



INTERNAL INVESTIGATIONS: Insights and Best Practices for In-house Counsel

May 5, 2022



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War on Corporate Officers: More Aggressive Prosecution of Corporate Crime

DOJ Deputy Vows Corporate Crime Crackdown on More People:
<https://news.bloomberglaw.com/white-collar-and-criminal-law/doj-deputy-vows-white-collar-crime-crackdown-hitting-more-people>

US Department of Justice adopts “bold” approach to prosecuting corporate crime and will engage in “rigorous enforcement”: <https://www.jdsupra.com/legalnews/us-department-of-justice-adopts-bold-6691113/>

US Signals Corporate Crime Shifts in Pair of Fraud Settlements: <https://news.bloomberglaw.com/us-law-week/us-signals-corporate-crime-shifts-in-pair-of-fraud-settlements>

US Deputy Attorney General Signals Aggressive DOJ Focus on Corporate Crime: <https://corpgov.law.harvard.edu/2021/11/25/us-deputy-attorney-general-signals-aggressive-doj-focus-on-corporate-crime/>

The SEC Joins DOJ’s War on Corporate Officers:
<https://www.natlawreview.com/article/sec-joins-doj-s-war-corporate-offenders>

DOJ announces tougher stances on corporate crime:
<https://thehill.com/regulation/business/578990-doj-announces-tougher-stance-on-corporate-crime>

Focusing on Individual Accountability



Obama Administration (Yates Regime)

- Sought to hold individual corporate officers accountable for corporate wrongdoing
- Encouraged prosecutors investigating corporate crime to prosecute individuals
- Discouraged corporate resolutions without a clear plan to hold individuals accountable



Trump Administration

- Eased the Yates Regime
- DOJ sought more discretion to resolve corporate cases
- Encouraged corporate resolutions where companies disclosed individuals “substantially involved” in the misconduct

DOJ's Revival of the Yates Regime



Biden Administration (Monaco Memo)

- Returns to enforcement standards established by the Yates Regime
- Requires companies to provide the DOJ with all non-privileged information about individuals involved in misconduct
- Framework involves both incentives and potential punishments (carrots and sticks)



The deterrence we get from a potential conviction of an individual, particularly a senior executive – there's nothing like it. "



Kenneth Polite, Jr. – Acting Assistant Attorney General for the Criminal Division of the Department of Justice



Department
of Justice

And the SEC?



The Commission will make war without quarter on any who sell securities by fraud or misrepresentation.

– SEC Chairman Gary Gensler (November 2021)



Corporate Liability: Refresher



- ▶ Is the employee acting within the apparent scope of their employment?
- ▶ Does the employee intend to benefit the company?



Internal Investigations: Triggers

External

- Government action
- Risky endeavor
- Current events



Internal

- Hotline
- Audit
- Complaints



Internal Investigations: Purposes

1

**Assess
scope**

2

**End the
bad
behavior**

3

**Build
defense**



Special Consideration for Protecting Privilege in Internal Investigations



Who should investigate?

