

The image features a large red diagonal shape on the left side, which serves as a background for the title text. The right side of the image shows a grayscale photograph of a modern multi-story office building with a glass facade. The name 'Bradley' is visible on the building's facade. In the top right corner, the word 'Bradley' is written in a bold, black, sans-serif font with a red horizontal line underneath it.

Bradley

Hazards, Tips, and Unknowns: Ethical and Privilege Issues for In-House Counsel

Todd Presnell



Donald J. Trump

@realDonaldTrump

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Attorney–client privilege is dead!

6:07 AM - 10 Apr 2018

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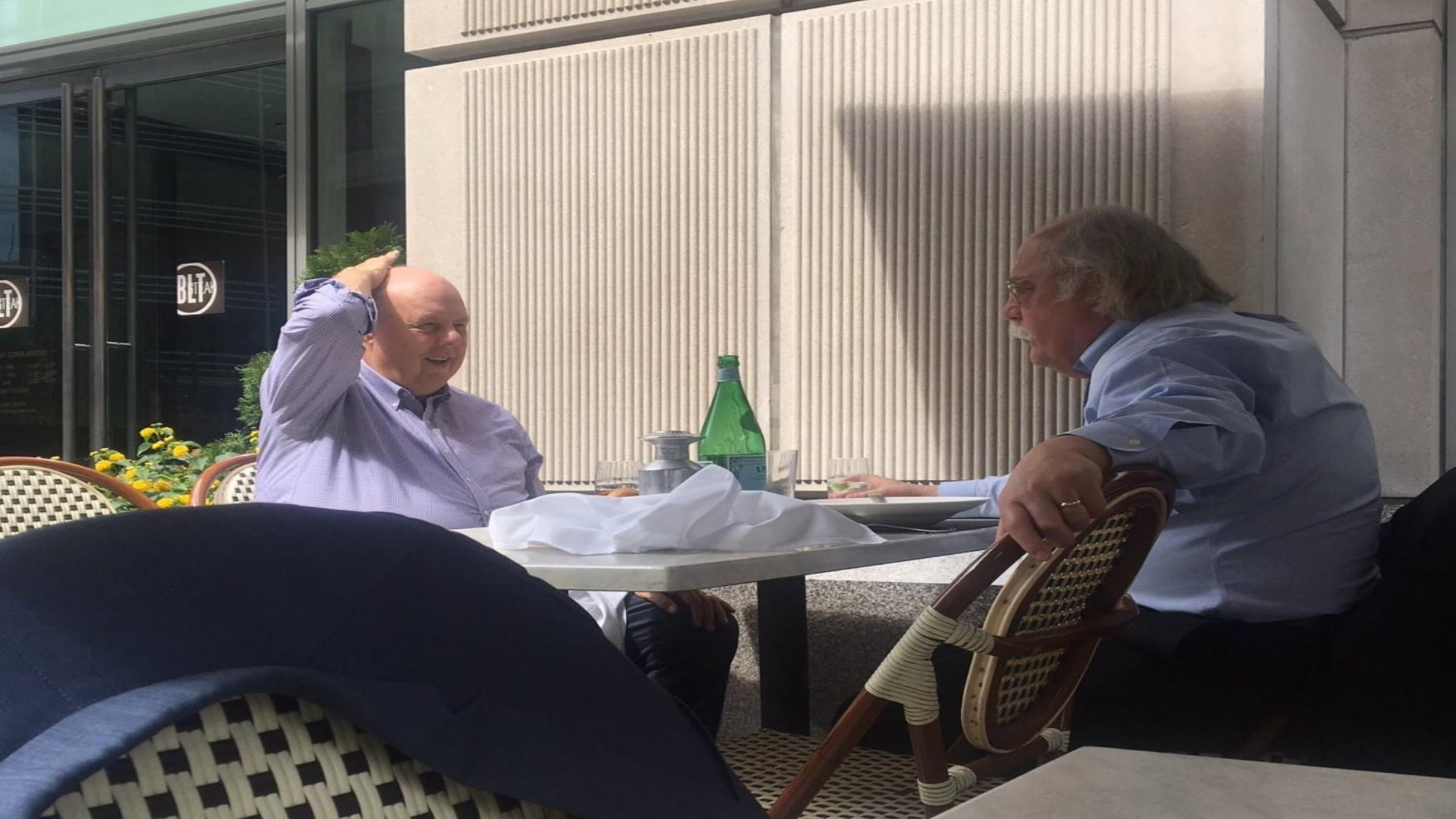


54K

27K

105K





***In re Charges of
Unprofessional
Conduct in Panel File
No. 41310, 899 S.W.2d
821 (Minn. 2017).***

Confidentiality



I was notified [by] my [Client] yesterday that he is terminating my representation and that he is not accepting the settlement offer.

He got upset apparently that Medicare is taking a while, as it always does, and now doesn't want the settlement.

I advised him that he already accepted it, there is no rescinding his acceptance. He is picking his file up today apparently.

I'm going to send a lien for our fees and costs to you. I'm assuming you will be having legal bring a motion to enforce the settlement.

He's been advised of all of this. Sorry for the inconvenience but he is a very difficult client.

