By **Gregory C. Mollett**

Avoiding Prying Eyes in Family and Closely Held Business Communications

Take steps to help clients reduce the risk of disclosing private information

Businesses of all kinds must be vigilant to protect from prying eyes those communications that could reveal business secrets or prove damaging in later litigation. Family businesses are particularly vulnerable. Why? The formality typically built into corporate environments can be missing in family-owned/operated businesses. For example, family members commonly discuss business issues in informal settings, under unguarded circumstances and in conjunction with non-business matters. The danger? Such businesses face the loss of privacy and the inadvertent disclosure of issues, options, opinions and strategies.

The situation can be compounded when communications occur in writing in non-traditional corporate settings. Family members often text or communicate via social media. Such writings often are done quickly, without careful deliberation over phrasing and language choices, without later editing, fact checking or legal reviews and without even a passing consideration of the potential for having to explain the communications months or years later in a court case.

So, what can be done? Encourage your clients to be proactive. All businesses can take steps to reduce the risk of disclosing private information, being required in litigation to recount information that should have been protected by legal privileges or protections and having to explain unfortunate or inflammatory word choices. The bottom line? If your clients make deliberate choices now, they can ensure that they're not the next "do not let this be you" anecdote being studied by others.

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High Risk of Disclosure

Very few businesses identify potential litigation issues at the time of underlying events. A decision is made. A contract is negotiated. An employee is separated. A competitive strategy is launched.

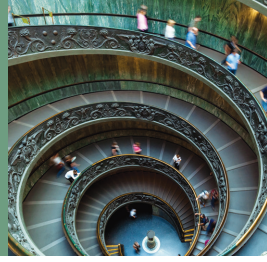
It's only later, when things have gone (or are going) poorly, that people start to wonder whether information exists—from correspondence or otherwise—that might be used against them. There's no way to shelter all "normal course of business" communications from later scrutiny in litigation. However, there's a particularly high risk of disclosure in family businesses. Why? Consider the following fact pattern.

Family Corp. Quarterly Meetings

Family Corp. is a three-generation family business. The entire company is family owned. The family matriarch is the CEO. She and family members from all three generations meet once a quarter to candidly discuss business developments, risks, threats, competitive strategies and financial matters. Between "formal" quarterly meetings, family members of various generations see each other socially and communicate informally by telephone, text and social media.

During a quarterly meeting, the CEO explains that recent competitive pressures have Family Corp. considering ways to reduce expenses. She's concluded that the company can reduce costs through human resource adjustments. Historically, Family Corp. focused its employment strategies on stability. The company would interview, hire, reward and keep employees long term. Now, she says, Family Corp. needs to reevaluate hiring, recruitment and retention strategies.

The CEO has just reviewed a study on recent employment trends. She learned that younger workers tend to be more mobile. They often move from job to job and don't stay long enough to be rewarded and



promoted. The CEO sees an opportunity to reduce costs. She proposes to replace long-term workers, who make more money, receive more benefits and have more accrued vacation, with lower cost entry-level workers. Done systematically over the next 18 months, she's concluded that Family Corp. could save $1 million.

Various family members voice opinions concerning the CEO's proposed plans and strategies. Consistent with her general practice, during the meeting, one of the CEO's siblings takes notes on her tablet. In addition, the CEO's executive assistant takes more formal notes. He does his best to capture the overall gist of what's said and who says it. The resulting notes are typed up and circulated before the next quarterly meeting. No one takes responsibility to verify or edit the notes.

Two years later, Family Corp. is sued. Three former employees between the ages of 45 and 60 allege that they were fired and replaced by younger people in violation of state and federal anti-discrimination laws. They're seeking more than $1 million in damages. Once the suit is filed, the attorneys for the plaintiffs demand that Family Corp. produce "all documents" concerning discussions about hiring, treatment and retention of workers based on age. Defense attorneys ask Family Corp. if there are any responsive documents and are told "no."