Inside Counsel

- Efficiencies
- Less disruptive
- Cost savings



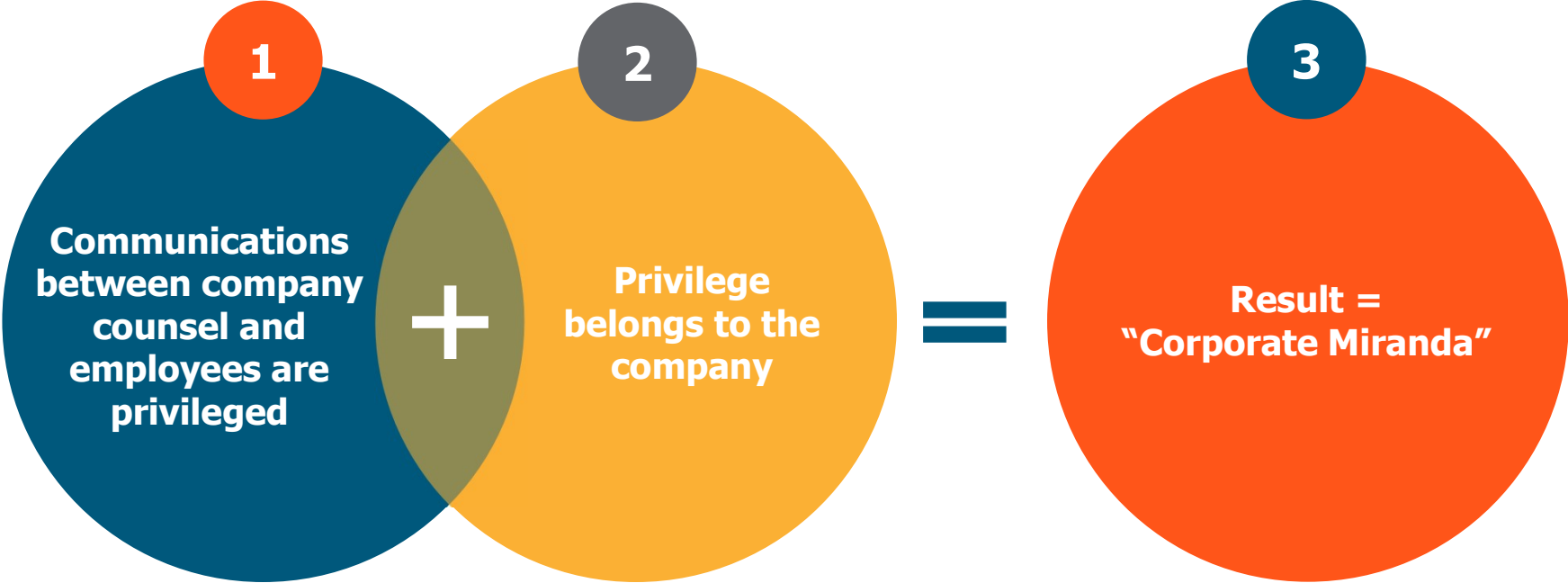
External Counsel

- More receives
- Perceived more objective
- Access to varied expertise
- Stronger privilege protection

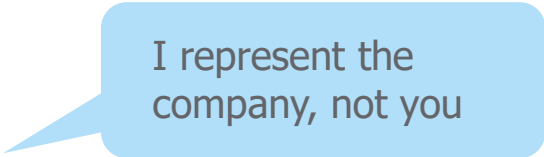



Witness Interviews: Upjohn (SCT 1981)


Critical that the employee understands you are not their personal attorney



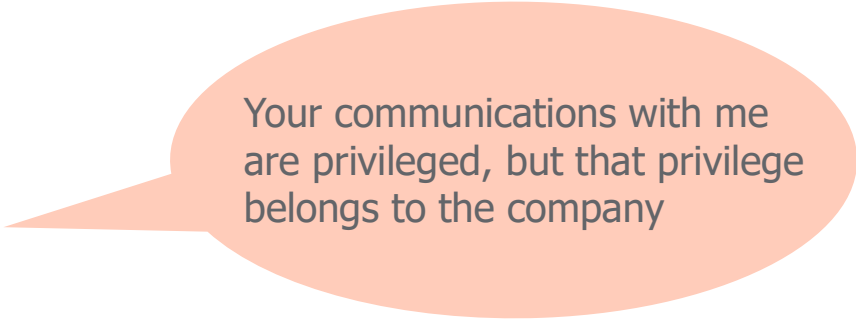
The Warnings:



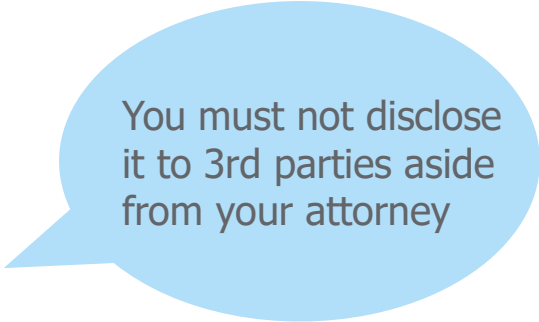
I represent the company, not you



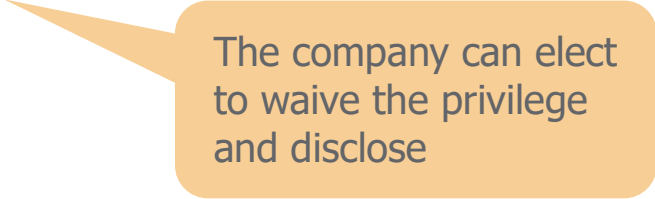
I am conducting an interview to gather facts to provide legal advice to the company



Your communications with me are privileged, but that privilege belongs to the company



