and contact [legal team]"
  - Retention/deletion rules: what to preserve vs. what to delete, aligned with records policies
  - Acknowledgment requirement: annual sign-off by all employees with access to sensitive information
- **Enforcement mechanism:** policy must be more than aspirational—tie to disciplinary framework and include monitoring/audit provisions.
- **Update cadence:** AI tools evolve monthly; policy should be reviewed at least quarterly.

Takeaway: A policy creates the "reasonable steps" courts look for when evaluating privilege claims.

Training: Help Employees Spot a Legal Question

- **The goal:** employees should recognize when an issue is "legal" and route it to counsel instead of AI.
- **Red-flag triggers to train on:**
  - "Can we be sued for..." / "Are we in violation of..." / "What's our liability if..."
  - Any question involving regulatory compliance, contracts, or potential disputes
  - Questions about communications with outside counsel or litigation strategy
  - Requests to summarize or "explain" legal memos or advice from lawyers
- **Training format:** scenario-based exercises using energy-sector examples (environmental incidents, permit issues, joint-venture disputes).
- **Frequency:** at onboarding + annual refresher + triggered by policy updates.
- **Measure effectiveness:** track legal-department intake volume pre/post training; reward "good catches."

Takeaway: Training is the frontline defense—employees can't protect privilege if they don't see the issue.

Key Takeaways for AI Tools and Privilege

- **1. AI does not change privilege law—it creates new, fast pathways to waiver.**
- **2. Consumer AI is the greatest threat:** no confidentiality, no privilege, full discoverability.
- **3. The employee blind spot is real:** business teams may use public AI for legal questions, often without recognizing the privilege implications.
- **4. Courts are already ordering production of AI interactions** (Fortis, Heppner, OpenAI,). The law is moving fast.
- **5. Policy + Training + Enterprise Tools = your three-legged stool.** Removing any leg collapses the privilege framework.

Takeaway: Build the system now—before your next discovery request asks for AI logs.

Key Takeaways

- Privilege is proven document-by-document; the “primary purpose” must be legal.
- Work product is harder to waive than privilege — disclosure to an adversary is the trigger.
- Modern platforms multiply inadvertent-waiver paths. Design channels, holds, and protocols in advance.
- AI: consumer tools break confidentiality; enterprise tools with contractual safeguards + counsel direction preserve work-product arguments.

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Jarod Stewart is chair of Steptoe's Commercial Trials & Litigation Group. He is a seasoned litigator and trial lawyer who gets the details right; is responsive; and out-briefs, out-prepares, and out-works the opposition to succeed in litigation and at trial. Jarod has represented plaintiffs and defendants in a wide variety of matters, including business divorces, trade secrets disputes, healthcare litigation, fraudulent-transfer lawsuits, oil and gas disputes, and transnational cases involving Latin America.

Jarod primarily focuses his practice on helping clients in the energy and healthcare industries. He has gone toe-to-toe with outstanding lawyers from across the United States and has won significant victories for his clients in court, arbitration, and administrative proceedings. Clients praise his ability to produce outstanding work product quickly, and to help them navigate thorny legal issues whenever and wherever he is needed.

Jarod's clients know that they can call him at any time to provide guidance and direction on how to navigate disputes at an early stage or throughout hard-fought litigation, including trial and appeal.

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Jacquelyn Rex Tobin is the deputy office managing partner of Steptoe's Houston office. Jackie is a trial lawyer with a broad litigation practice, representing plaintiffs and defendants in complex civil litigation, including multi-district litigation, construction litigation, and white-collar matters and investigations. Jackie prides herself on working closely with clients to develop creative solutions to ensure they get the outcome they want—whether that means proceeding to trial or resolving the matter through settlement.

Jackie also regularly advises general contractors and project owners throughout the development and construction of their projects, ensuring timely completion and payment of all work without the need for litigation.

Prior to attending law school, Jackie was an elementary special education teacher in the Rio Grande Valley with Teach for America.

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David Isaak is the office managing partner of Steptoe's Houston office. David has spent more than two decades fighting for companies and executives in their most serious legal matters, including government and internal investigations, white-collar criminal and regulatory cases, and high-stakes civil litigation.

David's white-collar criminal and regulatory practice centers on representing clients in legally and factually complex investigations and white-collar criminal cases involving health care fraud, tax fraud, securities fraud (including insider trading), antitrust, commodities manipulation, trademark infringement, theft of trade secrets, work site immigration enforcement, environmental crimes, and violations of the Foreign Corrupt Practices Act (FCPA).

His victories are often private, such as when prosecutors declined to prosecute a software executive and his company after a lengthy investigation into alleged trade secret theft. But he has also had many public successes, including his role in securing an acquittal on manslaughter and Clean Water Act charges for the Deepwater Horizon well site leader.

David is frequently called upon to represent clients in high-stakes civil matters involving allegations of breach of contract, breach of fiduciary duty, trade secret theft, fraud, fraudulent inducement, and various other tort claims.

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Grace Haidar is Legal Counsel at Trafigura Trading LLC, based in Houston, TX. She held a previous in-house role at Aramco Americas, and was a Litigation and International Arbitration Associate at the law firms of Jones Day and K&L Gates LLP. Grace specialized in international arbitrations in the energy industry while in private practice, and has expanded her practice in-house, to include M&A, energy and infrastructure projects, and now energy commodities transactions.

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