***Smith v. The
Technology House,
Ltd., 2019 WL
2746868 (Ohio Ct.
App. June 28,
2019).***



We note a judge's responsibility to perform the duties of the judicial office impartially, competently, and diligently, and, in particular Rule 2.15 of the Ohio Code of Judicial Conduct.

R. 2.15 A judge having knowledge that a lawyer has committed a violation of the Ohio Rules of Professional Conduct that raises a question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other aspects shall inform the appropriate authority.

Agenda

- **Attorney-Client Privilege for Corporations**
- **Application to In-House Lawyers**
- **Consultants and Former Employees**
- **Practice Tips**



Privilege Decision Point

Corporate Attorney-Client Privilege

Centerview Bank Case Study



Centerview Bank Case Study



Kathryn Williams
Regional Manager
Illinois



Elise Franklin
VP & General Counsel
Atlanta, Georgia



Tom Mattingly
Branch Manager
Age: 60

Centerview Bank Case Study



Franklin and Williams discuss Mattingly's performance but also business operations



Franklin instructs Williams to prepare a memorandum summarizing their meeting

Centerview Bank Case Study



Mattingly later terminated



**Mattingly files age
discrimination lawsuit**

Centerview Bank Case Study



- **Mattingly's counsel deposes Williams**
- **Williams asked about conversation between Williams and Franklin**
- **Requests copy of Williams-Franklin memo**

Centerview Bank Case Study



**Privileged
Conversation?**



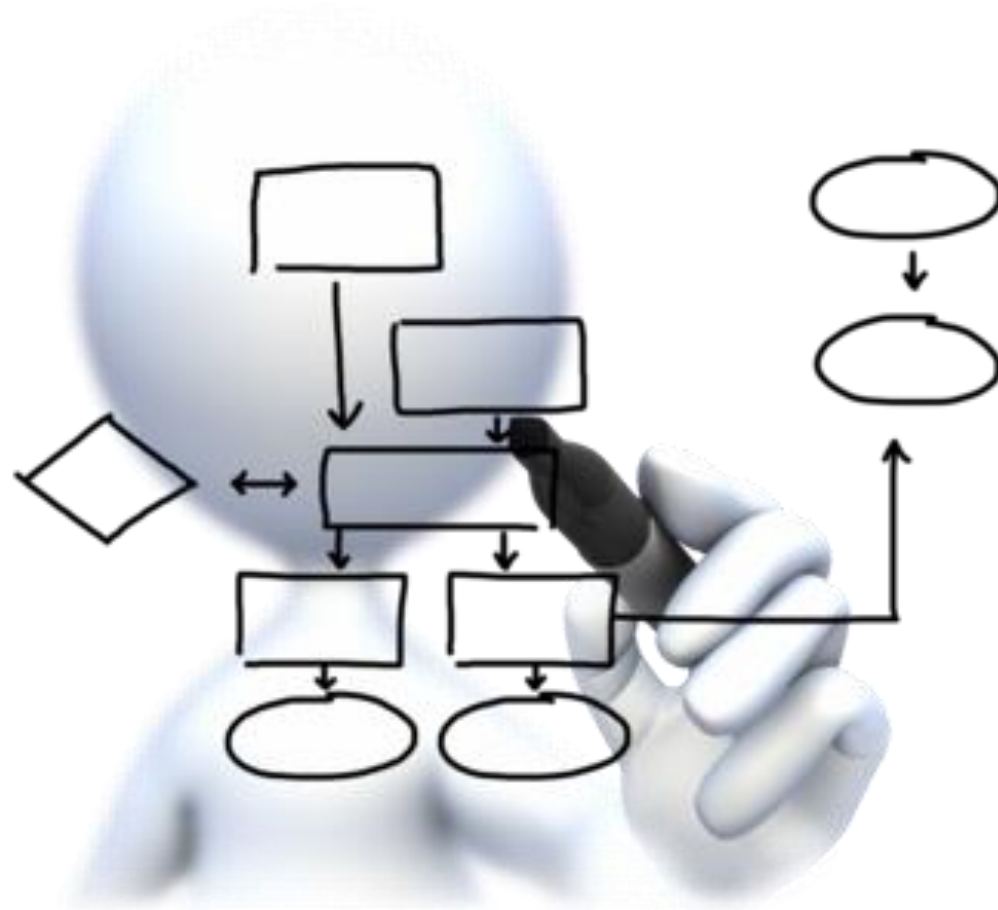
**Privileged
Report?**

Corporate Attorney-Client Privilege



- **Attorney-Client Relationship**
- **Communication**
- **Confidential**
- **Legal Advice**

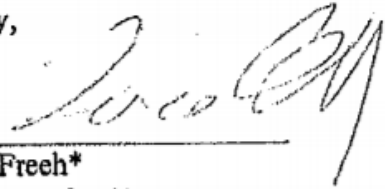
Attorney-Client Relationship



***Estate of Paterno
v. NCAA, 168
A.3d 187 (Pa.
Super. Ct. 2017)***



Sincerely,



Louis J. Freeh*
Senior Managing Partner
Freeh Sporkin & Sullivan, LLP

APPROVED AND AGREED TO ON BEHALF OF
The Board of Trustees of The Pennsylvania State University:

