Buchanan

Attorney-Client Privilege, Work Product and Legal Ethical Standards: What Every In-House Lawyer Needs to Know

AMN Healthcare

Presented to:

ACC Association of Corporate Counsel

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True or False

- The attorney-client privilege applies equally to in-house and outside counsel.
- Communications between in-house counsel and corporate employees are privileged, provided those communications are made in confidence.
- Documents created by in-house counsel are work product and protected from disclosure under the work product doctrine.
- Meeting minutes prepared by in-house attorneys are protected under the attorney-client privilege, provided the in-house attorney is also present at the meeting with non-attorneys.
- The duty of confidentiality covers information within the scope of the attorney-client privilege and confidential information but does not extend to public information.

AGENDA

- Attorney-Client Privilege and Legal Ethics
- Work Product Doctrine and Legal Ethics
- Litigation Considerations
- Best Practices

Attorney-Client Privilege

Overview of the Attorney-Client Privilege

- Oldest common law privilege
- Three key elements

  (1) communication between lawyer and client

  (2) made in confidence and without waiver

  (3) for the purpose of obtaining or providing legal advice
- Federal Rule of Evidence 501
- California's Evidence Code § 954

Communication Between Lawyer + Client

- Two-way street
  - Applies to communications between lawyer-client and client-lawyer
- Privilege belongs to the client
- Lawyer ethically required to assert
- Business organizations are clients
- But all employees are not

Made in Confidence and Without Waiver

- Third-Party Disclosure
  - The Elevator
  - Zoom Depositions
- Essential Third-Parties
  - Specialized Knowledge
  - Functional Equivalent
  - Consultants Used to Aid in Legal Tasks
- Subject-Matter Waiver
  - Sword and Shield
  - Affirmatively Placed at Issue

For the Purpose of Obtaining or Providing Legal Advice for the Client

- Mixed Communications
  - "Primary Purpose" vs. "Dominant Purpose"
  - In-House Counsel's Dual Roles
    - Business
    - Legal
- Underlying Facts
- Crime-Fraud Exception
  - Model Rules vs. California

Intersection between A-C Privilege and Duty of Confidentiality

- Duty of confidentiality is one of the most important duties an attorney has to a client. *In re Jordan*, 12 Cal. 3d 575, 580 (1972); Rule 3-100 of the Rules of Professional Conduct of the State Bar of California 3-100; Business and Professions Code Section 6068(e)(1).

- A lawyer's duty to maintain client secrets extends to publicly available information obtained by the lawyer during the representation if the client wants to maintain its secrecy or its disclosure would be embarrassing or detrimental to the client. Cal. State Bar Formal Opn. No. 2016-195.

In-House Counsel & Attorney-Client Privilege

- Has a higher burden, particularly with business title along with legal title
- More fact-specific inquiry than outside counsel
- Carbon-copying in-house counsel is not magic
- Corporate culture is important (always vs. selectively)

- Not all employees fall within the scope of the privilege
- Employees with scope of the privilege vary depending on whether federal or state law applies
  - CA follows *Upjohn*
  - Privilege extends to all levels provided communication is made for the purpose of seeking legal advice
- Delivery of information to legal department does not transform non-privileged information into privileged information

In-House Counsel A-C Privilege Examples

Privileged

- Text messages exchanges with former employee regarding incident report and duty to preserve
- Incident reports that in-house counsel instructed be sent as confidential communications
- Internal ratings of patents and patent applications
- Meeting minutes to discuss proposed safety change that also included business proposals
- Instructions relayed by non-lawyer at the request of in-house lawyer
- Questionnaires prepared by corporate counsel and returned as part of internal investigation

Source

- ***F.R., Jr. v. Sonesta Int'l Hotels Corp.,*** **No. CV-23-04867-SB (ROX), 2024 BL 132803 (C.D. Cal. Feb. 22, 2024)**
- ***Scripps Health v. Superior Court of San Diego Cty.,*** **109 Cal.App.4th 529 (2003)**
- ***FTC v. Qualcomm,*** **Inc., No. 17-CV-00220-LHR, 2018 WL 2317835 (N.D. Cal. May 22, 2018)**
- ***In re Ford Motor Co.*****, 110 F.3d 954 (3d Cir. 1997)**
- ***Dolby Labs. Licensing Corp. v. Adobe Inc.*****, 402 F. Supp.3d 855 (N.D. Cal. 2019)**
- ***Upjohn Co. v. United States*****, 449 U.S. 383 (1981)**

