

ACC Colorado In-House Counsel Forum

Privilege Pitfalls in Dealing with Consultants

April 4, 2019

Presented by

Matthew C. Holohan

Partner, Kilpatrick Townsend & Stockton LLP

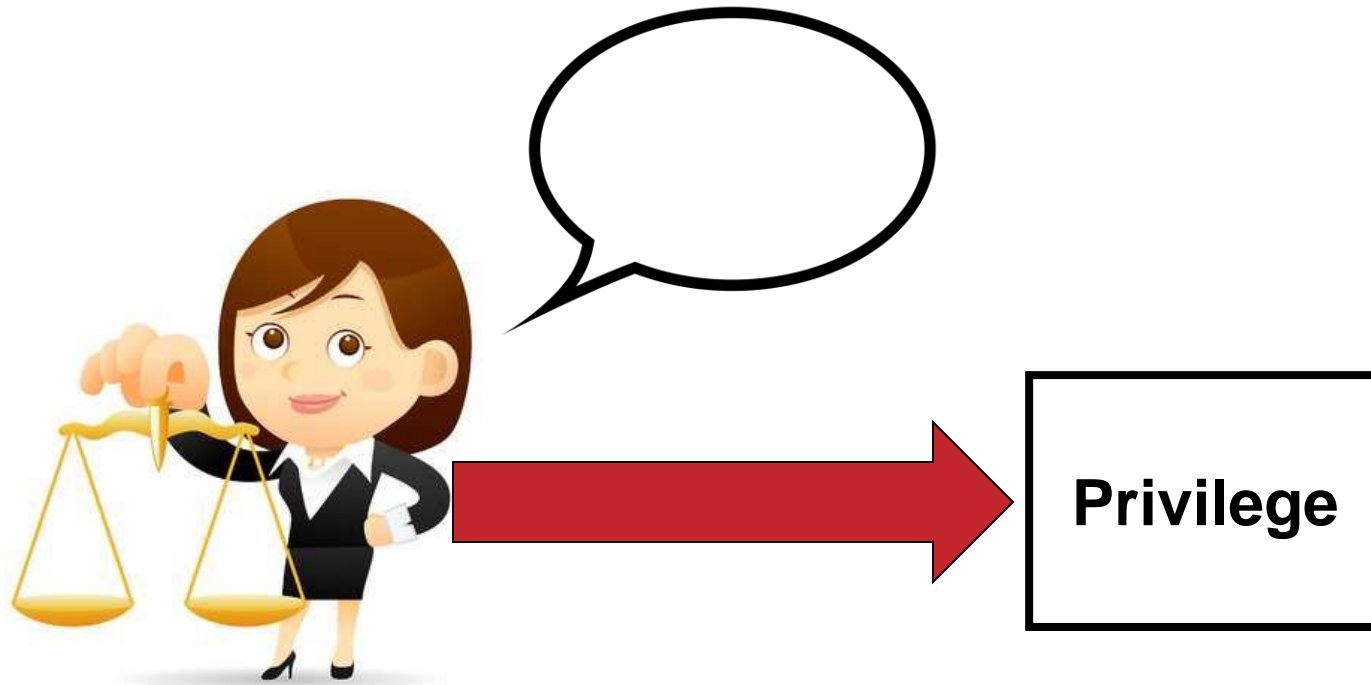


Attorney-Client Privilege Definition

- Confidential communication
- By or to the client or her agent
- In the course of obtaining counsel, advice, or direction with respect to the client's rights or obligations