During depositions of family members, a witness mentions that there were oral discussions about "human resource issues" during quarterly board meetings. The plaintiffs' attorneys press for details about what was said in the meetings. The deponent remembers that there was a plan to replace existing, long-term workers with new people. However, he tells the defense lawyers that he doesn't wish to discuss the substance of quarterly meetings: "It was just family and was meant to be private."

Does the family member have to testify about what he remembers from the meeting? If so, what could Family Corp. have done to avoid this problem?

Depending on the state where the meeting took place, generally the family member must testify to everything he remembers. For example, most states have no "board meeting" privilege. When business people get together to talk business, they should expect that if there's a later legal proceeding, they may be asked for their personal recollections of what was said and by whom.

Attorney-Client Privilege

Certain types of business decisions have legal consequences. If so, having legal counsel attend the meeting to field legal questions and provide legal advice can keep the substance of (at least some portions of) the meeting privileged from later disclosure or testimony. But, there are steps that must be taken to create and protect the privilege.

It's not enough merely to have an attorney in the room for meetings. For the privilege to arise, there must be both an attorney and one or more clients who are communicating. Who constitutes the "client" can vary state to state. Generally speaking, in a formal corporate setting, the client is the company itself, and the company will be represented by the executives of the company individually and as a group. So, a Family Corp. meeting attended by owners and counsel would have both an attorney and collectively a client.

In addition to who must be present, for attorney-client privilege to attach, there must be consideration of who may not be present.

In addition to who must be present, for attorney-privilege to attach, there must be consideration of who may not be present. The attorney-client privilege doesn't attach if the communications occur in the presence of someone other than the attorney and the client. For example, at the Family Corp. quarterly meeting, if vendors, customers or the public were present, the privilege wouldn't arise. Exactly where that line is drawn can sometimes be difficult to know. Some states define "client" very narrowly in a corporate setting. The presence of Family Corp. employees, who aren't owners or executives, might be deemed outside the group that the law considers the "client."

If the attorney and the client are present, and no one else is there, privilege still doesn't automatically arise. The

privilege doesn't come simply from the presence of the attorney or from communication with or including the attorney. The privilege arises when the client seeks legal advice and/or when the attorney provides legal advice. That seems straightforward, but it isn't always so.

For example, during a Family Corp. quarterly meeting, there's an extended discussion of corporate expansion. The attorney is asked about what she thinks of the plan to acquire property and build new facilities in an adjoining state. Whatever her opinion on this topic, what she says isn't privileged. She's being asked for a business opinion, not a legal opinion. This distinction can be complicated, especially in family businesses in which family members may be attorneys who also are owners or executives. Whether privilege exists as to certain conversations literally comes down to an analysis of the subject matter of individual topics.

Fortunately, there are ways to increase the reliable application of the privilege. First, manage meeting attendees. If the goal is to keep discussion of certain topics privileged, know the law as to who constitutes the "client" and proactively limit attendance to those individuals who are either the attorney or attorneys and the client or clients.

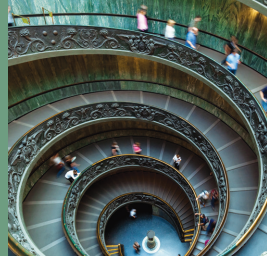
Second, create a meeting agenda in advance. You and your client need to determine which meeting topics will or may have legal implications. As part of the process, require attendees to submit meeting topics in advance for placement on the agenda, so that you can determine whether a topic is business, legal or a combination of both. With the agenda determined, divide the meeting between purely business topics and definite or potential legal topics. Write out the business topics. Create a separate agenda for legal topics. On the main agenda, after the business topics, state that the meeting will adjourn into executive sessions to discuss legal matters. On a separate agenda, place the words "Confidential—subject to attorney-client privilege" at the top and then identify the topics. Word the topics in ways that identify the expected legal aspects of each topic. For example, "discuss legal implications of proposed human resource planning."

Third, consider whether to include outside counsel in meetings. It isn't necessary to have outside counsel present for the attorney-client privilege to arise. However, because in-house attorneys often provide both business and legal advice, having an outside attorney present on behalf of the company can strengthen a later claim that the conversations during the meeting are privileged. This is particularly true if the outside attorney attends only the executive session, during which legal issues are discussed.

