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34th WORKFORCE MANAGEMENT BRIEFING

High Stakes and High Priorities

ETHICS – GC Confidential: In-House Counsel and the Rules of Professional Responsibility

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The Basics

Model Rule of Professional Conduct 1.6

A lawyer **shall not reveal information** relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [certain exceptions]. . . . A lawyer **shall make reasonable efforts** to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Fed. Rule of Civil Procedure 26

Parties may obtain discovery regarding any **non-privileged** matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Public Policy Tug of War



FOR

The confidentiality of a client's disclosures to her attorney promotes an open atmosphere of trust.

AGAINST

The privilege results in the suppression of evidence and, to that extent, the attorney-privilege is "at war with the truth."

The "Compromise"

- The privilege accords the shield of secrecy only with respect to confidential communications made within the context of the strict relation of attorney and client.
- Ultimately, a communication (email, written, oral, etc.) will be privileged only if it satisfies the requirements of the law governing privilege.

Heads-Up: The Bar Is Higher for In-House Counsel

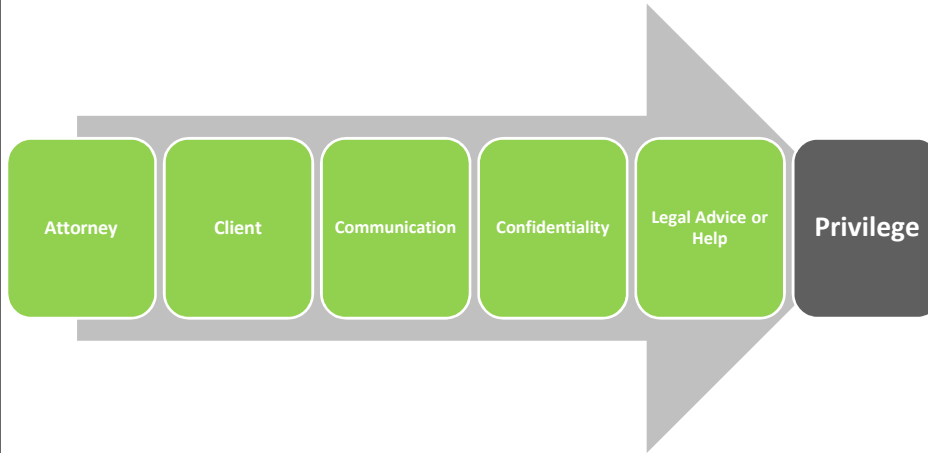


- Generally, communications with outside counsel: privilege attaches absent “a clear showing to the contrary.”
- Generally, communications with in-house counsel: the claim of privilege must be justified.

The Courts “Get It.”

You are more than a legal advisor.

Five Elements for Privilege



The Lawyer as Part of the Executive Team: More Than Legal Advice

<ul style="list-style-type: none"> • While an organization or corporation can be a client for purposes of the attorney-client privilege, a fine line exists between an attorney who provides legal services or advice and one who performs non-legal activities. <i>Payton v. N.J. Tpk. Auth.</i>, 148 N.J. 524, 550 (1997) 	<ul style="list-style-type: none"> • Business development • Compliance • Finance • Market Growth
<ul style="list-style-type: none"> • "[M]odern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues." <i>In re Vioxx Prods. Liab. Litig.</i>, 501 F. Supp. 2d 789, 797 (E.D. La. 2007). As such, general "[b]usiness advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client," because the purpose and intent is not to communicate legal advice. <i>Id.</i> (quoting <i>In re CFS-Related Securities Fraud Litig.</i>, 223 F.R.D. 631 (N.D. Okla. 2004)). 	<ul style="list-style-type: none"> • Operations • Public relations • Quality • Safety • Staffing • Strategy
<ul style="list-style-type: none"> • "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation" <i>In re GM LLC Ignition Switch Litig.</i>, 2015 U.S. Dist. LEXIS 5199, *239 (S.D.N.Y. Jan. 15, 2015) (quoting <i>In re Kellogg Brown & Root, Inc.</i>, 756 F.3d 754, 759 (D.C. Cir. 2014)). 	