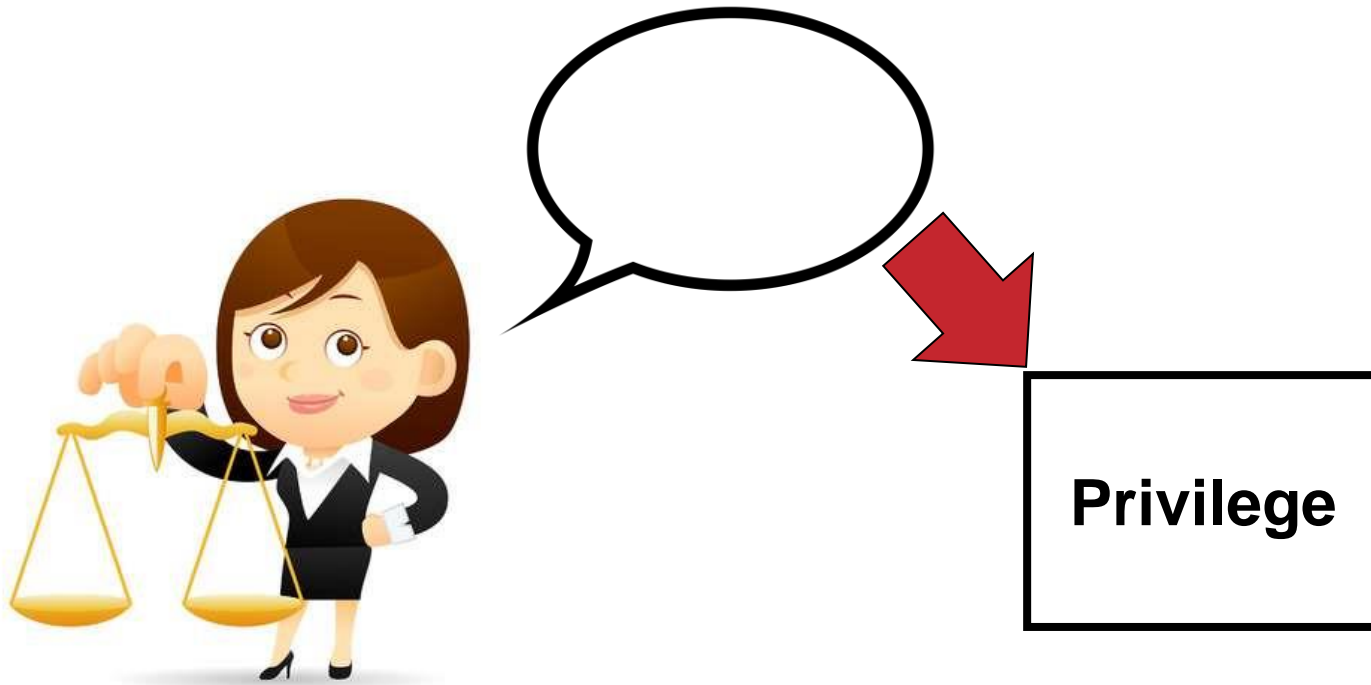
Choice of Law

- Jurisdictional approach: Privilege law of the attorney's home jurisdiction applies.



Choice of Law

- “Touch base” approach: Apply the law with the closest connection to the communication.



- “Circumstances giving rise to a reasonable expectation that the statements will be treated as confidential.”



“With respect to the client’s rights or obligations”