Fourth, actively manage the meetings. If during a meeting, a topic or conversation veers into an area that may have legal implications, you must step in, whether you're inside or outside counsel. Before the discussion continues, you should ensure that the only people present are you and the client and then consider shifting the discussion into the executive session (if the conversation isn't already taking place there). This can be challenging. Even innocuous topics can quickly meander into areas in which legal issues are or may be implicated. Having an aggressive, knowledgeable counsel at the meeting is the best defense.

Fifth, manage the minutes. If the company is going to create written minutes, make sure that the minutes pertaining to any legal discussion are labeled as "confidential—subject to attorney-client privilege" at the time the minutes are created or shortly thereafter. This is just good procedure. Waiting until after a suit is filed before labeling the minutes is ill-advised and can be seen as tampering with evidence. While the company should label the minutes as soon as possible, it shouldn't over designate. Some companies label every portion of every meeting minute entry as subject to the attorney-client privilege. Labeling everything, including purely business topics, as privileged can backfire. In litigation, a judge will ultimately determine what's privileged. Experience has shown that judges look more skeptically at assertedly privileged material within larger documents that have blanketly labeled all information as "privileged." Similarly, if entire documents are labeled as privileged, and a court later determines that the document or portions of the document aren't privileged, a jury can be misled when shown an admissible document stamped as privileged.

Sixth, keep the privilege. If all of the necessary steps are taken, the privilege can be lost by deliberate or accidental waiver. If you or the client(s) share the privileged information with others, the privilege can be lost forever. For example, it isn't uncommon in a family setting to have a company executive share communications from counsel with a spouse or another family member who isn't considered the "client." When that occurs, the privilege is waived.



Meeting Minutes Policy

Under the original fact pattern, the CEO's assistant provides to Family Corp. attorneys electronic copies of the minutes that he prepared. When the minutes are reviewed, some problems are discovered. There are typewritten abbreviations, including in the references to who's speaking. Some of the entries read as if they're attempts at verbatim statements, and others have indications of being paraphrased. There's no reference to counsel or any attorney-client privilege.

Making things worse, when Family Corp.'s attorneys show the notes to the CEO, she immediately begins shaking her head. "This isn't what I said." As she reads on, she concludes that large swaths of information that she believes were discussed aren't referenced at all. The CEO's deposition will be very difficult. How could this have been avoided?

As already discussed, minutes pertaining to executive sessions involving attorney-client privileged matters should be created, verified, maintained and safeguarded so as to ensure the minutes are privileged from production in litigation. Minutes that don't involve privileged information still must be carefully handled. The most important aspects of a meeting minutes policy are attribution, accuracy and completeness.

The individual charged with creating meeting minutes has a big responsibility. From a business perspective, the minutes exist so that the company can track both the subjects discussed and the substance of that discussion. If both of those goals are accomplished, board attendees or other authorized individuals can either determine what happened at a meeting they missed or refresh their recollection as to what happened at a prior meeting. In a purely business context, attribution and complete accuracy aren't as critical as in the litigation context. Of course, most companies don't create or maintain minutes with an eye toward litigation. The smart ones do.

Attribution. Who's speaking can be critical. If the minutes don't accurately identify each speaker, there's a risk that meeting minutes could be used to impeach people with statements that they never made. For example, if the Family Corp. meeting minutes reference the CEO stating that the new human resource policy may disadvantage older workers, but "she doesn't care about their problems," the CEO almost certainly will be asked about the comments during deposition and/or at trial. If the CEO didn't actually make the statements, the CEO must testify under oath both: (1) denying the statement; and (2) concluding that the minutes are inaccurate. Even though she's being truthful, a jury may be troubled by her testimony and begin to question her honesty and character. Even if the statement was verbatim accurate, if attributed to the wrong person, the damage can be substantial.

