

# Attorney-Client Privilege from the In-House Perspective

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*"Let me through. I'm a lawyer."*

## Attorney-Client Privilege Background

- Rule of evidence, not of ethics – ethics rules may be more protective of client confidences.
- Different formulations among state and federal courts, and among jurisdictions.
- Always a fact-specific analysis.
- Privilege “belongs to” and is controlled exclusively by the client, but must be asserted by the attorney unless waived by client.
- In-house privilege will receive greater scrutiny.

# Attorney-Client Privilege Background

- The purpose of the attorney-client privilege is to encourage full and frank communication between an attorney and client to facilitate rendering legal advice.

## Ethics Rule 1.6: Duty of Confidentiality

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) [list of exceptions]

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

# Basic Tenets of Attorney-Client Privilege

- Attorney-client relationship
- Confidential communication
- Communication made in course of giving or seeking legal advice
- Not waived by client

# Attorney-Client Relationship



# Attorney-Client Relationship: Attorney

## In-House Lawyer

- United States – well established.

## Potential Pitfalls

- In-house lawyer: must have an active law license.
- International law: privilege may be questioned.
  - U.S.-based employee communicating with foreign-based in-house attorney.



# Attorney-Client Relationship: Client

## Rule 1.13: Organization as Client

- (a) A lawyer employed or retained by an organization represents *the organization* acting through its duly authorized constituents.
  
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7.

# Attorney-Client Relationship: Client

## Scope of Privileged Communications

- Control Group (narrower) – only those in control who have power to bind corporation.
- Subject-Matter Test (broader) – communications with (i) lower-level employees with facts necessary to representation and (ii) employees with a “need to know” lawyer’s advice.

Potential Pitfall: North Carolina has not explicitly adopted either approach, but cases frequently apply subject-matter analysis.

# Attorney-Client Relationship: Client

## Employee/Constituent

- Corporate entity must act/communicate through employees or agents.

Potential Pitfall: Employee who has communicated with company counsel asserts control over privilege/conflict of interest from accidental joint representation.

- Scenario: interview of employee; employee admits to wrongdoing; company wants to disclose information to government or otherwise; employee asserts lawyer was his/her lawyer – asserts privilege or creates a conflict of interest.

# Attorney-Client Relationship: Client

## Employee/Constituent

### Practice Pointers: Invoking *Upjohn*'s instruction.

- Ethics – avoid misunderstanding about lawyer's role.
- Establish and define privilege (retain control).
  - *Counsel to company/not individual.*
  - *Privilege belongs to company/not individual; company may waive.*
  - *Confidentiality expectations.*
  - *Right to retain counsel.*

# Attorney-Client Relationship: Client

## Former Employee

- Majority rule protects communications with former employees if otherwise meets *Upjohn* standard (needed for representation of client) and about facts from period of employment (not developments after employment ended).

## Practice Pointer:

- Use the *Upjohn* warning to explain role and protect privilege.
- Recognize line between topics that can be protected by privilege and those that cannot.

# Attorney-Client Relationship: Client

## Corporate Families: Parent, Subsidiary, Affiliates

- Majority rule: Communications between counsel and corporate affiliates' employees are privileged.
- Three approaches:
  - Wholly owned affiliates = “one client”
  - Joint representation
  - Common interest

# Attorney-Client Relationship: Client

## Parent, Subsidiary, Affiliates: What affiliation is enough?

- *SCR-Tech LLC v. Evonik Energy Services LLC*, 2013 WL 4134602 (NC Bus. Ct.)
  - Privilege likely applies in a wholly owned scenario.
  - Outside of a wholly owned scenario, the Court will examine:
    1. the nature of the affiliation (i.e., the degree of common ownership and control), and
    2. the existence of a shared legal interest to determine whether communications are protected.

# Attorney-Client Relationship: Client

Parent, Subsidiary, Affiliates

Potential Pitfall: Advising affiliate that is less than wholly owned.

Communication between counsel for parent and employees of subsidiary will receive more scrutiny, and communications may not be privileged.

The intricacies of attorney-client privilege are funny. But not "ha-ha" funny. More "psych, you're not protected" funny.





# Attorney-Client Relationship: Client

Parent, Subsidiary, Affiliates, Constituents

Joint representations: intentional or unintentional.

- General rule:
  - Lawyer who is representing multiple clients on same matter has a “joint representation.”
  - Although communications between joint clients and lawyer are privileged as to third parties, in a dispute between/among the clients all communications are discoverable.
  - Lawyer owes ethical duties to both clients.