Attorney-Client Privilege in Corporate In-House Setting

The Core Principle Is “Primary Purpose”

- To be privileged, the “primary purpose” of a communication must be to seek or provide legal advice.
- A communication that does not actually request legal assistance or convey information reasonably related to the requested legal assistance is not privileged.

Primary Purpose vs. Mixed Purpose

- Emails to or from in-house counsel that seek **both legal and business advice will often not** satisfy the “primary purpose” requirement.
 - Emails that list an attorney and a non-attorney in the “To” field may not be privileged if they are deemed to be for both a business and a legal purpose.
 - Emails that list an attorney in the “To” field and a non-attorney in the “cc” field are privileged only if the non-attorney is copied in order to notify that person that legal advice was sought and what legal advice was rendered.

Few Bright Lines . . .

Privilege is considered on a case-by-case basis.

Too Many Hats: *United States, ex rel. Elin Baklid-Kunz v. Halifax Hospital Medical Center*

- *Halifax* is an example of how one District Court analyzed the privilege.
- In *Halifax*, the hospital's former director of physician services alleged that Halifax:
 - submitted thousands of fraudulent claims to Medicare,
 - paid kickbacks to key referring physicians in order to generate patient referrals to the hospital, and
 - entered into financial relationships with physicians that violated the Stark Law.
- The United States intervened and alleged the presentation of false claims, the use of false statement to get claims paid, and the creation of false records.
- Potential damages and penalties ranged in the hundreds of millions of dollars.

P.S.: The case settled.

Principles Employed in *Halifax*

- **The privilege protects communications, not facts:** *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).
- **Derivative protection:** The privilege also protects "communications between corporate employees in which prior [legal] advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities." *In re Vioxx*, 501 F. Supp. 2d at 797. The privilege applies to communications between corporate counsel and a corporation's employees made "at the discretion of corporate superiors to secure legal advice from counsel." *Upjohn Co.*, 449 U.S. at 394.
- **Burden:** The proponent of the privilege bears the burden of proving the attorney-client relationship and confidentiality of the communication. *In re Seroquel Prod. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 WL 1995058, at *2 (M.D. Fla. May 7, 2008).
- **Draft documents:** A draft of a document is protected by attorney-client privilege if it was "prepared with the assistance of an attorney for the purpose of obtaining legal advice or, after an attorney's advice, contained information a client considered but decided not to include in the final version." *In re Seroquel*, 2008 WL 1995058, at *3. A draft is not protected "[i]f the ultimate document is purely a business document which would not have received any protection based upon privilege in any event" *Id.* Draft documents prepared with the assistance of counsel or for the purposes of obtaining legal advice are privileged, as are drafts that contain information not included in the final version.
- **Compliance advice is not legal advice:** Compliance employees are not acting at the direction of counsel under protection of the privilege just because the compliance department reports to and operates under the supervision and oversight of the legal department.

Non-Privileged Documents and Communications at Issue in *Halifax*

The *Halifax* Court held that, based on the record before it, **NONE** of the following documents were protected by the attorney-client privilege:

- (1) compliance referral log
- (2) certain documents/communications that were not “To” or “From” an attorney
- (3) documents/communications relating to audits and reviews
- (4) documents/communications relating to fair market value determinations and physician compensation analyses
- (5) documents produced to the United States in response to subpoenas
- (6) email strings
- (7) crime fraud exception documents

Intent and Labels Not Enough

- **COMPLIANCE LOGS:** The privilege did not cover logs in which compliance personnel recorded facts and documented complaints or problems.
 - Maintaining logs “at the request of counsel” is not enough to invoke the privilege.
 - Keeping logs “in anticipation of possible litigation and/or adverse administrative proceedings relating to issues identified on it by Compliance Department” is not enough.
 - Headers and footers are not enough.
 - Emails contained in the log entries were not privileged because they were not to or from counsel **and “did not expressly reflect information gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice.”**