Accuracy. When reviewing the notes before her deposition, the Family Corp. CEO tells her attorneys that she generally remembers the statement that's being wrongly attributed to her. It was made by her youngest brother. The CEO goes on to say that her brother is a blustery windbag, prone to hyperbole. Making things worse, the CEO says, is that the phrasing of his comment is inaccurate. What the CEO remembers is that her brother said something similar to "it isn't the company's job to look out for the circumstances of each worker. Everybody has their own problems." While this statement isn't favorable either, the context and meaning are different than the phrasing placed in the minutes.

If the CEO testifies that the minutes are inconsistent with her memory, she'll be in for a tough cross examination. "Are you saying your memory is more accurate than the official meeting minutes, taken by a person whose sole job was writing down what was said and who wrote things up in real time?" Ugh. The CEO's answer may well be "yes," but it will be tough to convince a jury that she was right.

Completeness. The CEO goes on to tell her attorneys that her younger brother said more than what's in the minutes. She remembers clearly that she followed up on his comments by asking him what he meant. She recalls him saying, "it isn't that I don't care about our workers, of course I do, but come on, this is a business, and we can't let the potential problems of every single worker be the basis for our decision making." You look at her sadly, saying, "But, what you just told us is not in the minutes."

When the CEO is deposed, she's asked if she remembers anything else about the meeting, other than what's in the minutes. Being under oath, she has to tell the truth. So, she states that the minutes are incomplete, and then she recounts her recollection of the additional comments from her brother. The plaintiffs' attorney smiles broadly. "Now you're telling us that you remember things that were never even written down, and coincidentally, the new statements walk back the bad

things that are in the minutes? The jury is going to love you!" Ugh, again.

The takeaways in the areas of attribution, accuracy and completeness are simple. First, the individual assigned to prepare the minutes must be knowledgeable. If she doesn't know for certain the identity of each individual at the meeting, that must be addressed before the meeting starts. There can be no guessing.

Second, if the conversation during a meeting is going fast and the minute taker loses track of who says what, she must stop the discussion and insist that individuals talk one at a time. That's what happens in a courtroom. These minutes might someday be read to people who are weighing the conduct of the meeting participants. There's simply no room for confusion or overlapping statements.

Third, Family Corp. must decide what level of detail it wants in its minutes. Minutes don't have to be verbatim transcripts of every word spoken. Many times, a company chooses not to create a transcript. Things like "discussion of personnel issue continued" are used, rather than detailing specifics. All minutes should be prepared based on the level of detail the company selects in advance, and all minutes should be prepared in the same fashion. For example, if some parts of the meeting purport to have quotes and others don't, an argument can be made in later litigation that the company was purposely watering down its note taking on controversial topics. If different levels of detail are involved meeting to meeting, a similar argument can be made.

When a company strives for detail, it runs the risk that something damaging might be said and can't be walked back. For example, the CEO's younger brother (being a blustery windbag) might be better suited to note taking that merely indicated, "Mack expressed his thoughts on the new policy." It might be difficult to later reconstruct Mack's comments, and individuals at the meeting might remember them differently, but it's much easier to walk back the content and provide context if Mack's extemporaneous outbursts aren't recorded verbatim.

In circumstances in which absolute certainty is sought, some companies choose to record board meetings in full. That's a strategic choice. For the reasons just discussed, having a verbatim transcript isn't always ideal. Also, it may deter spontaneous interaction. Individuals who know they're being recorded tend to be more guarded. If recordings are made, they should be handled consistent with principles relating to the attorney-client privilege.

Fourth, the individual preparing the notes must ensure accuracy. That has to be done in at least two ways. During a meeting, the minute preparer must be willing to interrupt the meeting and seek clarification about what's being said, while it's being said. That can be awkward and intimidating, especially if it involves interrupting an important family member or executive. But, it has to be done. Writing down "essentially" what was said isn't the same as getting things right. Ensuring that things were taken down right is accomplished by a minutes review policy.