In-House Counsel A-C Privilege Examples

Not Privileged

- Incident reports prepared in the normal course of business
- Emails sent by plaintiff to her attorney using her employer's computer as emails were not considered confidential
- Report prepared by outside consultant to provide advice whether company should purchase patents
- In-house counsel's Board-prepared materials where substance was business-focused
- Reports prepared by outside counsel conducing internal review and provided to regulatory agency under a confidentiality agreement
- Non-lawyer's request for regulatory strategy when the company is in a highly-regulated industry

Source

- ***F.R., Jr. v. Sonesta Int'l Hotels Corp.,*** **No. CV-23-04867-SB (ROX), 2024 BL 132803 (C.D. Cal. Feb. 22, 2024)**
- ***Holmes v. Petrovich Dev. Co.*****, 119 Cal.App.4th 1047 (2011)**
- ***Wisk Aero LLC v. Archer Aviation Inc.*****, No. 21-CV-02450-WHO (DMR), 2023 WL 2699971 (N.D. Cal. Mar. 29, 2023)**
- ***McKesson HBOC, Inc. v. Superior Court of Los Angeles Cty.*****, 115 Cal.App.4th 1229 (2004)**
- ***FTC v. Abbvie, Inc.*****, No. CV 14-5151, 2015 WL 8623076 (E.D. Pa. Dec. 14, 2015)**

Working with Foreign In-House Counsel

- Remember to consider that the usual privilege rules may not apply when foreign counsel are involved
- Need to research and consider
  - Role and status of in-house counsel
    - Ensure in-house counsel providing advice are licensed to practice law
  - Forum in which the privilege question will be heard
  - Choice of law
    - Consider using privilege law selections in agreements where appropriate
  - Whether working at the direction of U.S. in house attorney
    - U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961) (Communications with non-attorneys acting at the direction of an attorney may be privileged)

Work Product Doctrine

Overview of the Work Product Doctrine

- Covers documents and tangible things
- Prepared in anticipation of litigation or for trial
- Greater protection to mental impressions, conclusions, opinions or legal theories of party's attorney
- Less protection if the party seeking production has a substantial need for the materials and cannot without undue hardship obtain the substantial equivalent by other means

Key Similarities & Differences from A-C Privilege

- Different Types of Work Product
  - Fact Work Product vs. Opinion Work Product
- Not Sacrosanct
  - Compelled disclosure for substantial need
- Anticipation of Litigation Requirement
  - Scope may differ under state law
- Waiver of Work Product Protection Differs
  - Disclosure to a third party in a way that creates a significant likelihood that an adversary or potential adversary in the anticipated litigation will obtain it
  - Versus cat-out-of-the-bag waiver with privilege

Work Product Examples

Protected

- Report prepared by legal counsel justifying tax deductions taken by client that was shared with accounting firm that reflected lawyers' mental impressions
- Recordings of witness interviews undertaken by investigators employed by counsel where disclosure would reveal attorney impressions, conclusions, opinions, legal research or theories
- Documents prepared by Pwc, acting as Chevron's agent, evaluating the transaction at the direction of Chevron's in-house counsel

Source

- ***United States v. Sanmina Corp.*, 968 F.3d 1107 (9th Cir. 2020)**
- ***Coito v. Superior Court of Stanislaus County*, 54 Cal.4th 480 (2012)**
- ***United States v. ChevronTexaco Corp.*, 241 F. Supp.2d 1065 (N.D. Cal. 2002)**

Work Product Examples

Not Protected

- Report prepared by legal counsel justifying tax deductions taken by client that was shared with accounting firm that reflected facts
- Recordings of witness interviews where no attorney impressions were evident in recordings
- Identity of witnesses interviewed absent a showing that disclosure would reveal attorney tactics, impressions, or evaluation of the case

Source

- ***United States v. Sanmina Corp.*, 968 F.3d 1107 (9th Cir. 2020)**
- ***Coito v. Superior Court of Stanislaus County*, 54 Cal.4th 480 (2012)**
- ***Coito v. Superior Court of Stanislaus County, 54 Cal.4th 480 (2012)***

Litigation Considerations

Litigation Considerations

- Anticipation of Litigation Should Trigger Litigation Hold
- Privilege Logs
- Joint Defense Agreements & Common Interest Agreements
- Inadvertent Production
- Rule 502(d) Orders

