



# Attorney-Client Privilege

Key Concepts for Avoiding Waiver

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# Disclaimer

- The information in these slides and this presentation is not legal advice and should not be considered legal advice.
- This presentation represents the personal opinions of the presenters.
- This presentation is offered for informational and educational purposes only.

# Attorney-Client Privilege vs. Confidentiality

## Attorney-Client Privilege

- Evidentiary Principle
- Purpose: Protects lawyers from being compelled to disclose privileged communications
- Requirements:
  - A Communication
  - Between Privileged Persons
  - In Confidence
  - Seeking Legal Advice

**vs.**

## Client Confidentiality

- Ethical Principle
- Rule of Professional Conduct 1.6
- Purpose: Prohibits attorneys from disclosing client information for privacy reasons
- Very few limitations

All privileged information is confidential, but not all confidential information is privileged.

# *Upjohn v. United States*

449 U.S. 383 (1981)

1. Information is necessary to supply the basis for legal advice to the corporation or was ordered to be communicated by superior officers;
2. Information was not available from “control group” management;
3. The communications concerned matters within the scope of the employees’ duties;
4. The employees were aware that they were being questioned in order for the corporation to secure legal advice;
5. The communications were considered confidential when made and kept confidential.

When met, an employee is considered a client for the purpose of ACP, and the employee’s communications with the attorney are privileged.

# *Upjohn* Warnings

## Corporate *Miranda* Warning

- Notice that the attorney represents the company, not the company employee
- Notice that the company may choose to waive the privilege and disclose what the employee informs the attorney

I am  
AN attorney.

I am not  
YOUR attorney.

## Key ACP Concepts & Waiver Pitfalls

Presence of a Third-Party

Limited Subject Matter

Inadvertent Disclosures

Selective Waiver

Duration

# Presence of a Third Party

- To be protected by ACP, communication must be made in confidence
- Generally, disclosing communications to a third party undermines the privilege
  - Goes against the notion that the communication was meant to be confidential



# *Kovel* Doctrine Exception

*United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)

- Expanded ACP to include “all the persons who act as the attorney’s agents”
- Factors Considered – Whether the third party:
  - Facilitated/assisted communication for the purpose of providing legal advice
  - Is indispensable for the provision of legal advice
  - Communicated with intent for discussions to be confidential
  - Served as a “translator” on complex subject matter or merely supplied facts
  - Was directed by an attorney

# *Kovel* Best Practices

- *Kovel* Engagement Letter – Attorney, Client, & Third Party
- File Separation
- Privilege Labels
- Correspondence Directed to Attorney
- Separate Billing

# Limited Subject Matter Waiver

## FRE 502(a)

When disclosure in a federal proceeding waives ACP, the waiver will extend to undisclosed communications or information if:

1. The waiver was intentional
2. Disclosed and undisclosed information concerned the same subject matter
3. Ought in fairness be considered together

# Inadvertent Disclosures

FRE 502 provides three ways parties may avoid waiver after accidental disclosure:

1. Court Order – FRE 502(d)
2. Party Agreement – FRE 502(e)
3. Fact-Intensive Analysis – FRE 502(b)

# Duration of ACP

Once ACP is established, it can be invoked at any time unless:

1. Waived
  2. Subject to an Exception
- **Individual:** Privilege continues even after termination of the A-C relationship *and* death of the client
    - *Swidler & Berlin v. United States*, 524 U.S. 399 (1998)
  - **Organization:** Privilege terminates when the organization ceases to have legal existence

# Former Employees

- Privileged information obtained by the former employee *during* employment remains privileged after termination
- Privilege still belongs to the organization—Former employees *cannot* assert the corporation's privilege, if the current employees elect to waive privilege
- Post-employment interviews of former employee may be privileged if the lawyer's purpose is to learn facts relating to a lawsuit that the former employee was aware of through employment

# Selective Waiver

- Corporations argued that voluntary disclosure should result in only “selective waiver”
  - Rejected by most courts

**Waiver to One Government Agency**

=

**Waiver to All**

# Common Interest & Joint Defense

- Often utilized by co-defendants with aligned interests
- Separate lawyers, but shared information
- Approach common-interest agreements with caution



# Dual Roles of In-House Counsel

- Legal advice is privileged, but business advice is not
- *In re Grand Jury*, 143 S. Ct. 543 (2023)
  - CA9 ruled that a law firm must turn over tax-related records because its corporate client primarily sought business, not legal, advice
  - SCOTUS granted certiorari
  - Issue: Whether ACP extends to communication involving both legal and nonlegal advice

**The Court dismissed the *writ of certiorari* as improvidently granted.**

# Miscellaneous Issues

- Employees may not have reasonable expectation of privacy when using company email system
- Engagement letters rarely privileged
- Sharing privileged information with family may cause waiver

# North Carolina

## “Primary purpose test”

- Whether the action is taken in the ordinary course of business
- Pursuant to company policy
- Related to the rendition of legal services

*Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC*

(N.C. Super. Nov. 9, 2020)

# Questions?



# Contact Us!



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