Primary Purpose vs. One of Many Purposes

- **AUDITS AND FAIR MARKET VALUATIONS:** Communications regarding audits by the compliance, finance, and case management departments and fair market value opinions were generally not privileged:
 - Attorney not listed in the “To” or “From” fields.
 - When communications are simultaneously emailed to a lawyer and a non-lawyer, a corporation cannot claim that the “primary purpose” of the communication was legal advice.
 - Too many recipients or listing a lawyer and non-lawyers together in the “To” field. Furthermore, they were not deemed to involve requests for legal advice.
- **EMAIL STRINGS:** Sending a non-privileged communication to an attorney does not make it privileged.

Investigations: *United States of America ex rel. Harry Barko v. Halliburton Company*

- Are internal investigative reports prepared by non-lawyer employers at the instruction of in-house counsel privileged?
 - The District Court held that an investigation “undertaken pursuant to regulatory law and corporate policy **rather than for the purpose of legal advice**” was not privileged.
 - The District Court used a unique “but for” test: Would the investigation have been conducted regardless of whether legal advice was sought?
- The work product doctrine will only protect an attorney’s “mental impressions, conclusions, opinions, or legal theories” prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3)(B).
- The work product privilege has no applicability to documents prepared by lawyers in the ordinary course of business or for other non-litigation purpose.
- The case is extremely active. Stay tuned.

Attorney Work Product: Privileged? Not Absolutely

- The attorney work product doctrine is rooted in the concept that “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).
- A document need not be prepared to *aid* in the conduct of litigation in order to constitute work product, much less *primarily* or *exclusively* to aid in litigation. Preparing a document in anticipation of litigation is sufficient. *United States v. Aldman*, 134 F.3d 1194, 1198-99 (2d Cir. 1998).
- To establish that material is protected by the attorney work product doctrine, a party need only show that, “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.” *Schaeffler v. United States*, 22 F. Supp. 3d. 319, 335 (S.D.N.Y. 2014).
- “The protections afforded by the attorney work product doctrine are not absolute.” A party may obtain fact work product if it “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A)(ii).
- Work product protection does not extend to those documents which are prepared in the *ordinary course of business*.

Attorney Work Product: *In re General Motors LLC Ignition Switch Litigation*

- General Motors, LLC (“New GM”), recalled certain vehicles due to an ignition switch defect.
- Outside counsel reviewed numerous documents and interviewed more than 200 New GM employees and former employees as well as others. The result was a written report.
- New GM submitted the report to Congress, the DOJ, and the National Highway Traffic Safety Administration (“NHTSA”).
- In the pending multidistrict litigation, New GM submitted the report as part of discovery but *refused* to disclose the notes and memoranda relating to the witness interviews by outside counsel.
- The plaintiffs’ request for the materials was denied on the basis of attorney work product except that the plaintiffs were not precluded from making a future application for particular materials in the event that a witness who was interviewed by the Valukas team becomes “unavailable.”

Waiver: *In re General Motors LLC Ignition Switch Litigation*

- “[W]hen [a] disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding *only if*: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; *and* (3) they ought in fairness to be considered together.” Fed. R. Evid. 502(a) (emphases added).
- “[A] voluntary disclosure in a federal proceeding or to a federal office or agency ... generally results in a waiver *only* of the communication or information disclosed.” Fed. R. Evid. 502, Committee Notes (emphasis added).

The Mechanics of Protecting Privileged Documents

The basic process in a litigation as to documents . . .

1. GATHER ALL POTENTIALLY RELEVANT DOCUMENTS
2. REVIEW TO DETERMINE IF WITHIN SCOPE OF DISCOVERY
3. SEGREGATE DOCUMENTS WITH ATTORNEY COMMUNICATIONS
4. ANALYZE FOR PRIVILEGE**
5. PREPARE PRIVILEGE LOG
6. *IN CAMERA* JUDICIAL REVIEW

**** REMEMBER:** Labels such as “Confidential” and “Attorney-Client Privileged” are the beginning, not the end of the analysis. Labels may, at best, show intent but are not determinative.