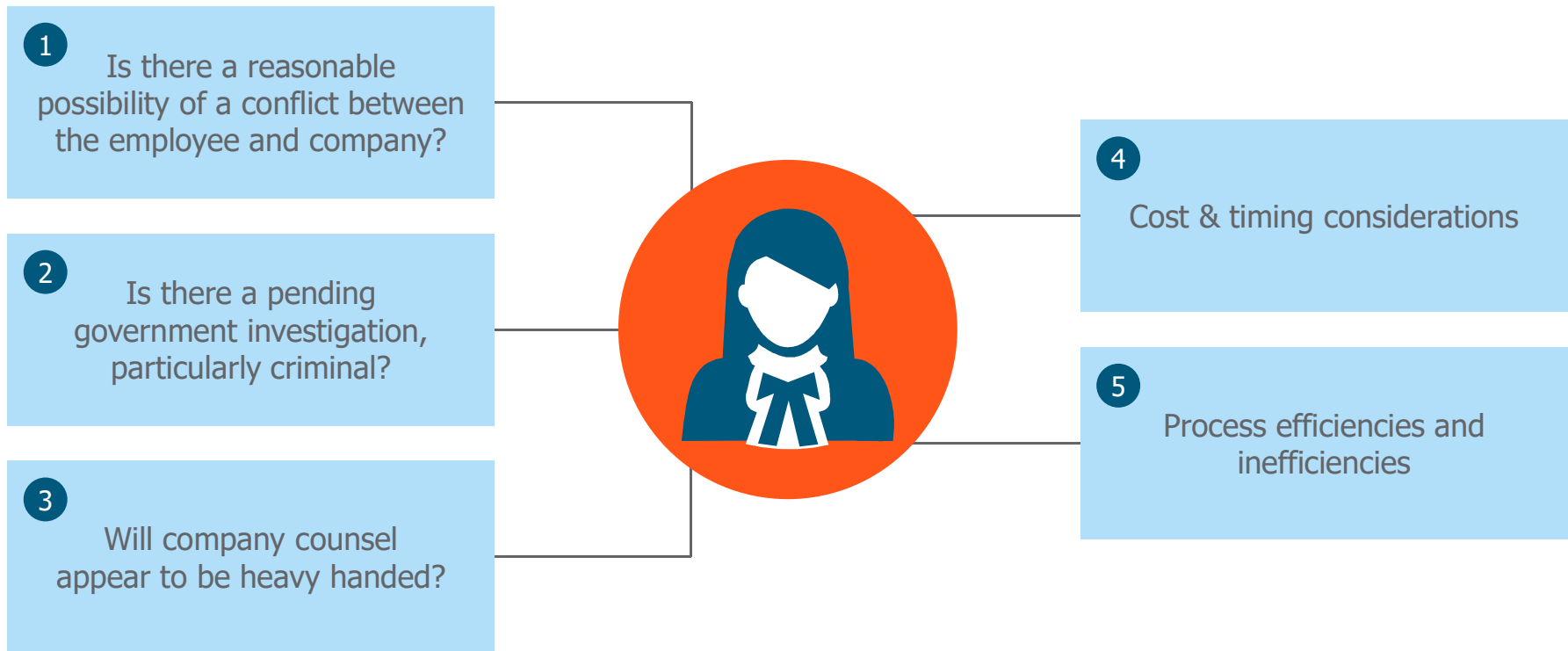
You must not disclose it to 3rd parties aside from your attorney



The company can elect to waive the privilege and disclose



Does the Witness Need a Lawyer?