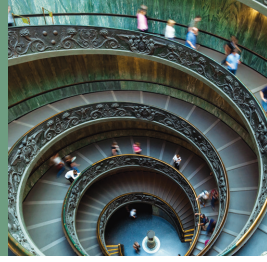
After each meeting, the preparer should finalize the minutes and circulate them to meeting attendees along with a request to verify the attribution, accuracy and completeness of the minutes. Many companies use this process, but not all really enforce it. Minutes should be read shortly after the meeting. That's when memories are most fresh. Minutes should be read slowly and carefully. An individual who attends a meeting knows what happened there, and therefore, it's easy to skim the minutes without reading carefully. That's a problem. Reading the minutes weeks, months or years later at a deposition isn't the time to realize that information is missing or edits should have been made.

Fifth, if you have a plan, stick with it. The individuals attending meetings and those taking the minutes may change over time. What shouldn't change (unless there's conscious choice to make go-forward changes) is the process used. Everyone must understand the process, agree to it and follow it.

Sixth, all board members or regular meeting attendees should sign the meeting minutes policy. For the same reasons that the company might not want to keep copies of old meeting minutes, the company might not want individual attendees to do so. Either all minutes should be returned after review following the meeting (along with a no copy policy), or attendees should be instructed to destroy the minutes in a confidential manner. Minutes shouldn't be casually handled or secretly hoarded. The company should be the controller of the minutes. If an individual with a right to review the minutes wants to see them, she should review the official record, not keep her own "shadow" file.

Individual Note Taking

Under the original fact pattern, the plaintiffs' attorneys depose all family members present at quarterly meetings. When a particular member is asked, she confirms



that she keeps a "personal journal" on her tablet. The plaintiffs' attorneys demand a copy of the journal.

Must Family Corp. produce the type written personal journal? If so, what could Family Corp. have done to avoid this problem?

After the fact, there's almost no way to protect the individual notes taken by family members. When the topic is raised, the family member is shocked. "What about my 'privacy?'" Not much could be more private than a personal journal. Sadly, expectations of personal privacy don't override rules of discovery in litigation. If the notes are relevant to the subjects of the lawsuit and aren't otherwise immune from production by a privilege or protection (such as attorney-client privilege or spousal privilege), a judge likely will require production of the substance of the personal journal.

So, what could Family Corp. have done differently? First, the company could have had a note taking policy. Note taking needn't be prohibited, but if it's going to be permitted, there should be an agreed-on set of rules created to identify and protect information at meetings.

For example, Family Corp. could provide note pads or tablets and require attendees to only use the approach approved by the company. That way, during a meeting, anyone taking notes or otherwise capturing information would be easy to identify.

Second, as discussed above with regard to meeting minutes, Family Corp. could have a board member agreement signed by all attendees. Even in a family context, it's best practice to have board member agreements. Such agreements can be long or short, depending on the circumstances of the individual company. The agreements would contain commitments by the board members on topics such as self-dealing, confidentiality, note taking, trade secrets and company property. If a board member is unwilling to sign such an agreement, there's reason to question whether the member takes seriously the confidentiality associated with corporate information.

Third, private journal entries can be subject to privileges (as referenced above). A company shouldn't engage in deception about what the notes actually are. However, many subjects that have even tangential legal aspects can be safely protected via forethought and planning.

For example, at the beginning of handwritten or typed notes, a note taker who meets the requirements for being considered a "client" could write, "Dear Counsel, I write to seek your legal advice concerning the following issues." While such an approach isn't a catch all for everything written thereafter, questions, comments, queries and issues for follow up often are deemed within the privilege if the author can legitimately testify that she intended the notes to be used to seek legal advice on issues concerning the company.

In addition to note taking, a related danger comes from recording conversations. With nearly everyone carrying a computer in her pocket, it's easier than ever to record conversations. There are various legal, strategic and ethical considerations relating to the recording of others, but from a purely evidentiary perspective, the best rule is to have a policy and stick to it. As with note taking, meeting attendees should agree in advance that no one will record any portion of meetings without corporate approval. If the company wants verbatim recordings of what's said, such recordings should be made in conjunction with the split-meeting approach discussed above. Any recordings during otherwise attorney-client privilege protected portions of the meeting should so state on the recording itself. And, when the meeting is concluded, the recordings must be safeguarded. Playing of the recording within earshot of those not within the attorney-client privilege can waive the privilege.