Best Practices

Best Practices: Attorney-Client Privilege

- Review job descriptions, titles, reporting lines
- Recognize that A-C privilege typically will not apply to third-party vendors
- Education of managers/key employees
- Adopt clear-cut policy with objective criteria for incidents
- Set a protocol for how internal investigations are conducted
- Use attorney-client privilege legend judiciously
- Consider starting privileged emails with "you asked me to provide legal advice with respect to X. This (email/memo/call) reflects legal advice, which I ask that you keep confidential."
- Restrict distribution
- Regularly review document retention policy, ensure litigation holds are automatically sent

Best Practices: Work Product

- Before labeling a document as “work product” ensure that it was either:
  - prepared in anticipation of litigation or
  - reflects the value or merit of a claim or defense, or a strategy or tactic
- Proceed with caution when labeling something as “work product” when it was not prepared “in anticipation of litigation”

- Consider that a designation of material as “work product” when not prepared in anticipation of litigation may trigger a litigation hold, requiring the retention of material typically destroyed / not retained in the normal course of business
- Recognize the protections in both A-C and work product are stronger for outside counsel, so determine when outside counsel should be brought in for investigations and retention of third-parties such as consulting experts

Thank You For Joining Us

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Selective Cases

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Questionnaires prepared by corporate counsel, sent to and filled out by manager-employees, and then returned to corporate counsel as part of the general counsel's internal investigation.
- "Communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."
- A statement of policy also accompanied the questionnaire, "which clearly indicated the legal implications of the investigation."
- The managers were likewise "instructed to treat the investigation as 'highly confidential' and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information."

Selective Cases

In re Grand Jury, 23 F.4th 1088 (9th Cir. 2022)

- Affirmed that the dominant purpose or "primary purpose" test governs determining whether attorney-client privilege attaches to communications with both legal and business purposes.
- Defendant company and their law firm were served with subpoenas as part of a criminal investigation. Both withheld certain documents claiming attorney-client privilege attached.
- Government asked the court to apply a "because of" test to determine whether the documents at issue were created because of anticipated litigation, rather than whether their primary purpose was to seek legal advice.
- Court rejected government's position, explaining that the "because of" test should apply in the work product analysis rather than in attorney-client privilege analysis.
- The court did not rule on whether the "primary purpose" test requires that *the* primary purpose of the communication be legal advice, or if it is sufficient that *a* primary purpose of the communication be legal advice.

Selective Cases

United States v. Sanmina Corp., 968 F.3d 1107 (9th Cir. 2020)

- Corporate defendant was audited by the IRS with respect to questionable tax deductions. Outside counsel prepared a report to justify the deduction, citing two withheld memoranda written by in-house counsel. IRS sought production of those memoranda. Defendant claimed both attorney-client privilege and work product protection applied.
- Prior to the audit, the memoranda had been shared with E&Y, KPMG, and the law firm. The IRS argued the protections had therefore been waived.
- Because the company had shared the memoranda with the accounting firms for the purpose of obtaining fair market valuations and not for the purpose of obtaining legal advice, the district court held that attorney-client privilege had been waived. The circuit court did not overturn.
- However, work product protection had not been waived as the accounting firms were not adversaries in litigation and sharing the memoranda with them did not increase the likelihood that adversaries would obtain them. However, because the valuations themselves were shared with the IRS, all factual information within the memoranda (as opposed to legal opinions) had to be produced.

Selective Cases

In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997)

- After Ford identified safety concerns about one of the automobiles, its general counsel examined the legal implications and proposed a course of action to address the concerns. Ford convened a meeting to discuss this proposal.
- Communications were privileged because Ford had concerns about a particular product, Ford's lawyer examined the legal implications of these concerns and proposed a course of action, and the meeting was called, in part, to discuss this proposal. Although the decision included consideration of profit and loss issues, economics, marketing, and public relations, the court concluded "it was infused with legal concerns and was reached only after securing legal advice."

Selective Cases

***Stirratt v. Uber Techs., Inc.*, No. 19-CV-06361-RS (DMR), 2024 WL 1723710 (N.D. Cal. Apr. 19, 2024)**

- Redaction of Board of Directors meeting minutes was improper where in-house counsel led the conversation of a business discussion absent a clear showing that the purpose of the discussions led by in-house counsel involved legal advice.
- Uber redacted a portion of Board minutes where committee members, in-house counsel, and other Uber employees were discussing a possible business transaction.
- Uber needed to show more than the attorney's involvement in or recommendation of a transaction – they needed to make a showing that the communications were for the primary purpose of providing or obtaining legal advice.
- In camera review showed that in-house counsel led the discussion of the business transaction, but that this alone was not enough to create a presumption that the discussion involved legal advice.