Privilege Protection



Maintenance of privilege is threshold consideration



Meticulous documentation is key

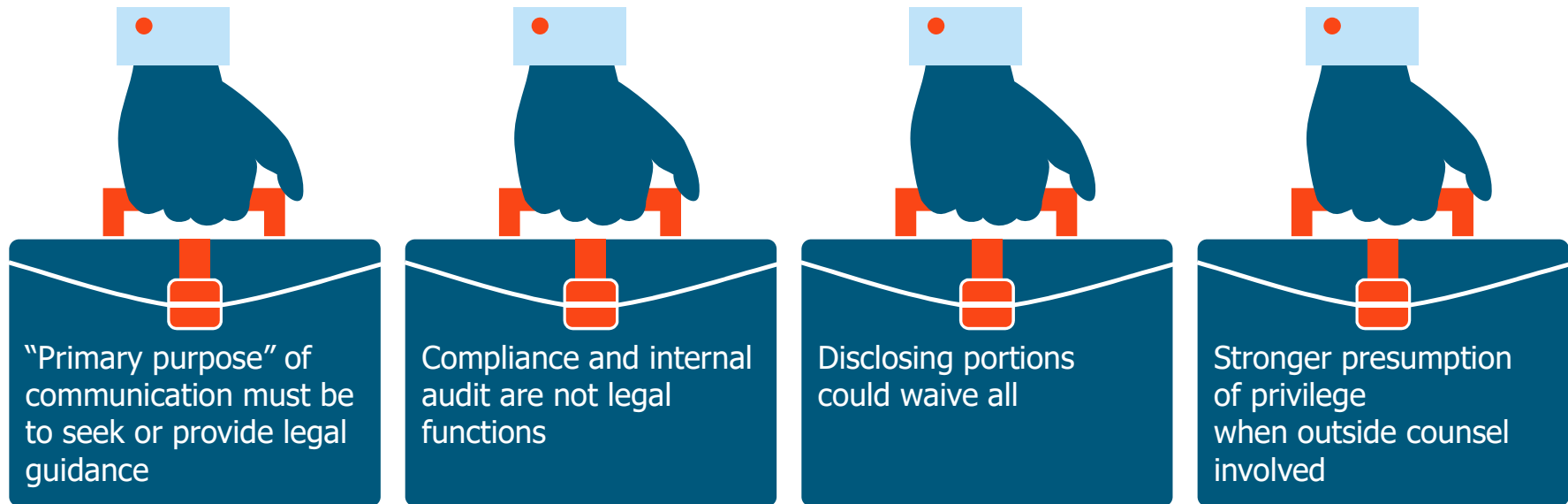


Protect the privilege with an eye toward waiver

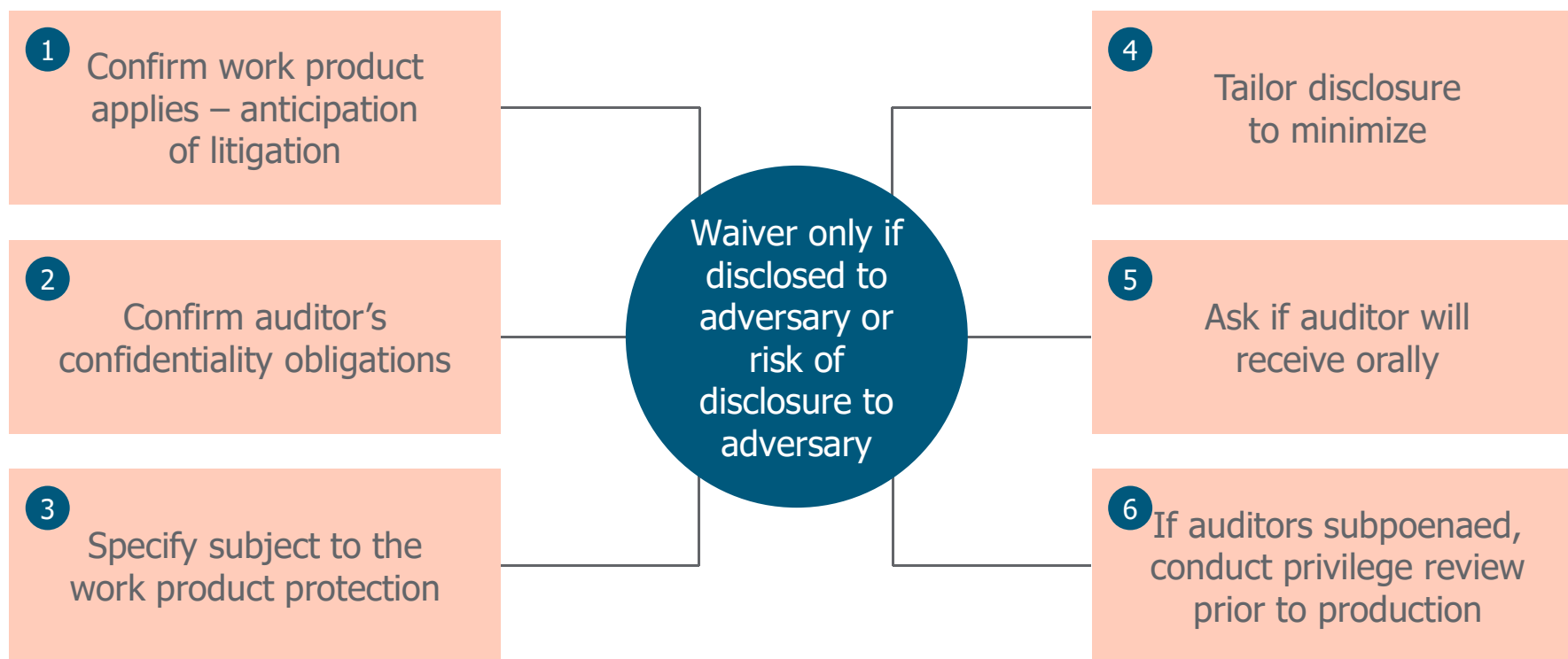


Recent court decisions conflict on what, how, and when a communication is privileged