Casual Electronic Communication

Under the original fact pattern, one of the family members is asked in deposition whether he ever "communicated" with other family members about human resource issues. He states that his son is in the "human resources business" and so sometimes he asks him for advice. After further questioning, the family member states that on occasion, he would text with his son discussing practices inside Family Corp. The plaintiffs' attorneys demand to image the phone of the Family Corp. deponent.

Must Family Corp. allow imaging of the phone? If so, what could Family Corp. have done to avoid this problem?

The best way to keep family business private is to keep business in the business setting. Informal communications (oral or written) are rarely approached with the care associated with more formal settings. While it may be impossible to ensure that no business is discussed outside of the business setting, family businesses can be proactive in instructing all involved not to send texts or emails or make social media posts about business. Any deviations should be sought out and addressed.

Texts and social media posts present two of the biggest sources of damaging information in litigation. Generally speaking, people tend to text using different language than they otherwise use. From abbreviations to emojis, clarity often is sacrificed in favor of brevity. When the subject refers to where to meet for dinner, brevity may be best. If the subject is, "I knew that idiotic new policy was trouble," it might have been better to avoid the communication at all or at least to have typed it with an eye toward what prying eyes might later make of the text. Many legal cases have been jeopardized when text messages people thought were private were later produced in litigation and shown to witnesses testifying in deposition or at trial.

Phone imaging is a hot topic in courts across the country. Most litigation today involves the identification, collection and production of electronically stored information (ESI). ESI can take many forms, one of which is text messages. Different courts have different requirements with regard to whether a party with discoverable text messages may produce just the text messages or must produce the entire device on which the messages were created or stored.

For most people, the thought of having the entire contents of their personal cell phone imaged by someone else is horrifying. The best way to avoid the possibility of imaging is to keep work and personal messages separate. If a single device (such as a cell phone or tablet) is used for both personal and business purposes, the risk of someone reviewing personal information goes up drastically. In addition, keeping a work phone only for work messages tends to keep people more focused on the potential of others reviewing their messages.

However, even if people keep separate work and personal cell phones, there remains a danger of personal texting that discusses business topics. The only way to protect such messages is not to create them. That can be easier said than done. In a family business, family members communicate about personal and business topics, sometimes, simultaneously. Training and practice is the best way to ensure that family members don't talk about work via text. A good rule for your client to follow is that, if he wouldn't say something out loud in open court, he shouldn't write it in a text.

On a related note, the credibility and character of family members can be undermined by social media posts. Likely, the CEO of Family Corp. isn't choosing to post unflattering comments or photos on social media platforms. At least, Family Corp. trusts that the CEO has such judgment. But, just as perilous are posts by other family members about the CEO or others within the company.

The best practice for avoiding social media blunders is to create a social media policy and have family members with access to business information make their posts available for corporate review.

Oral Conversations

Under the original fact pattern, many (but not all) family members gather for a holiday party while the proposed employment change is still under consideration. In a small group at the party, a family member asks the spouse of a different family member what she thinks about the proposed plan to "get rid of the older workers." Coincidentally, the spouse is an attorney. She warns the inquiring party that there may be legal problems with such a strategy. Unhappy with the response, the family member brings in another partygoer and repeats the question and the answer. During deposition, the family member admits to talking about the issue at the party. He's asked to recount everything he remembers. He really doesn't want to.

Must the family member describe either or both of the conversations? The short answer is yes to both. There's no attorney-client privilege, and the conversations are relevant to the litigation. When a family member talks verbally about business matters in a non-privileged context, anything said is fair game in future litigation.

What could Family Corp. have done to avoid this problem? If family members start talking business, someone needs to say "not here" and/or "not now." Individuals wouldn't stand on the street corner and shout about personal matters. Analogously, that's what a business does when its owners, officers or employees talk about business matters in an unprotected environment. No one's perfect, but approaching social interactions where business may come up should be done proactively. If your client doesn't want to have to testify about what was said at a party or family gathering, he shouldn't talk about business topics and should discourage others around him from doing so.