The Attorney-Client Privilege and Attorney Work Product Doctrine

What Every In House Counsel Needs to Know

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Presented to:
10 Roles of In House Counsel

• Editor of others’ work
• Point person with regulators, auditors, counsel, HR, others
• Supervisor of investigations
• Manager

• Legal advisor
• Policy advisor
• Procedural advisor to committees
• Committee participant
• Investigator
• Reporter on claims, litigation, situations
10 Activities We Do Each Day

- Attend meetings
- Draft reports, letters, emails, contracts, documents
- Endless phone calls and problem triage
- Draft “legislation”—policies, procedures, etc.
- Read things sent to us for comment, and make notes
- Advise departments about law, policy, business decisions, or mixtures
- Make public appearances, sometimes at hearings
- Communicate with regulators, agencies
- Supervise staff
- Deal with document gathering and retention
10 Quasi-Legal Activities that Might Involve Privilege Issues

- Auditors commenting on legal matters
- Various self-critical analyses
- Risk management documents and emails
- Non-attorney labor relations professionals’ notes and work
- Non-attorney human resources advice
- Non-attorney compliance professionals’ work
- EEO/SH/Title IX administrators’ activities
- Mediation or grievance settlement communications
- Ombudspersons
- Reasonable accommodation, leave or disability analysis
Elements of the Attorney-Client Privilege

1. A communication;
2. Made between privileged persons;
3. In confidence;
4. For the purpose of seeking, obtaining, or providing legal assistance to the client
A Communication

• It is the act of communicating that is central to privilege analysis
• Ordinarily the fact and time of communication is not privileged; only its contents
• The mere delivery of a document to the attorney does not make it privileged
Made Between Privileged Persons

• By a client
  – Entity communications
  – *Upjohn* (federal) and *Chadbourne* (California)
  – Individual communications

• To an attorney acting as such
  – Duly licensed
  – Acting as lawyer
In Confidence

- Presence of third parties during communication
- Third parties used to transmit information
- Maintained in confidence
  - **TIP**: Label as such
  - **TIP**: Control dissemination
  - **TIP**: Maintain as such
- Dissemination of advice within the company
For the Purpose of Seeking or Providing Legal Assistance to the Client

• In general
• Attorney engaged for non-legal advice purposes
  – Business or policy matters
  – Negotiator
  – Investigator
• Dual capacity (legal and business advice)
• Attorneys at meetings or on committees
  ✓ TIP: Request for advice
• Whistleblower matters
Who is your client?

• Considerations:
  – The company is normally the holder/client
  – The company and *Upjohn/Chadbourn* rules
  – Exceptions: The *Bevill* factors
    ✓**TIP**: Whether the advice is personal as opposed to company-related
  • If personal, can you tell the company about what you learned?
Advising the Decision-maker

- Is a conflict waiver needed?
- Are you at risk he will claim you are his lawyer?
- How do you handle information about potential wrongdoing from an individual manager?
- How do you handle information about criminal acts?
Gathering Information to Assess Any Conflicts and Determine Representation

• How do you get what you need to determine whether there is any conflict of interest?
  ✓ **TIP:** Be explicit about your role at this point

• Are any of the materials given you at this point privileged?
  – Historical documents
  – Contemporary communications

• Are your notes about the documents and what they mean privileged?
  – The ACP and WP doctrines in witness interviews
A Warning About Waiver

• Actions constituting waiver
• Who may waive
• Disclosure under non-waiver agreements
• Purposeful disclosure
• Waiver by reliance on advice
• Waiver by use to refresh memory
• Scope of waiver
Elements of the Work Product Doctrine

- Documents or tangible things otherwise discoverable
- Prepared in anticipation of litigation or trial (federal rule)
- Sought by another party in the litigation
- With greatest protections given to attorney thoughts and impressions, but
- Consideration of undue hardship if the material is not otherwise discoverable
“Prepared in Anticipation of Litigation or Trial”

- Generally requires the threat of some adversary proceeding, and proof that the document was prepared in response to it
  ✓ **TIP**: Useful rule is the “but for” test
- The anticipated claim must be specific
- Attorney must be acting as attorney, though need not be litigation counsel
“Prepared in Anticipation of Litigation or Trial”

- Dual purpose documents
- Reports needed for regulatory compliance
- Reports made to avoid, rather than defend, litigation
- Reviews of preexisting documents not protected
- Protection exists for the specific threatened litigation, and likely not beyond
Investigations

• If you do the investigation yourself, what are the privilege issues?
  – The five types of investigations
  – Separating facts from advice
• If you have someone else do the investigation, what are the privilege issues?
  – Is it your work product?
  – If you put it in issue as a defense, then what?
Investigations

• Are you acting as:
  – As an attorney?
  – As fact investigator?
  – As legal advisor?
  – In anticipation of litigation?
Best Practices

• Think it through before taking action
• Be aware of the privileged status of all communications, and be clear with the parties to the communications
• If you intend something to be ACP, 4 essentials:
  – Direct its preparation as a client communication
  – Label it as such
  – Restrict access to it
  – Control its dissemination
Best Practices

• To enhance WP protection
  – Articulate imminent claim
  – Separate absolute work product
Questions?

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