Key Take-Aways from Herrera, Halifax & Phillips



Disclosure of work product to auditors



The Need for Independent Counsel

POOL COUNSEL

- Attorney will work with lead counsel for the company and conduct fact development for the specific employees
- Employees are similarly situated
- None of the employees have individual criminal exposure
- Attorney will develop relationship with prosecutor
- Common interest/JDA

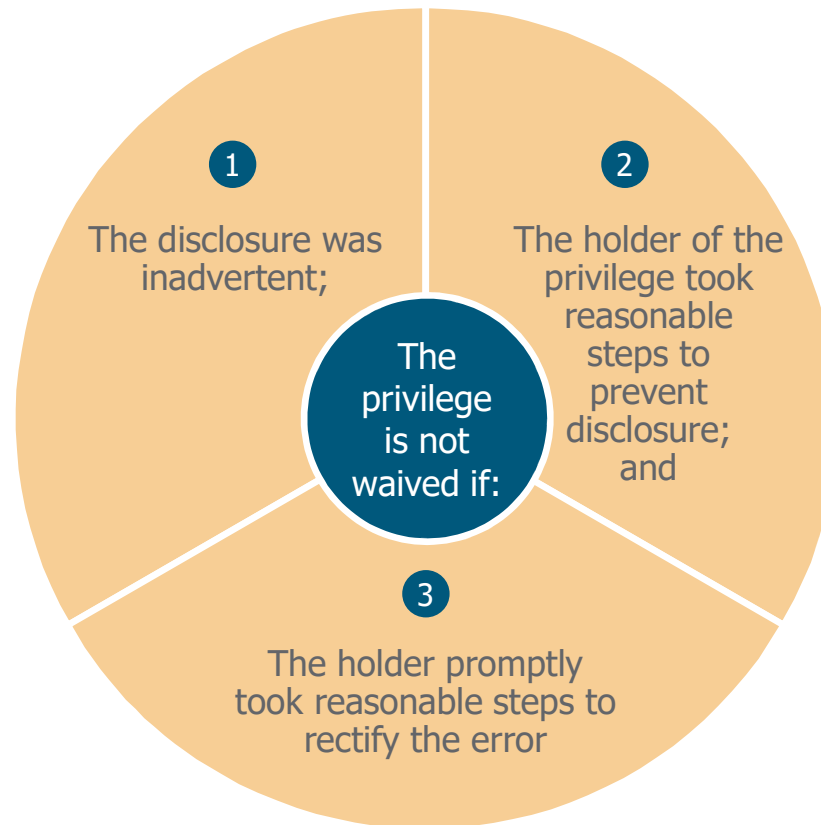
INDIVIDUAL COUNSEL

- Individual employees have personal exposure to criminal liability or some other conflict
- Rely on DOJ to decide which employees have separate individual exposure
- But can push the DOJ (more on that later)
- Attorney should proactively handle potential conflicts

SHADOW COUNSEL

- Company and individual executive are represented by company's lead attorney
- But, executive may need own, independent counsel at a later time
- Shadow counsel not disclosed to agency or investigators unless need for separate counsel arises
- Attorney advises executive to ensure executive is receiving conflict-free advice

Waiver: Inadvertent Disclosure



Fed. R. Evid. 502(b)

Waiver: Inadvertent Disclosure


J-M
Manufacturing Co.,
Inc.
v.
McDermott Will &
Emery



Fourth Dimension
Software v.
Der Touristik
Deutschland GMBh,

Ethical Considerations for Inadvertent Disclosure

CA Rule 4.4 Duties Concerning Inadvertently Transmitted Writings



- ▶ Where it is reasonably apparent to a lawyer who receives a writing relating to a lawyer's representation of a client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall: (a) refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and (b) promptly notify the sender.
- ▶ This rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been inappropriately disclosed by the sending person. See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37.
- ▶ California case law affirmatively states it is an ethical obligation of an attorney who receives inadvertently produced materials that obviously appear to be subject to the attorney-client privilege or otherwise clearly appear to be confidential and privileged that the attorney shall immediately notify the sender. *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817.

