

Privilege & the In-House Counsel

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Privilege & the In-House Counsel

Two Legal Privileges

- ▶ Attorney Client Privilege (“ACP”)
- ▶ Attorney Work Product Doctrine



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When a client consults with an attorney for the purpose of obtaining legal assistance, all confidential communications of the client in furtherance of that end are protected by the ACP.

Elements:

- Where legal advice of any kind is sought
- From a professional legal advisor in his capacity as such
- The communication relating to that purpose
- Made in confidence
- By the client
- Are at his instance permanently protected
- From disclosure by himself or by the legal advisor
- Except that the protection can be waived.



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Legal Advice

The attorney-client privilege does *not* automatically protect communications simply because a lawyer participated in them.

The privilege only protects communications *primarily* motivated by a client's request for *legal* advice from a lawyer.

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Legal Advice

Labeling a document "privileged" assures it is privileged?

No!

Copying a lawyer on a document assures it is privileged?

No!

Participating in a meeting makes the conversations privileged?

No!

A lawyer's files are all privileged?

No!

A law firm's – or a law department's - internal communications are all privileged?

No!

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Legal Advice

Am I a lawyer providing business advice?

Or

Am I a business person providing legal advice?

Or

Am I both?

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From a Professional Legal Advisor

Attorney-client privilege requires that a lawyer act *as a legal advisor* – not in some non-legal role.



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Legal Advice

“Business” advice is *not* privileged.

- Courts distinguish “legal” from “business” advice by analyzing the *content* of communications.
- Given the content-based nature of privilege protection, courts usually analyze each pertinent communication.
- Courts disagree whether privilege protection depends on the "primary purpose" of an entire communication, or of each discrete portion of such a communication.

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From a Professional Legal Advisor

- Is it protected “legal” vs. unprotected “business” advice?
- What is the “primary purpose” of the communication?
- “Primary purpose” test applies only if the communication contains both legal and business aspects – pure business advice does not preserve privilege protection.
- Do you look at the communication as a whole or each component?

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From a Professional Legal Advisor

Expansive view:

- Post-accident memorandum; hospital's risk management documents; corporation's "document hold" notice sent to over 600 employees; memorandum that admittedly contained both legal and business advice.

Narrower view:

- Political advice; grammatical and typographical advice; financial advice; lobbying advice; technical advice; document retention advice (however, other courts protect this type of advice); marketing advice; public relations advice; personal advice provided as a friend; accounting advice; advice about mailings; investment advice.

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From a Professional Legal Advisor

How can you tell if it is protected “legal” vs. unprotected “business” advice?

- An outside lawyer is included?

Probably “legal” (and it helps).

- It is circulated widely inside the company?

Could be either “legal” or “business” (and it may not help).

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From a Professional Legal Advisor

Widespread intra-corporate circulation of communications can be an indicia of a primarily “business” rather than “legal” purpose – the *Vioxx* approach.

In *Vioxx*, the court relied on a special master's report prepared by a law professor -- which concluded that Merck's widespread intracorporate circulation of arguably privileged communications demonstrated the primarily business-related nature of many communications.

Contrary to modern reality and attempts to encourage transparency.

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From a Professional Legal Advisor

The Good News For In-House Lawyers . . .

- In-house lawyers practicing in the United States deserve the same privilege protection as outside lawyers - generally.
- In-house lawyers may engage in privileged communications with their corporate client.

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From a Professional Legal Advisor

The Not-So Good News for In-House Lawyers . . .

- In-house lawyers with both law department *and* business titles will find it nearly impossible to successfully claim privilege protection for communications undertaken in the latter role.
- Many courts recognize that in-house lawyers frequently provide primarily business-related advice -- in contrast to most outside lawyers.
- Some courts parse through communications involving lawyers wearing "two hats" -- finding some privileged and some not.

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From a Professional Legal Advisor

Does the privilege extend to communications with lawyers undertaking investigations?

Maybe!

Some courts protect such communications -- explaining that lawyers engaged in such investigations necessarily bring to bear their lawyer skills.

Some courts find that such lawyers are simply gathering historical facts, and therefore do not protect their communications.

Corporations relying on the fact of such communications might impliedly waive privilege protection.



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Privilege protects only communications that the *client* intends to remain confidential.



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There is no privilege protection for communications or documents which the client intends to disclose to third parties outside the privilege.

