

PRACTICE TIPS FOR THE TRANSACTIONAL LAWYER: LEGAL PRIVILEGE AND CONFIDENTIALITY

- ✓ No matter whether you believe the communication to your client is privileged, write it believing that someone besides your client is likely to see it. And that someone may be the Judge.
- ✓ Note that the attorney-client privilege only extends to clients, clients' representatives, lawyers and lawyers' representatives. So, if attorney-client privileged material is provided to a company during due diligence, even if under a non-disclosure agreement, you have gone outside the confidential lawyer-client relationship and the privilege is most likely waived.
- ✓ Caution the client not to forward your advice to folks outside the lawyer-client relationship.
- ✓ Having the client, as well as the attorney herself, document that the attorney's role is to give legal advice is useful. Putting legends on the privileged communications can be useful, but also harmful if overused. Expressly communicating in terms of requesting or providing legal advice is useful.
- ✓ Keep in mind that some of your documents might contain both privileged and non-privileged material. Just because some of the document is privileged doesn't mean that the entire document can be withheld from production.
- ✓ Keep in mind that some courts hold that the attorney-client relationship (and thus the right to waive the privilege) transfers to new owners in an asset transaction.
- ✓ If employees are sitting in a privileged portion of the board meeting like bumps on a log, consider asking them to step out.
- ✓ If the client's position is that a document constitutes work product because litigation was anticipated, the client needs to have made tangible efforts to have preserved documents at the same time. In a perfect world, a document preservation memorandum would go out the same day that the litigators later claim litigation was anticipated.
- ✓ Don't assume that your communications with the client's accountants are privileged. A position that the communication is privileged is stronger where the law firm has engaged the accountant.
- ✓ Recognize early on situations where the client might need to assert your advice to support its claim or defense.
- ✓ In practice, not much has changed since McNulty. The expectation is that the government should not have to go through the process of requesting a waiver at all—the company should volunteer to do so.
- ✓ Investigating attorneys should generally give each interviewee what has come to be known as the “Upjohn warning” or “corporate *Miranda* warning.” The warning should include the following elements: (i) the attorney represents the company, not the individual employee; (ii) the interview is protected by the attorney-client privilege, which is controlled exclusively by the company, and not the employee; (iii) the company may decide, in its sole discretion, to disclose all or part of the interview to third-parties, including any governmental agencies.
- ✓ Determine whether or not it is desirable to encourage (but not advise) the employee to retain separate counsel. Note that if joint representation is undertaken and a conflict later emerges, corporate counsel may be disqualified from representing either the corporation or the employee.
- ✓ If the goal is to preserve privilege over a report and investigation by a special committee, the company should refrain from disclosing the substance of the investigation report or its conclusions, except in the most general terms, in public statements or in submissions to government regulators.