By: Steve A. Garban
an authorized signatory of The Board of Trustees of The Pennsylvania State University

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees
The Pennsylvania State University

Date: 12/2/11

Investigation Task Force

APPROVED AND AGREED TO ON BEHALF OF
The Special Committee established by
The Board of Trustees of The Pennsylvania State University:

By: K.C. Frazier
an authorized signatory of The Special ~~Committee~~ ^{Investigation Task Force} established by
The Board of Trustees of The Pennsylvania State University

Printed Name: K.C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

Communication



Written



Oral

Communication



Confidentiality



Confidential when made



Intent to Remain Confidential

Confidentiality

***BouSamra v. Excelsa
Health (Pa. App.
2017)***



Legal Advice



Corporate Attorney-Client Privilege



Employee—Outside Counsel



Employee—In-House Counsel

Corporate Attorney-Client Privilege



Employee—Employee



**In-House Counsel—
Outside Counsel**

Corporations?

**Control
Group
Test**



**Subject
Matter
Test**

Control Group Test

Corporate employee who communicates with corporate attorney—

is in a position to take a substantial part in decision that corporation will make upon advice of counsel.

Subject Matter Test

- **Communication made for purpose of rendering legal advice**
- **Made at direction of supervisor**
- **Request made to secure legal advice**
- **Subject matter of communication within scope of employee's duties**
- **Communication kept confidential**

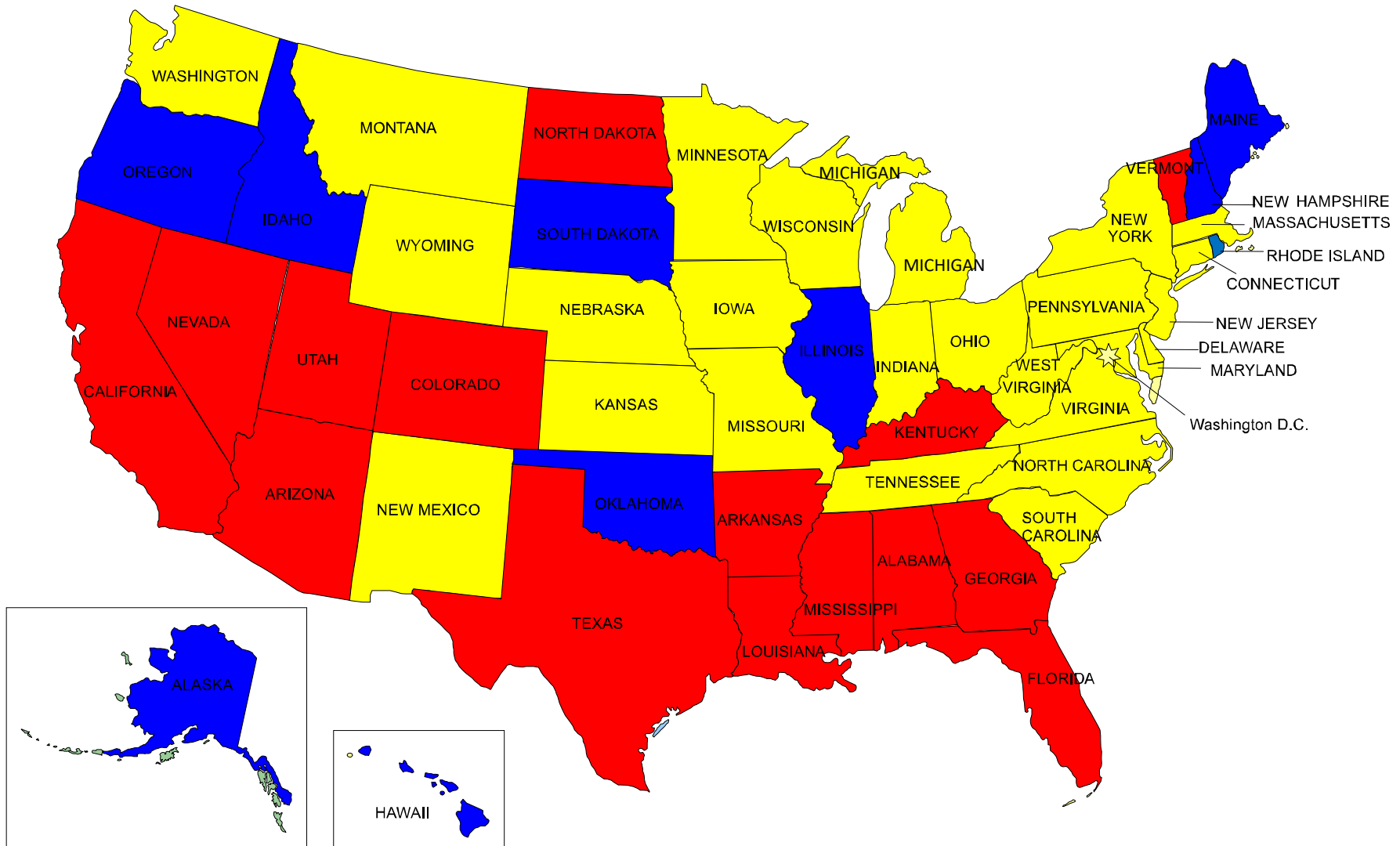
Control Group



Subject Matter



■ Subject Matter ■ Control Group ■ Undecided





**What about
consultants?**



What about former employees?