Selective Cases

***F.R., Jr. v. Sonesta Int'l Hotels Corp.*, No. CV-23-04867-SB (ROX), 2024 BL 132803 (C.D. Cal. Feb. 22, 2024)**

- Plaintiffs sought production of an incident report prepared by a former Sonesta employee. Court held that incident report was not a communication, did not reflect legal advice or strategy and was not protected by the AC privilege. Court also held that the incident report was not work product. The report was completed within a week of the incident and almost 2 years before the case was filed. There also was no evidence that counsel directed that the incident report be completed in anticipation of litigation.
- Even if Defendants had shown that the incident report was prepared in anticipation of litigation, the court would order production as it constitutes fact work product and Plaintiffs have a substantial need for the contemporaneously created document.
- Text messages exchanged between managerial employee and former employee related to the duty to preserve and the incident report were protected by the attorney-client privilege because the managerial employee was acting at the direction of the in-house lawyer. The communications were furthering counsel's litigation strategy.

Selective Cases

***Wisk Aero LLC v. Archer Aviation Inc.*, No. 21-CV-02450-WHO (DMR), 2023 WL 2699971 (N.D. Cal. Mar. 29, 2023)**

- In-house counsel Board-prepared materials were not privileged where the substance of the materials was focused on business decisions and Wisk could not make a showing that the advice provided was legal in nature.
- In-house counsel drafted portions of a Board deck, made comments on Board materials, and drafted slides on a Board funding request. The court found all three documents were not subject to AC privilege because there was no reason proffered that the drafted materials reflected any particular legal advice or opinions.
- Wisk argued that the in-house counsel's comments to the Board in these materials "reflect[]s the substance of [his] legal advice," but the court found this insufficient.
- Considering that communications from general counsel "warrant[] heightened scrutiny," the court reasoned that nothing presented by Wisk suggested the materials at issue would not have been created absent any legal considerations, and therefore the primary purpose test warranted a finding of no privilege.

Selective Cases

***City of Roseville Employees' Ret. Sys. v. Apple Inc.*, No. 19-CV-02033-YGR (JCS), 2022 WL 3083000 (N.D. Cal. Aug. 3, 2022)**

- Court addressed 9th Circuit precedent that attempted to draw a line as to when communications related to regulatory compliance (here, SEC filings) are business or legal communications.
- Court declined to apply a brightline rule saying that they are always privileged or never privileged, choosing instead to apply the primary purpose test.
- Apple put together a preannouncement of their Form 8-K financial metrics in addition to the disclosure form itself in response to a Nikkei Article that leaked some of the figures to negative effect.
- Court found circumstances relevant as it showed an interest in disseminating the information publicly to stem investor fallout rather than just for purposes of regulatory compliance.
- Where documents (here, Investor Letter and Q&A document re the 8-K disclosures) were sent to in-house counsel *and others* seeking advice, the communication was not privileged because the request did not *explicitly* seek legal advice.
- Cover emails seeking "feedback" from in-house counsel that did not highlight any particular legal issue and was directed at both non-attorney and in-house counsel and was not privileged.

Selective Cases

***Dolby Labs. Licensing Corp. v. Adobe Inc.*, 402 F. Supp.3d 855 (N.D. Cal. 2019)**

- Court considered a number of documents related to licensing negotiations on the part of Adobe, as well as documents related to a tangential audit. Central to most of the documents at issue was directions by various members of the in-house counsel team to obtain information the lawyers needed to assist with these negotiations and audit.
- Primarily, when company employees responded to in-house counsel with requested information relating to Adobe products and technical issues, those responses were deemed not privileged. The primary question was whether the employees were relaying mere technical facts relating to the integration of Dolby technology into Adobe software, or if the employees were conducting tasks specific to litigation (comparing the case to an instance where employees were tasked with comparing their technology to allegedly infringing products at issue in litigation). Thus, where there was a mere recounting of facts as opposed to a call for "a technical expert's opinion" or analysis, the communications were not privileged even if directed by in-house counsel.
- However, where those technical facts were compiled specifically in anticipation of litigation, work product protection still applied in a few circumstances (though still possibly subject to a substantial need exception).
- Instructions relayed from in-house counsel – even if written into an email by a non-lawyer – could still be subject to AC-privilege. However, the subsequent emails among employees collecting information in response to those instructions were not privileged.