- Business advice not protected

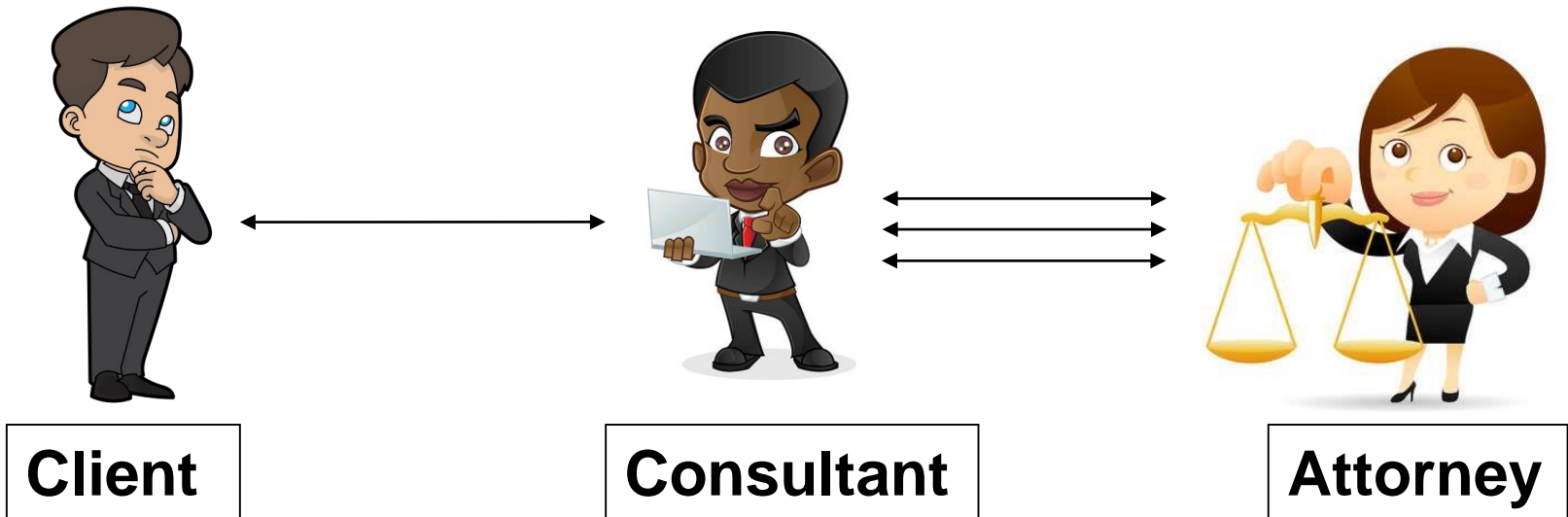
“Defer investments into new technologies.”

“Set aside cash for patent royalties.”

Comparison to Other Privileges

- Patent agent privilege
 - Limited to communications regarding USPTO practice
- Clergy privilege
 - Applies only the sacramental context
- Doctor-patient privilege
 - Limited to medical treatment

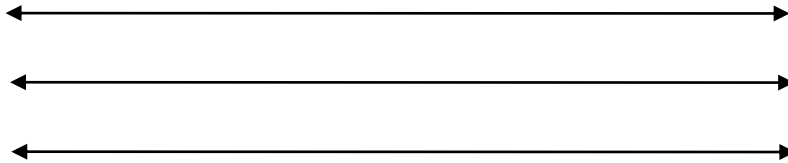
By or to the Client or Agent



By or to the Client or Agent



Client



**Attorney +
Consultant**

By or to the Client or Agent

- De facto employee
- Special importance in the transaction
- Necessary for the provision of legal advice
- Facilitates the provision of legal advice
- For the purpose of obtaining legal advice

By or to the Client or Agent – Considerations

- Is the consultant acting independently?
- Is the consultant's input necessary to assist the attorney in rendering legal advice?
- Did the consultant advance the purpose of the privilege?
- Is the consultant performing the functions of an employee?
- Is the consultant acting as a conduit for legal advice?

By or to the Client or Agent – Considerations



**Employee/
Conduit**



**Contractor/
Expert**



Hypotheticals

Questions?

Speaker Contact Information



Matthew C. Holohan

Partner

1400 Wewatta Street, Suite 600

Denver, CO 80202

t 303.405.1488 | f 303.379.5676

mholohan@kilpatricktownsend.com

- ANCHORAGE
- ATLANTA
- AUGUSTA
- BEIJING
- CHARLOTTE
- DALLAS
- DENVER
- HOUSTON
- LOS ANGELES
- NEW YORK
- RALEIGH
- SAN DIEGO
- SAN FRANCISCO
- SEATTLE
- SHANGHAI
- SILICON VALLEY
- STOCKHOLM
- TOKYO
- WALNUT CREEK
- WASHINGTON D.C.
- WINSTON-SALEM

