

Agenda ...

- Reviewing the Basics
 - Attorney Client Privilege
 - Work Product
 - Upjohn
- Everyday Scenarios
 - Internal Investigations
 - Business or Legal Role?
 - Consultants
 - Transactions
 - International Matters
- Take-aways



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The Attorney-Client Privilege

Privilege protects confidential communications between client and lawyer for the ***purpose of seeking or providing legal advice.***



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ABA Model Rule 1.6

A lawyer shall not reveal information relating to the representation of a client unless ...

- the client gives informed consent
- the disclosure is impliedly authorized in order to carry out the representation
- the disclosure is permitted under the rules



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A privilege exists if:

- (1) the relation of attorney and client existed at the time the communication was made,
- (2) the communication was made in confidence,
- (3) the communication relates to a matter about which the attorney is being professionally consulted,
- (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and
- (5) the client has not waived the privilege.

State v. McIntosh, 336 N.C. 517, 523–24, 444 S.E.2d 438, 442 (1994)



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The Fourth Circuit has adopted the “classic” test for determining the existence of the attorney-client privilege. As employed, application of the privilege requires that:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
 - a) by his client
 - b) without the presence of strangers
 - c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not
 - d) for the purpose of committing a crime or tort; and
- (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Subpoena No. 2013R00691-009, 201 F. Supp. 3d 767, 771–72 (W.D.N.C. 2016)



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Burden

The party asserting the attorney-client privilege has the burden of establishing that all of the elements of the privilege are satisfied.



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Breaking it down ...

- What → Communication
- Between → Client and Lawyer
- Purpose → Seeking or Providing Legal Advice

- *Not for* purposes of committing a crime or tort.

- Can only be waived by the Client



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What is legal advice?

- Email from business partner to in-house counsel:
 - Please review the attached Purchase Order. Under the terms, do we have a legal obligation to pay for the defective shipment?

- Email from business partner to in-house counsel:
 - “We are not going to pay our supplier because the latest shipment was defective.”

- Email from business partner to in-house counsel:
 - Attached please find the Purchase Order.

- In the deposition of the business partner:
 - Why did you instruct Finance to not pay for the shipment?



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The treatment of facts

- Historical facts are not privileged.
- The underlying facts can be discovered, but cannot use “facts are not privileged” principle to access otherwise privileged communications.
- Clients’ recitation of facts to their lawyer, accompanied by a request for legal advice, are the most privileged of all communications.
- Lawyers’ recitation of facts present more subtle issues, but also deserve privilege protection if they come from privileged communications.



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Corporate Privilege

Privilege requires communications to be:

- Made by company employees
- Made to in-house counsel, acting in capacity as corporate lawyer
- Made for the purpose of securing legal advice
- Made at the direction of the employees’ superior
- Considered and kept confidential

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



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Upjohn Warning

- We have been retained by COMPANY to _____.
- We represent COMPANY.
- We do not represent you or any other employee.
- We are speaking with you and other [COMPANY] employees to learn information that we can use to provide legal advice to the company to.....
- Our meeting is protected by the attorney-client privilege, meaning no one can require you to disclose what we talk about. The company, however, controls the privilege. This means that the company can decide to disclose the information learned in the interview to anyone, including the government



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Upjohn, continued ...

- To maintain the company's attorney-client privilege over our meeting, you should keep our discussion confidential and not discuss it with anyone, including your supervisor and any other employees.
- Do you understand what I just explained? Do you have any questions before we start? If you have any questions at any time during the interview, please let me know and we will address them.



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Organization as Client

- Rule 1.13: Organization as Client
 - Lawyer represents organization acting through duly authorized constituents; may also represent individual constituents in compliance with the conflicts rules
 - In dealing with constituents, lawyer shall explain identity of client when lawyer reasonably should know that the organization's interests are adverse to the constituent with whom lawyer is dealing.



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A Note on Waiver ...

- Only authorized agent of corporation
- Unintentional?
 - Inadvertence
 - Reasonable Steps to Prevent
 - Reasonable Steps to Rectify
 - FRE 502(b)



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The Work Product Doctrine

- Materials prepared in anticipation of litigation
 - Fact work product: e.g., witness statements
 - Subject to disclosure upon a showing of ***substantial need*** and cannot obtain equivalent without ***undue hardship***
 - Opinion work product: e.g., mental impressions and theories of counsel
 - Usually ***not*** subject to disclosure



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Internal Investigations

- You investigate a hotline allegation that an employee was being harassed. You conclude that the allegations are baseless and draft a memorandum reflecting your legal analysis and conclusions.
- Is the memo privileged?



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Internal Investigations

- Your Human Resources department is investigating a claim of workplace harassment and prepares a report for the employee's HR file.
- Is the report privileged?



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Internal Investigations

- You have been asked to retain outside counsel to assist the Audit Committee with an internal investigation into potential accounting irregularities.
- Will outside counsel's communications with you be privileged?