Selective Cases

***FTC v. Qualcomm,* Inc., No. 17-CV-00220-LHR, 2018 WL 2317835 (N.D. Cal. May 22, 2018)**

- FTC brought suit alleging that Qualcomm violated the antitrust laws by leveraging its market power in modem chips to impose unfair licensing terms and harm competition.
- FTC sought discovery regarding Qualcomm's internal ratings of its patents and patent applications.
- FTC argued that ratings were not privileged because these rating are used to decide where and how much money to invest in inventions.
- Qualcomm maintained that these rating were privileged because they reflect legal advice about patent prosecution and litigation since they are prepared by attorneys and based on judgments about the scope and enforceability of Qualcomm's patents.
- Court agreed with Qualcomm that ratings were privileged because they reflected attorneys' decisions about scope, validity, patentability and enforceability of Qualcomm's patents and patent applications.

Selective Cases

***MediaTek Inc. v. Freescale Semiconductor, Inc.*, No. 4:11-CV-05341-YGR (JSC), 2013 WL 5594474 (N.D. Cal. Oct. 10, 2013)**

- General counsel hired outside consultant to evaluate certain patents in connection with company decision of whether or not to purchase the patents. General counsel claimed the consultant was undertaking an investigation of technical aspects of the patents to assist him in rendering legal advice on the propriety of the purchase.
- The outside consultant communicated directly with company employees to obtain the information it needs to respond to the general counsel's request. Consultant created a report for the general counsel. The report and its prior drafts were the documents at issue.
- Court assumed that consultant could be considered agent of the lawyer for purposes of assessing privilege. That said, court found the communications were not privileged.
- MediaTek presented no evidence that the report was actually provided to attorneys, but rather it was provided to management. The fact that general counsel ordered the creation of the report was insufficient to find that the report was created for the purpose of giving legal advice. In camera review supported finding that the document was technical in nature and did not reflect legal advice.
- This court found that the confidentiality agreement entered into between consultant and general counsel was insufficient to make the engagement privileged particularly because the confidentiality agreement did not say engagement was privileged.

Selective Cases

United States v. ChevronTexaco Corp., 241 F.Supp.2d 1065 (N.D. Cal. 2002) (cont.)

- Work product protection applies to documents prepared "because of litigation" even where "prepared in connection with a business transaction or also served a business purpose."
- Chevron hired Pwc to evaluate anticipated transaction, anticipating the IRS would challenge the transaction. Documents prepared by Pwc, acting as Chevron's agent, evaluating the transaction at the direction of Chevron's in-house counsel therefore *could* be afforded work product protection.
- Each document was evaluated individually to determine whether the document would have been created in the regular course of business as part of conducting the transaction, or if created because of the anticipation of litigation.
- Work product protection could apply, though communications between counsel and Pwc were not afforded attorney-client privilege because their accounting expertise was not necessary for the attorney to provide legal advice.

Selective Cases

United States v. ChevronTexaco Corp., 241 F. Supp.2d 1065 (N.D. Cal. 2002)

- Communications between a corporation and its outside counsel are presumed to be made for the purpose of seeking *legal* advice.
- Unlike outside counsel, in-house attorneys can serve multiple functions within the corporation. In-house counsel may be involved intimately in the corporation's day to day business activities and frequently serve as integral players in business decisions or activities.
- Communications involving in-house counsel might well pertain to business rather than legal matters. The privilege does not protect an attorney's business advice. Corporations may not conduct their business affairs in private simply by staffing a transaction with attorneys.
- Because in-house counsel may operate in a purely or primarily business capacity in connection with many corporate endeavors, the presumption that attaches to communications with outside counsel does not extend to communications with in-house counsel.

Selective Cases

***FTC v. Abbvie, Inc.*, No. CV 14-5151, 2015 WL 8623076 (E.D. Pa. Dec. 14, 2015)**

- FTC challenged AbbVie's withholding of certain due diligence presentations as privileged.
- Court found that such presentations were not privileged because the presentations concerned business matters such as annual sales, product marketing and promotion, market competition, potential research issues and development strategies. They also did not qualify for work product protection as they were not prepared because of litigation.
- Court also considered whether a non-lawyer's request to general counsel in an email that "we ought to consider a regulatory strategy" was privileged and concluded it was not.
- Based on the information in the record about the nature of this request, the court does not find that this communication sought legal advice. As a participant in a highly-regulated industry, a pharmaceutical company must consider regulatory matters in making nearly all of its business decisions.