Test - is the draft document a work-in-process reflecting a lawyer's input or a final draft which the client intends to disclose?

Test – is the communication one which the client intends to disclose?

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Draft documents that clients create for the purpose of obtaining legal advice about them are protected.

- Draft response to a government inquiry; draft grievance disposition; draft client policies; draft email to a third party; the client's draft patent application; the client's draft agreement, accompanied by a request for legal review and advice; the client's draft interrogatory answers; the client's draft letter to a third party.

Draft documents that lawyers create are protected.

- If the lawyer and the client disclose the draft without changing it, the adversary can obtain that copy and does need the draft; if the lawyer and the client modify the draft, those modifications deserve privilege protection; if the lawyer and the client never disclose a version of the document, it necessarily reflected legal advice that was never disclosed and therefore deserves continuing protection.

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THIRD PARTIES

Is the third party “inside” or “outside” the privilege?

- If “inside” privilege protection, the communications remain protected.
- If “outside” privilege protection, the communications are not privileged.

This is different from waiver based mostly on timing – is the “outside” third party present *when* the privileged communication is made *or* is a privileged communication later disclosed to the “outside” third party?

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INVITED THIRD PARTIES

Client Agents:

- Majority Rule: the privilege does not protect communications in the presence of client agents other than those "necessary" for the communications.
- Restatement and Minority Rule: the privilege protect communications despite the presence of client agents who are "generally helpful" to the client.

Lawyer Agents

- Courts agree that the privilege can protect communications in the presence of lawyers' nonlawyer staff assisting the lawyer

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Historical facts aren't protected -- something either happened or didn't happen.

- Can opposing party seek the "factual" portion of clients' communications to their lawyers?
- Is the fact that the client communicated historical facts protected?
- What about the lawyer's request to his or her client for historical facts?

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Pre-existing, non-privileged documents don't become privileged by giving them to a lawyer.

Clients cannot ship their files to a lawyer and then withhold those pre-existing documents during discovery.

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Within a corporate setting, fellow employees' presence may or may not destroy the privilege -- depending on the applicable law and those other employees' role.

States following the minority "control group" standard for privilege protection in the corporate context examine whether such other employees fall inside the protected "control group" or outside that status.



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UPJOHN AND ITS WARNING

- *Upjohn Company v. United States*, 449 U.S. 383 (1981)
 - Communications between company employees and company counsel are privileged as to the company
- But what if the interest of the company and the employees are adverse?

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UPJOHN AND ITS WARNING

Model Rule 1.13(f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a **lawyer shall explain the identity of the client** when the lawyer **knows or reasonably should know** that the organization's interests are adverse to those of the constituents.

Model Rule 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that an unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall **make reasonable efforts to correct the misunderstanding**. The lawyer shall not give legal advice to an unrepresented person, **other than advice to secure counsel**, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Recommended Practices After *Upjohn*

- Deliver warning before interview
- Proof of delivery of the warning
 - Scripted warning
 - Attorney's Interview Notes
 - Written Acknowledgment, executed by interviewee
 - Third party recordkeeper at interview
- Consider volunteering recommendation to engage counsel

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Waiver

- **Waiver by Disclosure**
 - Voluntary*
 - Inadvertent*
- **Waiver by Affirmative Reliance**
- **Waiver by Advice of Counsel**



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Exceptions

- Crime / Fraud



- Fiduciary

Attorney Work Product Doctrine

- The Work Product includes materials prepared by persons other than the attorney.
- The materials may be prepared by someone other than the attorney as long as the materials are prepared with an eye towards the realistic possibility of impending litigation AND at the specific instance and request of an attorney.
- Work Product is broad but not as powerful as Privilege.
- Work Product is not absolute.

Attorney Work Product Doctrine

– What Does it Cover?

- Written statements, private memoranda, fact chronologies, mental impressions, personal beliefs & any information assembled by attorneys in anticipation of litigation.
- Clarification – “In anticipation of litigation” means “because of” the prospect of litigation or primarily to assist in litigation.

Attorney Work Product Doctrine – What Does it Cover?

- Materials prepared by anyone at the direction of the attorney where future litigation is a distinct possibility. This includes:
 - Attorney's paralegals and support staff;
 - Consultants/investigators/experts engaged by the attorney;
 - Client acting at the attorney's direction.

Questions?