# Attorney-Client Relationship: Client

## Joint Representation of Affiliates

### Potential Pitfall: Change-of-control issues.

- In-house counsel to parent corporation also provides legal services to subsidiary corporation. Through a transaction, subsidiary corporation becomes independent of parent or controlled by another entity or corporation declares bankruptcy and is controlled by trustee. Bankruptcy trustee, new owner or independent company seek communications between in-house or outside counsel and parent company.

# Attorney-Client Relationship: Client

- North Carolina Business Court has looked to the law of other jurisdictions in transactions with North Carolina parties.
- In Delaware, all privileges transfer in a merger or acquisition unless otherwise agreed. *Great Hill Equity Partners v. SIG Growth Fund* (Del. Ch.)
  - “Because [counsel] represented the corporation, the corporation’s post-merger owners took control of the corporation’s attorney-client privilege. *Weintraub*, 471 U.S. at 348 (all the parties agreed ‘that when control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well’); *Great Hill*, 80 A.3d 155.” *NewSpring Mezzanine Capital II, LP v. Hayes*, 2014 WL 6908058.
- In New York, the privilege for communications concerning the transaction may not transfer, but other privileges transfer. *Tekni-Plex, Inc. v. Meyer & Landis* (N.Y. Ct. App.)

# Attorney-Client Relationship: Client

Corporate Families: Parent, Subsidiary, Affiliates

## Practice Pointers:

- Carefully identify the client, in writing.
- Avoid representing subsidiaries or providing advice to subsidiaries when only the parent needs advice.
- Define the relationship when individuals hold titles at both the parent and the subsidiary.
- Obtain separate counsel if the subsidiary and parent are not fully aligned in interest. *See NY Ethics Opinion 2008-2*
  - Spin-off transactions; possible insolvency
- Consider transaction terms to protect/retain/transfer privilege.

# Confidential Communication



*"This is highly confidential, so, yes, we built a little fort."*

# Confidential Communication

1. Expectation of Confidentiality (*Subjective*).
2. Reasonable (*Objective*).
3. Intention to Maintain Confidentiality.
  - No intention to maintain confidentiality, then not privileged.
  - Intended but later disclosed, then waiver.

# Confidential Communication

Communications are protected, not information.

- Fact of engagement.
- Underlying facts/documents.
- Amount of fees.
- Identity of attorney or client (with very rare exceptions).

# Confidential Communication

Potential Pitfall: Broad intra-company distribution of communications beyond “need to know” group.

- Scope of privileged communications?
- Purpose of communication?

## Practice Pointers:

- Email hygiene: reply to all; distribution lists.
- Consider purpose/need to share information.
- Consider storage/access to confidential communications (public access electronic files).





# Confidential Communication

## Intention to Disclose Documents to Third Parties: Drafts

- Fact specific.
- Differs by jurisdiction.
  - General rule, final draft intended to be disclosed is not privileged.
  - Rule differs for preliminary drafts.
    - Some courts protect all preliminary drafts.
    - Some courts protect only content that did not survive to final draft.
    - Some courts refuse to protect preliminary drafts.
- If legal advice is sought or given about draft, should be privileged.

# Confidential Communication

## Intention to Disclose Documents to Third Parties: Public Disclosure/Drafts

### Practice Pointers:

- Keep legal communications easily identifiable.
- Create record of why changes to disclosure documents are necessary/appropriate.
- Use headers or otherwise identify drafts with date, author/party, legal.

# Confidential Communication

## Practice Pointers:

- Educate business contacts on importance of maintaining confidential communications.
  - Not cc'ing non-clients on emails.
  - No forwarding of emails beyond “need to know” group or to consultants/advisers.
- Check attendees at meetings/conference calls before attorney-client communications occur.
  - If consultant/adviser who may preclude privilege is involved, give client warning or segregate communications.

# Legal Advice Requirement



# Legal Advice Requirement

Legal and business advice – often commingled and in-house lawyers serve in overlapping roles.

- Most courts follow “Primary Purpose” test.
  - Some courts take broad approach and give corporations the benefit of the doubt.
  - Some courts more restrictive.
- Review of communication.
  - Some courts look at entirety of communication (four-corners approach).
  - Other courts analyze discrete portions of communication.
- Widespread intra-corporate circulation of communications.
  - Split in authority and scholarly criticism.

# Legal Advice Requirement

Non-legal advice is not protected.