Selective Cases

Coito v. Superior Court of Stanislaus Cty., 54 Cal.4th 480 (2012)

- Recordings of witness interviews undertaken by investigators employed by defendant's counsel were entitled to qualified work product protection.
- Where disclosure of witness statements would reveal attorney impressions, conclusions, opinions, legal research or theories, absolute protection was applicable.
- Where no attorney impressions were evident in recordings, plaintiffs could overcome qualified protection by showing undue prejudice that would result in injustice by withholding the recordings from production.
- However, the identity of witnesses interviewed was not entitled to protection absent a showing that disclosure "would reveal attorney tactics, impressions, or evaluation of the case (absolute privilege) or would result in opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege)." *Id*. at 863.

Selective Cases

Costco Wholesale Corp. v. Superior Court of Los Angeles Cty., 47 Cal.4th 725 (2009)

- Costco sought advice from outside counsel regarding whether certain employees were exempt from California wage and overtime laws. The attorney produced a 22-page opinion letter to Costco. In subsequent litigation, the court appointed a referee to review the letter, who produced a heavily redacted version that revealed all information they deemed to be factual rather than legal opinion.
- On appeal, the California Supreme Court held that the letter was privileged in its entirety, and the court erred in ordering a referee to review the document to determine whether the privilege applied.
- The court reasoned that the attorney-client privilege protects the *transmission* of information, whether the transmission contains factual information beyond attorney impressions does not defeat the privilege.
- The court rejected the application of the dominant purpose test, as the communication was not that between an employee and an attorney in order for the attorney to gather information, but rather a communication from an attorney to the employer providing requested information and advice.
- The court furthered ruled that the lower court should not have allowed review of the document to determine whether privilege attached per Evidence Code § 915.

Selective Cases

Holmes v. Petrovich Dev. Co., 119 Cal.App.4th 1047 (2011)

- Plaintiff sued her employer for, among other things, harassment, retaliation, and wrongful termination. She emailed her attorney from her work computer regarding the case.
- The Court concluded that emails sent by the plaintiff to her attorney about the lawsuit were not "confidential communication between client and lawyer" within the meaning of § 952 because the company's policy provided that personal emails were prohibited on work devices. The company could monitor and inspect files at any time to ensure compliance, and that employees had no right of privacy with respect to messages sent from work devices.
- The court likened the circumstances to "consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."

Selective Cases

***Zurich Am. Ins. Co. v. Superior Court of Los Angeles Cty.*, 155 Cal.App.4th 1485 (2007)**

- Lower court erred in ruling that attorney-client privilege only applied to communications directly from counsel, documents created by counsel, or documents that have been received by counsel.
- Per Evidence Code § 952, a "confidential communication" "includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."
- Documents that reflect legal advice or opinions, even when shared within the company, may still be privileged if shared with "those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." California Evidence Code § 952.
- Disclosure to agents and employees of the company client who were not participants in the legal consultation itself does not defeat attorney-client privilege if that disclosure is deemed reasonably necessary.

Selective Cases

***McKesson HBOC, Inc. v. Superior Court of Los Angeles Cty.*, 115 Cal.App.4th 1229 (2004)**

- McKesson's internal auditors discovered and disclosed improperly recorded revenue at its subsidiary HBO, resulting in shareholder lawsuits and an SEC investigation. McKesson hired an outside law firm to perform an internal review and prepare a report. The firm provided the report to the SEC in an effort to cooperate, entering into a confidentiality agreement with the SEC maintaining that its production did not waive any applicable privileges.
- Subsequent shareholder suits sought production of the report claiming that any privilege had been waived by sharing the report with the SEC.
- The court found that McKesson had waived both the attorney work product and attorney-client privilege by sharing the report with the SEC as there was no common interest or purpose among the parties.
- Though the parties had entered into a confidentiality agreement, the government did not have an interest independent of the agreement in keeping the information confidential, and therefore the privileges were waived.

Selective Cases

***Scripps Health v. Superior Court of San Diego Cty.*, 109 Cal.App.4th 529 (2003)**

- Records that are primarily created for legal purposes are entitled to protection, even if they are used for non-legal incidental purposes as well.
- Hospital in-house counsel instituted system of creating and maintaining incident reports and then having those incident reports communicated to him as confidential communications in his role as inhouse counsel for a self-insured hospital. Those records were maintained by a risk management office, who also created reports related to accident prevention for use by the hospital's quality assurance committee.
- Court ruled the records remained subject to privilege because the reports themselves are clearly confidential communications to counsel: "Where, as here, the right to the privilege is clearly established it should not be cast aside. The fact that the information contained in the communications might also be used for incidental purposes not entitled to the privilege is unimportant."