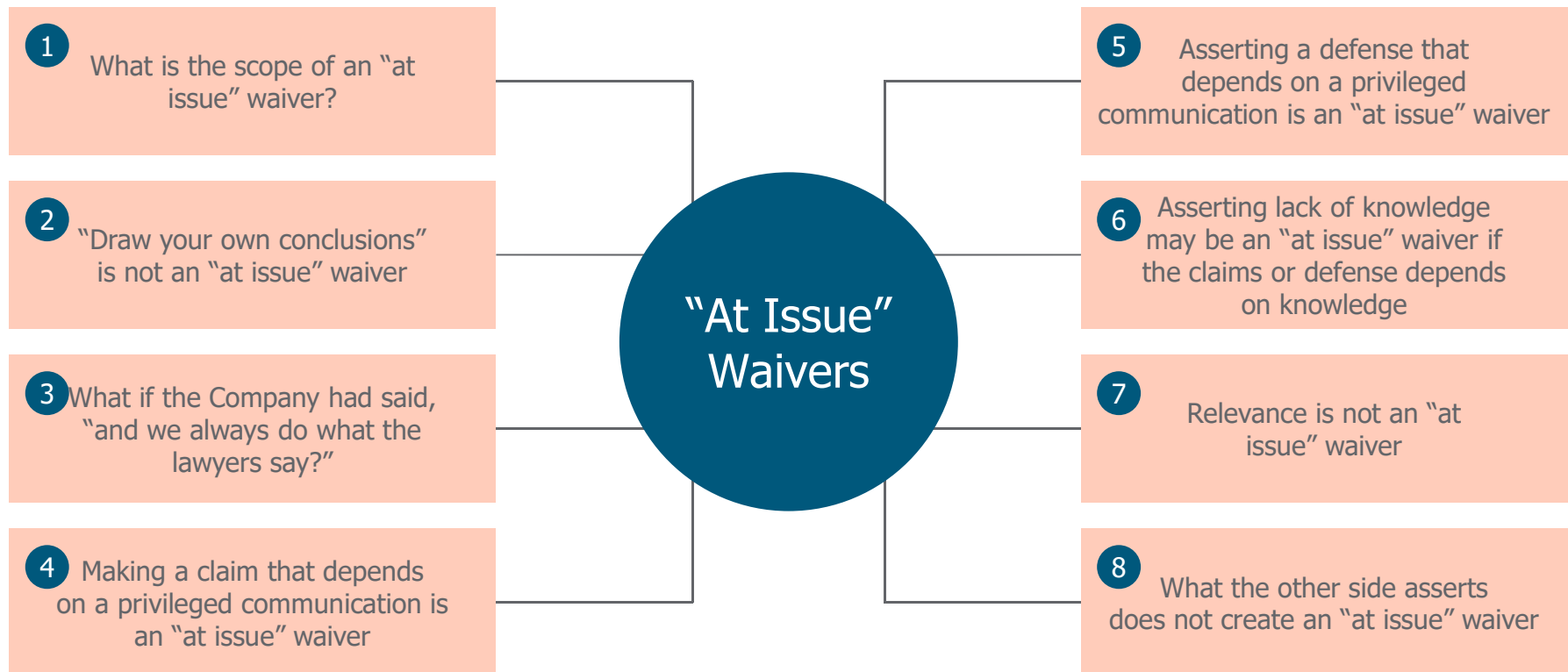
Waiver – Intentional Disclosure

What about intentional disclosure?

- Production without privilege review, clawback
- Disclosure for other purposes



“At Issue” Waivers





Special Consideration for Protecting Privilege in Internal Communications



In-House Communications

Courts have repeatedly held the same standard applies to in-house lawyers and outside counsel for purposes of determining whether the privilege applies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1974).

- ▶ When in-house counsel acts in his or her capacity as an attorney, the “attorney” requirement is met:
 - The attorney-client privilege extends only to confidential matters communicated between the attorney and his or her client in the course of receiving counsel, advice, or direction with respect to the client's rights or obligations. See, e.g., *A. v. Dist. Court of Second Judicial Dist.*, 550 P.2d 315, 327 (Colo.1976), cert. denied, 429 U.S. 1040, 97 S.Ct. 737, 50 L.Ed.2d 751 (1977); *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32, 35 (1975).
 - For CA, see, e.g. *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996); *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023 (2016).



In-House Communications – Dual Roles



In practice it is often more difficult for in-house counsel to demonstrate communications are privileged given that they can often serve in dual roles as attorney and business advisor.