- Examples:
  - Political advice
  - Grammatical and typographical advice
  - Financial, accounting, investment advice
  - Document retention advice
  - Information security advice
  - Public relations/media advice
- Some topics, cases going both ways.



# Legal Advice Requirement

Legal advice: Scrutiny for role of in-house lawyers.

- Examples of cases applying more demanding standard:
  - Courts must give a heightened level of scrutiny to privilege claims by in-house lawyers;
  - In-house lawyers must make a stronger showing that the privilege applies;
  - Courts must be especially careful when examining privilege claims by in-house lawyers;
  - There is room for suspicion if in-house lawyers claim privilege protection;
  - Courts must be especially vigilant when examining in-house lawyers' privilege claims;
  - Courts must cautiously and narrowly approach in-house lawyers' privilege claims; and
  - Courts should not give great weight to privilege claims by in-house lawyers.

Cases collected and summarized in Spahn, Tom, *A Practitioner's Summary Guide to Attorney-Client Privilege and Work Product Doctrine* [14.506]

# Legal Advice Requirement

Copying in-house counsel doesn't create privilege.

- A general counsel's instruction that company employees copy him on their emails "to assure that the attorney-client privilege is retained" is not effective. Court gave strong reminder to the in-house lawyer: "that is not of course how privilege (or for that matter work product) operates." *Bell Microprods. Inc. v. Relational Funding Corp.*, No. 02 C 329, 2002 U.S. Dist. LEXIS 18121, at \*3-4 (N.D. Ill. Sept. 24, 2002)



# Legal Advice Requirement

Practice Pointers: Email best practices.

- Cut off email strings when subject matter changes from privileged to business advice.
- Remember that business advice is NOT privileged. Use “privileged and confidential” appropriately.
- Limit recipients to extent possible.
- Make it clear when you are giving legal advice.
  - “I’m weighing in here in my role as counsel, and this email is legal advice protected by the attorney-client privilege ...”
  - “From a legal perspective ...”
  - “You asked for my advice as an attorney.”
- Use legal title rather than managerial title.
- Never forward privileged communications to outsiders (or unnecessary insiders). It is easy to forward emails if you are not careful.

# Legal Advice Requirement

Potential Pitfall: Board member is an attorney and, at times, represents the company as outside counsel. Line between business and legal role is blurred.

## Practice Pointers:

- Clearly identify instances when a board member who is an attorney is acting as an attorney.
- In drafting minutes, clearly delineate the portions reflecting legal advice:
  - The Chair then requested that Ms. Blackstone, counsel for the Company, provide an overview of the Board's legal responsibilities in connection with the contemplated transaction. Ms. Blackstone advised the Board that, as fiduciaries for the Company, they ... She further informed the Board that courts had struck down similar provisions, but that the Company could take the position that ...
- With the possible exception of nonprofits, it is better to have counsel who is not a member of the board.

# Legal Advice Requirement: Investigations

Investigations and fact-finding for the purpose of providing legal advice are privileged.

## Potential Pitfalls:

- Not all investigations are for the purpose of providing legal advice.
  - Investigations in response to HR complaints are for business purposes.
- Claiming the privilege precludes use of the investigation without waiving the privilege.

## Practice Pointers:

- Consider at inception if investigation should be privileged or not.
- Separate fact-finding from legal advice, if the factfinder will need to testify or provide a report.
- Consider outside counsel and/or parallel investigations.

# Waiver of Privilege

Waiver occurs by disclosure of privileged communications to third parties.

Waiver can be:

- Intentional (express or implied); or
- Inadvertent.

Scope of waiver may be uncertain.

- Beware of subject matter waiver.

Privilege belongs to client; client has power to waive.

- Generally, lawyer cannot waive without client consent.
- Successor to privilege post sale or spin-off.

# Waiver of Privilege

## Potential Pitfalls:

- Disclosure to someone outside the privilege (consultant, adviser).
- Disclosure in furtherance of transaction (negotiations, due diligence).

## Practice Pointers:

- Usually problematic and cannot be overcome.
- Some courts analyze efforts taken to protect further dissemination of information (confidentiality agreement/request not to disseminate).



*"But . . . most of all, I'm thankful for things that are  
privileged and confidential."*

# Things We've Seen: Best Practices for In-House Email Usage

- Remember – **not all of your communications are privileged.**
  - Be mindful of business/legal roles.
  - Avoid embarrassment factor.
- Be thoughtful about including third parties.
- Employ best practices when working with drafts.



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