APPLICATION TO IN-HOUSE COUNSEL



**In-House
counsel are
lawyers, too**

In-House Counsel



A corporation can protect material as privileged only upon a **clear showing** that in-house counsel acted in a professional legal capacity.

In-House Counsel



**Legal Hat
or
Business
Hat**

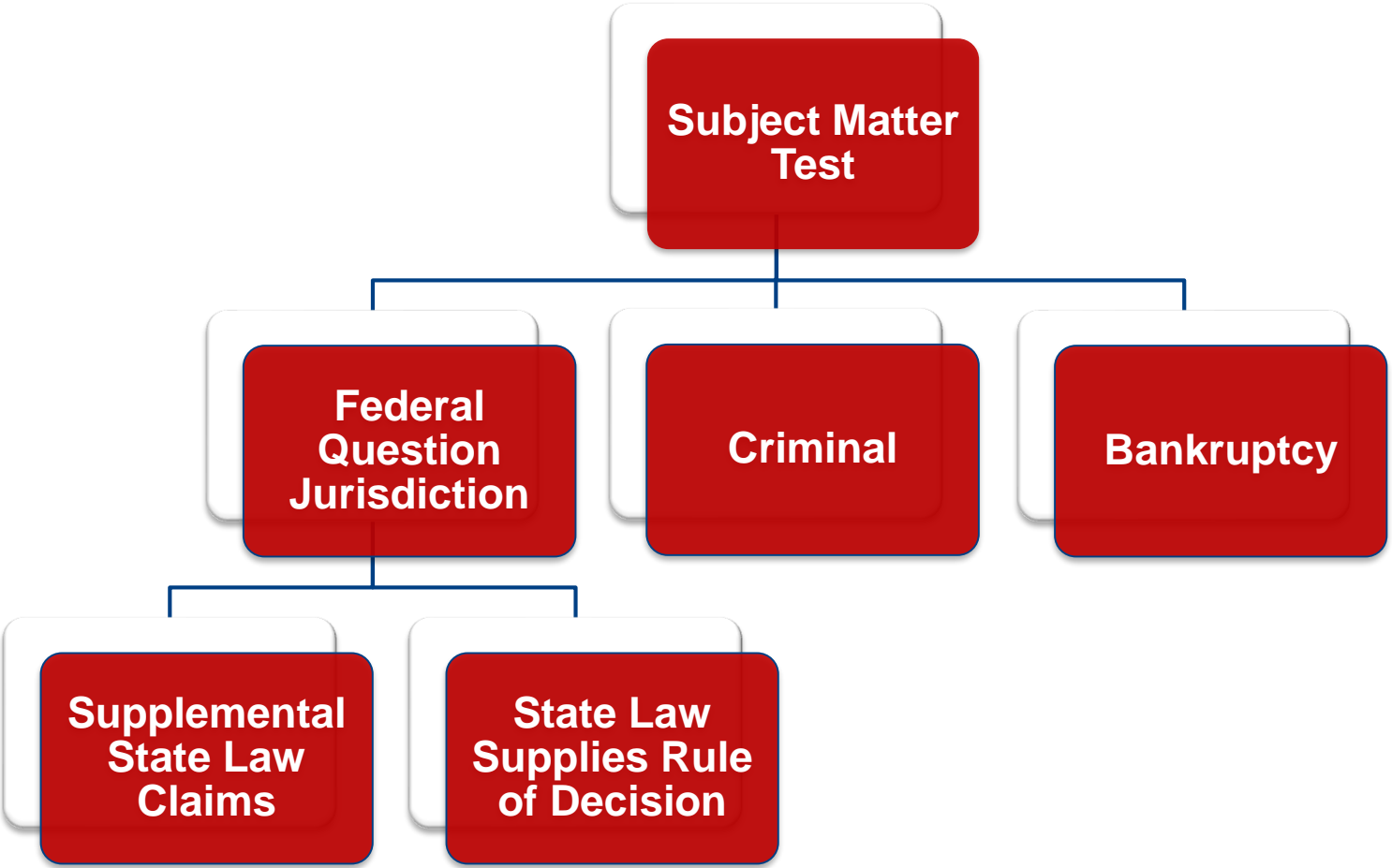
Dual Purpose Communications