- ▶ Majority of courts hold that legal advice must predominate for the communication to be protected.
- ▶ “[W]hen the legal advice is merely incidental to business advice, the privilege does not apply.” *Neuder v. Battell Pacific Northwest Nat. Laboratory*, 194 F.R.D. 289, 292 (D.C. 2000) (internal citations removed).



In-House Communications – Factors Considered

Whether the communication specifically requests legal advice or, if from counsel, references such a request.

See *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974)

Whether the subject matter is legal or related to ordinary business activities.

Valente v. Pepsico, Inc., 68 F.R.D. 361, 368 (D. Del. 1975)

Whether the document is marked as privileged or confidential. (Caution: overusing these labels may undermine claim).

Wesp v. Everson, 33 P.3d 191, 197 (Colo. 2001)

Whether the document is segregated from non-privileged material.

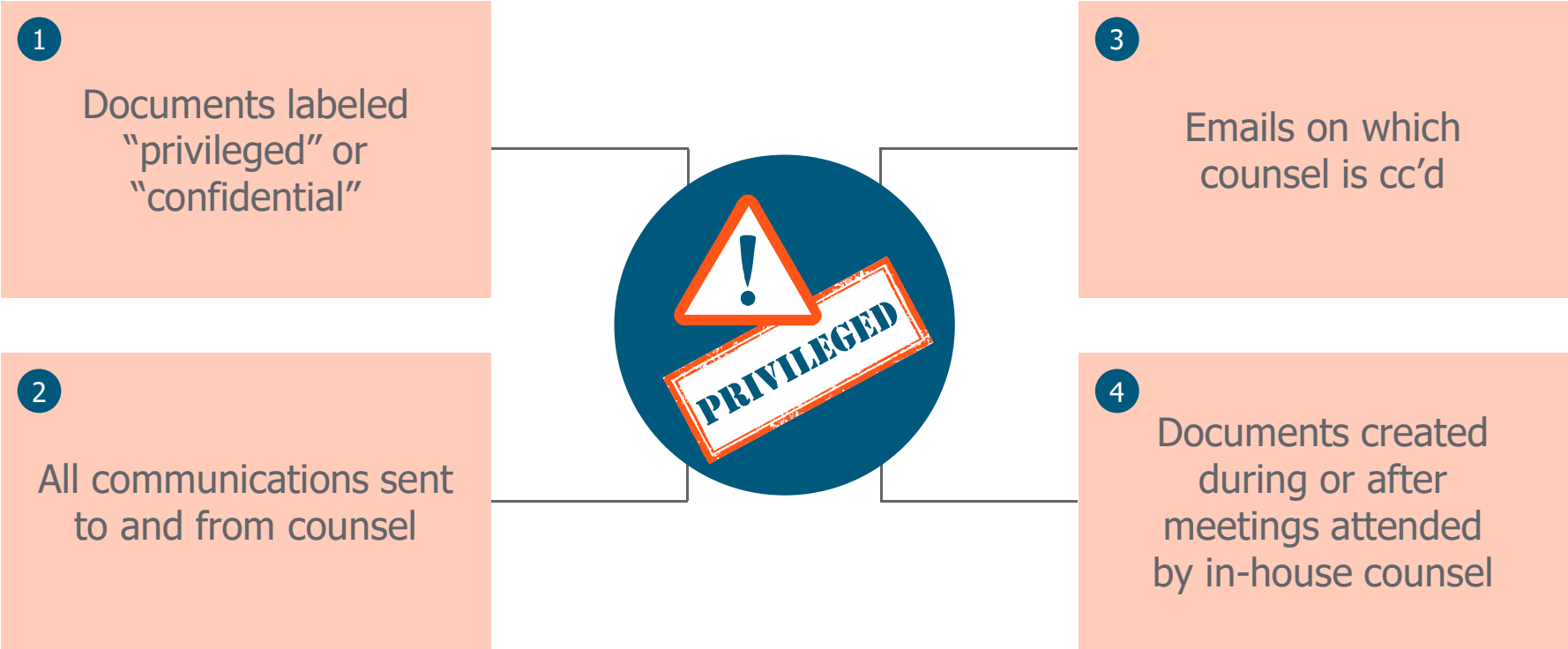
See *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 292-93 (D. Mass. 2000)

Extent of attorney's involvement in matter.