Takeaways for In-House Counsel

- **Make the “primary purpose” the primary purpose.**
- **Expressly state that the purpose is to provide or to obtain legal advice.**
- **Clients should ask for legal advice, and lawyers should deliver legal advice.**
 - If an employee is acting on the advice or instruction of counsel, she should expressly say so. “At the instruction of our General Counsel, I am gathering documents relating to”
 - “You asked me for legal advice concerning”
- **Reconsider your email.**
 - Sever email communications, as may be necessary, between business role and legal role.
 - Client: Avoid “cc-ing” counsel and non-lawyers.
 - Counsel: Avoid “cc-ing” non-essential personnel.
 - Avoid or sever email strings.

Takeaways for In-House Counsel

- **Retain outside counsel.**
 - Communications with outside counsel are cloaked in the presumption of privilege.
 - Outside counsel should retain consultants to extend privilege.
 - Outside counsel should conduct or supervise investigations.
- **Always include your impressions and opinions in documents, such as drafts and interviews.**
- **Remember that labeling something as “privileged” or “confidential” does not make it privileged or confidential.**
- **Consider keeping separate files.**
- **Document the reasons for conducting an in-house investigation (and the reason for not conducting one).**
- **Narrow the scope of subpoenas to exclude communications: no production, no waiver.**
- **Prepare a privilege log in response to every subpoena and document request.**

Sometimes It Is Harder Than You Think: Privileged or Not?

You Be the Judge: Privileged or Not?

An attorney is asked to render an opinion regarding the company's policy related to marketing needs, public relations, and lobbying efforts.

Answer: Maybe

What's the primary purpose? It is important to make clear which "hat" in-house counsel is wearing. "When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged." See *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007).

You Be the Judge: Privileged or Not?

An in-house counsel memo contains no legal research, contains certain business advice, and also concerns legal rights and obligations pertaining to that advice concerning possible litigation.

Answer: Privileged

The communication involved imminent litigation and was "predominantly of a legal character." *Rossi v. Blue Cross and Blue Shield*, 73 N.Y.2d 588, 594 (1989); *In re the County of Erie*, 473 F.3d 413, 419-420 (2d Cir. 2007).

You Be the Judge: Privileged or Not?

An attorney, who is both Senior Vice President and Corporate Counsel, is presented with a letter of credit from a third party. She determines that the letter of credit should be honored based on her knowledge of the U.C.P., and sends several emails regarding her decision. These emails are the subject of a discovery demand in a subsequent lawsuit.

Answer: Not Privileged

The court said that the attorney “evidently relied on her knowledge of commercial practice rather than her expertise in the law.” The emails did not contain any legal analysis. *MSF Holding, Ltd. v. Fiduciary Trust Co. Int’l*, 2005 WL 3338510, at *1 (S.D.N.Y. 2005).

You Be the Judge: Privileged or Not?

Business documents are sent to in-house counsel for review and comment. In-house counsel sends back comments with handwritten notes on the documents.

Answer: Maybe

It depends on the comments and notes. Simply providing documents to in-house counsel does not make them privileged; documents must be deemed privileged at the time they are created. Some courts will find this not to be privileged. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403-404 (8th Cir. 1987).

You Be the Judge: Privileged or Not?

Draft documents—prepared by an employee who is both in-house counsel and corporate secretary—concerning business and legal aspects of ongoing negotiations related to a transaction are sought six months later in connection with a lawsuit arising out of that transaction.

Answer: Not Privileged

The court stated that the company failed to show that the documents were “primarily of a legal character.” Privilege does not apply where legal advice is merely incidental to business advice. *Cooper-Rutter Assoc. Inc. v. Anchor Nat’l Life Ins. Co.*, 168 A.D.2d 663 (2d Dep’t 1990).

QUESTIONS?