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In re: Kellogg Brown & Root - 2014

- 756 F.3d 754 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1163 (2015)
 - Primary purpose test applies when more than one purpose for communication
 - Privilege applies as long as obtaining or providing legal advice was “**a** primary purpose of the communication,” meaning “one of the significant purposes” of the communication
 - “One of the significant purposes” is “an accurate and appropriate description of the primary purpose test”



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Tesla v. Cao - 2020

- 2020 WL 8515010 (N.D. Cal., Dec. 10, 2020)
- *Tesla* argued
 - Conducted for counsel to provide legal advice
 - Scripts were reviewed by counsel
 - Attorneys attended some of the interviews
- *Cao* argued
 - Not prepared by lawyers
 - Not communications to counsel
 - Standard practice to conduct interviews and prepare summaries



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Business or Legal Role

- Communications team copies you and 15 other business partners on an email with a draft press release.
- You participate on a subcommittee that is drafting an HR policy.



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Slocum v. Int'l Paper Co., 2021

- 2021 WL 5861499 (E.D. La. June 28, 2021).
- “Looks good!”
- Plaintiffs contended:
 - Counsel copied for informational and business advisory purposes
- Int'l Paper contended:
 - Email sought legal advice regarding legal implications of the proposed press release.
 - Subject line at “Privileged Atty Client Information”



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Holley v. Gilead Sciences, 2021

- 2021 WL 2371890, at *3 (N.D. Cal. June 10, 2021)
- In-house counsel is a member of the Development Committee.
 - Provides legal advice on IP issues as they arise
- Detailed analysis of specific documents
 - Communication of Patent expiration date – not privileged
 - Non-lawyer's financial analysis in a long summary (that included attorney-client advice) – Not privileged



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DOJ v. Google 2022

- DOJ Claims:
 - "In a program called 'Communicate with Care,' Google trains and directs employees to **add an attorney**, a **privilege label**, and a **generic 'request'** for counsel's advice to shield sensitive business communications, regardless of whether any legal advice is actually needed or sought. Often, knowing the game, the in-house counsel included in these Communicate-with-Care emails does not respond at all."



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Privilege and Consultants

- You retain an outside expert to assist you in analyzing information about issues related to company business.
- The expert reports only to you as in-house counsel.
- Litigation is later filed about the issues for which you retained the expert.
- Will your communications be privileged?



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NLRB v. Google

- Consultant was retained by in-house counsel.
- Engagement letter –
 - “Consultant’s expertise will assist Google and the Lead Attorney in rendering legal advice...”
 - “Consultant has been retained [to assist] ... in formulating legal advice ... anticipated and existing litigation....”



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NLRB v. Google

I note at the outset, that in considering the Respondent’s assertions of privilege, I reject two of its contentions concerning the applicable legal standards. First is the Respondent’s contention that the rebuttable presumption that a company’s communications with outside legal counsel are for the purpose of legal advice⁴ applies with equal force to a company’s communications with attorneys on its own staff who function in both a business capacity and a professional legal capacity. That contention was already rejected in this case by Judge Laws who, citing applicable precedent, ruled that the presumption does not apply to a company’s communications with attorneys on its own staff. Judge Laws noted that communications with in-house counsel are not presumptively privileged, but rather are cloaked in privilege only if the company makes a “clear showing that the in-house attorney participated in a professional legal capacity” rather than primarily for a business purpose. ALJ August 25, 2021 Order. Judge Laws



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My review did show that the Respondent made significant contemporaneous efforts to give this non-legal, 3rd-party, material the facial appearance of privileged communications. The most telling examples of these efforts are the multiple documents among the withheld materials in which, rather than providing material directly to the Respondent, IRI states that, at the Respondent's request, it is funneling the materials through outside legal counsel (Morgan Lewis and Bockius, LLP) so that outside legal counsel can then "forward it onto [the Respondent] under privilege." See, e.g., Privilege



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Privilege in Transactions

- The Company acquired the Assets of Manufacturer X through an APA, including servers and equipment.
- Prior to the divestiture, an employee was injured at the plant.
- You have received a Subpoena for Manufacturer X's investigation file that contains privileged communications.



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CFTC v. Weintraub, 471 U.S. 343 (1985)

Presumption is that control of an entity's attorney-client privilege relating to pre-transaction communication passes with control of entity



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International Matters

- *Philips North America LLC v. Fitbit LLC*, 2022 WL 252392 (D. Mass., Jan. 27, 2022)
- Communications by a Dutch patent attorney
- “Touching base” test to determine which country’s law applies



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Conflicts and Privilege Tips

- Slow down
- Identify the client(s)
- Consider conflicts
 - Early and often
- Get it in writing
- Pay attention to the applicable jurisdiction

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- Mark communications
- Watch out for cc's
- Narrow distribution lists
- Cut off email strings
- Provide Upjohn warnings
- Update policies



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Questions?

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