See *American Motors Corp. v. Huffstutler*, 61 Ohio St. 3d 343 (1991)

In-House Communications – Not Always Privileged

The privilege does not automatically apply to:



Legal vs. Business Advice - Examples

1

Memo prepared by in-house counsel containing primarily business advice with some legal advice is not privileged
RCHFU, LLC v. Marriott Vacations Worldwide Corp., No. 16-CV-1301-PAB-GPG, 2018 WL 3055774, at *4 (D. Colo. May 23, 2018)

2

Investigating whether insurance claim should be paid for business purposes is not legal advice & is not privileged
Munoz v. State Farm Mut. Auto. Ins. Co., 968 P.2d 126, 130 (Colo. App. 1998); *Menapace v. Alaska Nat'l Ins. Co.*, No. 20-CV-00053-REB-STV, 2020 WL 6119962, at *7 (D. Colo. Oct. 15, 2020)

3

Board meeting minutes with in-house counsel present are not automatically protected, only if legal advice sought
Pownell v. Credo Petroleum Corp., No. 09-CV-01540-WYD-KLM, 2011 WL 1045418, at *3 (D. Colo. Mar. 17, 2011)

4

Decision whether to honor line of credit not protected because no legal analysis involved
MSF Holdings, Ltd. V. Fiduciary Trust Co., Int'l, 2005 U.S. Dist. LEXIS 34171 (S.D.N.Y. Dec. 7, 2005)

Legal vs. Business Advice - Examples

5

Some courts have found that negotiations are a business, rather than a legal function
Georgia Pacific v. GAF Roofing Mfg. Corp., 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996).

6

Lawyers in legal department vs. lawyers in a business unit, or the board or on a committee.
Boca Investering's P'ship. v. United States, 31 F. Supp. 2d 9, 12 (D. D.C. 1998); *Neuder v. Battelle Pacific Northwest National Laboratory*, 194 F.R.D. 289 (D.D.C. 2000)

7

Communications in role as claims investigator are sometimes privileged
Mission National Ins. Co. v. Lilly, 112 F.R.D. 160, 163-65 (D. Minn. 1986); *Umpqua Bank v. First Am. Title Ins. Co.*, 2011 U.S. Dist. LEXIS 34088 (E.D. Cal. March 17, 2011)

8

Compliance-related documents prepared for and under direction of in-house counsel that did not seek legal advice not protected
U.S. ex rel Baklid-Kunz v. Halifax Hospital Medical Center, 2012 WL 5415108 (M.D. Fla. 2012)

Best Practices for In-House Counsel

1

Educate all company employees about the privilege and remind them that materials do not become privileged simply because they are sent to in-house counsel or in-house counsel is copied.



2

Prominently label all communications providing legal advice with a header indicating that it is "Privileged and Confidential – Attorney-Client Communication."



3

Don't improperly use or overuse such labels



Best Practices for In-House Counsel (cont'd)

4

Never attempt to make all communications privileged by funneling them through or copying in-house counsel.



5

Request that non-lawyer employees write at the top of their communications with counsel "Request for Legal Advice."



6

When requesting information from non-lawyer employees, write at the top of any written communication that "this information is being requested for the purpose of rendering legal advice."



Best Practices for In-House Counsel (cont'd)

7

Don't discuss business and legal topics in the same communication.



8

Limit distribution of privileged materials – don't overshare & start new email chains when appropriate.



9

Use only legal titles for yourself, such as "Assistant General Counsel." Don't accept or use business titles. Don't let your job description include the giving of business advice.



Best Practices for In-House Counsel (cont'd)

10

Consider using outside counsel when there is a unique concern about whether the information can be protected.



11

Develop a company policy on providing legal advice within the company:

- Requiring in-house counsel to maintain licenses to practice.
- Specifying who may seek and who may give advice.
- Requiring in-house counsel to be responsible for maintaining confidentiality and the privilege.
- Providing that legal communications may not be re-transmitted.



Best Practices for In-House Counsel (cont'd)

12

For meetings and calls:

- When discussing legal matters, Board meeting minutes should indicate clearly that:
 - In-house counsel attended in his/her role as legal advisor.
 - Discussions were for the purpose of providing legal advice.
 - Discussions were confidential and intended to be privileged.
- When in meetings or on conference calls:
 - Take clear notes of who is present.
 - If only portions of discussions are privileged, label them as privileged.
- Consider excluding from privileged discussions any observer or third party whose presence may prevent a claim to privilege (investment bankers, auditors, consultants).





[This document] provides a general summary and is for information/educational purposes only. It is not intended to be comprehensive, nor does it constitute legal advice. Specific legal advice should always be sought before taking or refraining from taking any action.

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