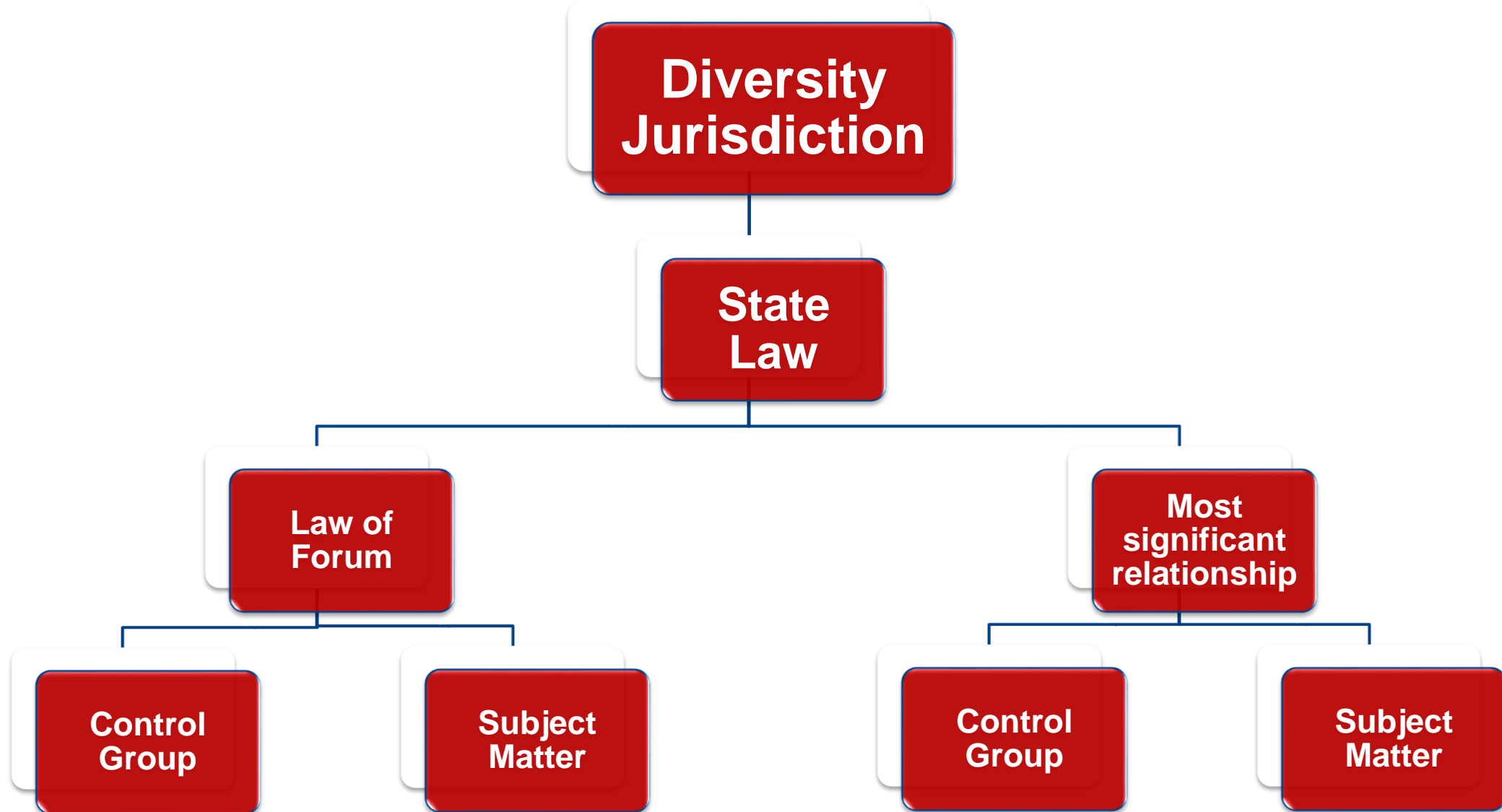


Conflict of Laws

Conflict of Laws in Federal Court



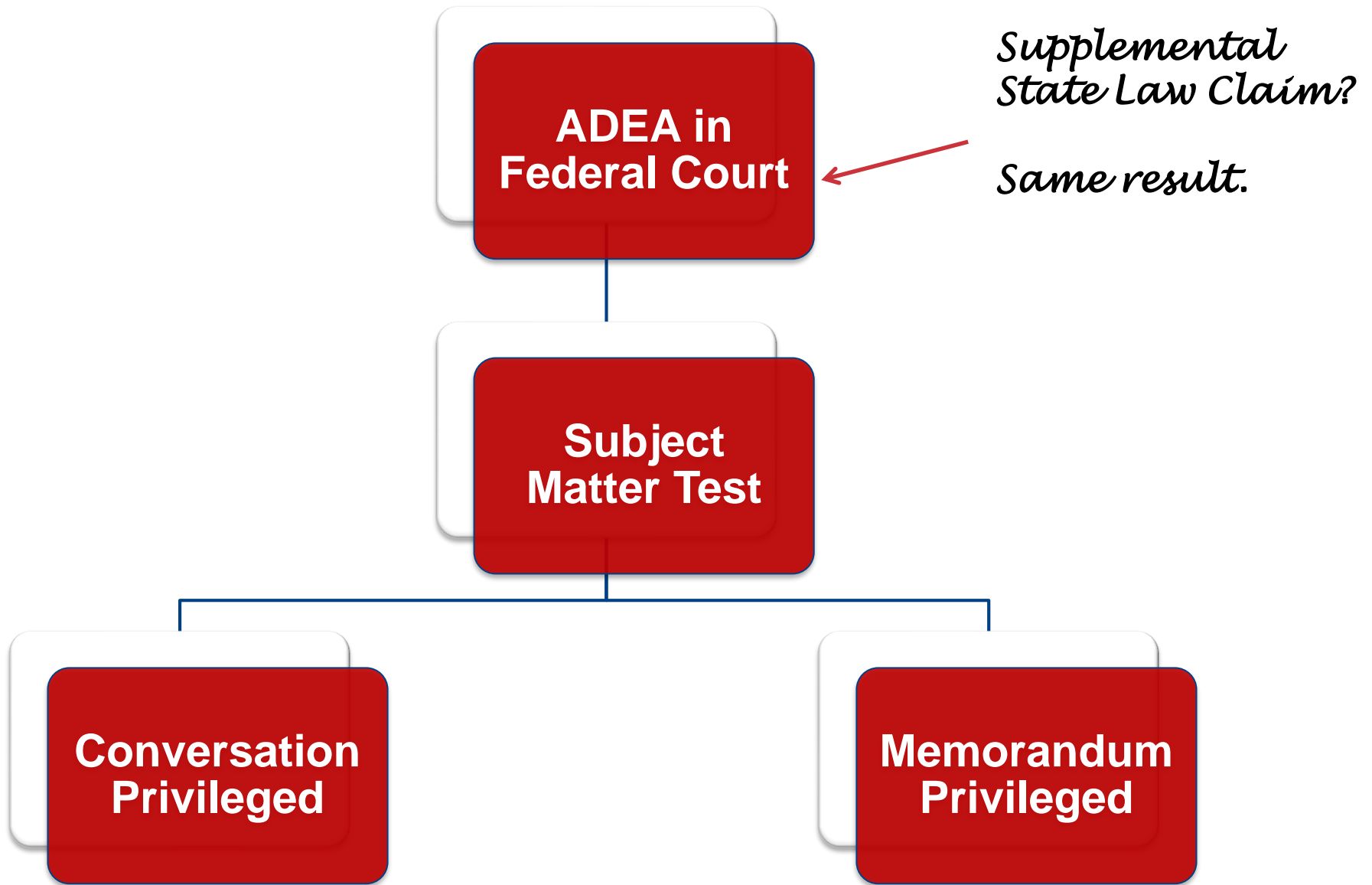
Conflict of Laws in Federal Court

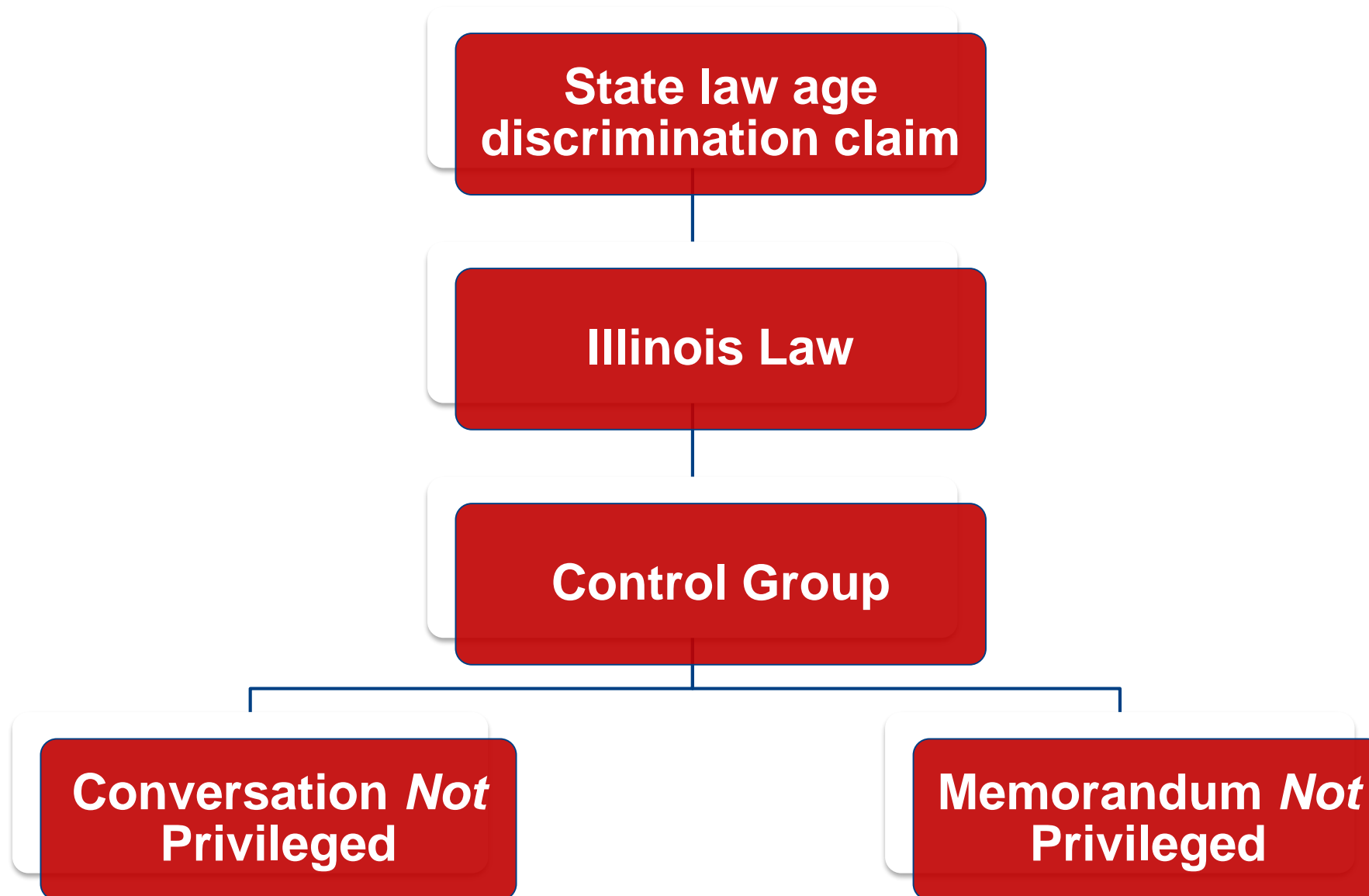


Centerview Bank Case Study

Centerview Bank Case Study

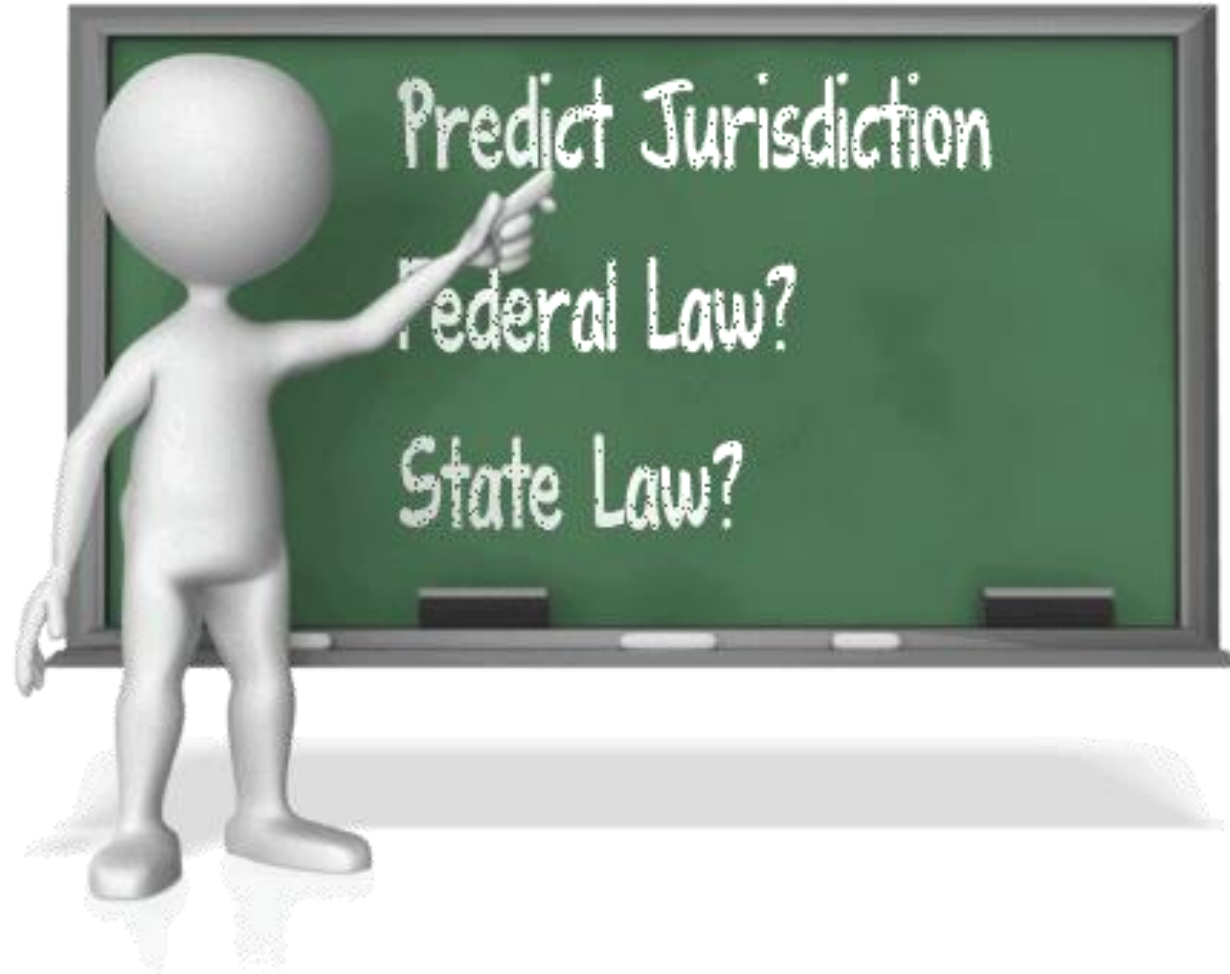






Practice Tips

Practice Tips

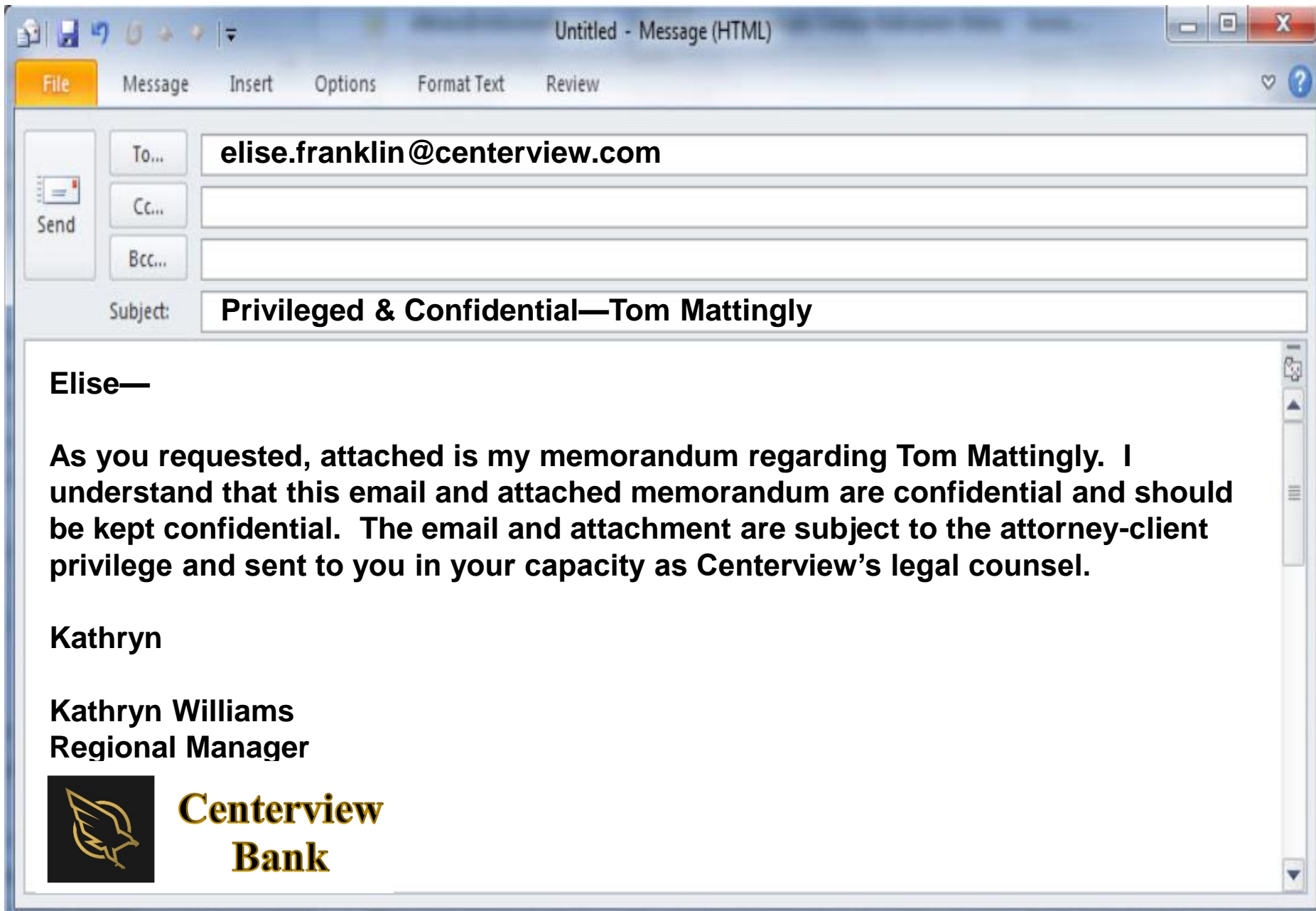


Practice Tips



Practice Tips







CONFIDENTIAL MEMORANDUM

TO: Elise Franklin
Corporate Legal Counsel

FROM: Kathryn Williams
Regional Manager

RE: Tom Mattingly

DATE: March 9, 2020

This memorandum was prepared at your request. I understand that this memorandum is necessary to assist you in providing legal advice to the Bank regarding Tom Mattingly's employment status. I also understand that this memo and its contents are confidential, subject to the attorney-client privilege, and should not be distributed to others.

Regarding Mr. Mattingly, ...

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Todd Presnell



PRESNELL ON PRIVILEGES

THE LATEST DEVELOPMENTS ON EVIDENTIARY PRIVILEGES FOR CORPORATE AND OUTSIDE COUNSEL

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On: March 18, 2020



WHAT'S GOOD FOR THE PRIVILEGE-LOG GOOSE IS GOOD FOR THE PRIVILEGE-LOG GANDER
On: March 10, 2020



IMPORTANT, BUT BURIED, EXECUTIVE PRIVILEGE COMMENTS IN D.C. CIRCUIT'S MCGAHN OPINION
On: March 5, 2020

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Adequate Upjohn Warning? 10th Circuit Issues Instructive Decision