

Robinson+Cole

# Attorney-Client Privilege and Work Product

*How it matters for in-house legal  
professionals*

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## Why spend our time talking about privilege?

- As legal professionals, we exchange confidential communications every day.
- We make assumptions about what is privileged and what will *remain* privileged.
- We work with colleagues (legal and business) across multiple lines of business. This has serious implications for whether the communications are privileged and will remain privileged.

Confidential Document  
Attorney-Client Privilege

## Agenda:

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1. Attorney-Client Privilege
2. Work Product Doctrine
3. Fiduciary Exception – When Privilege is Not Privileged
4. Wrap-up: Questions/Discussion

# Part 1

## ATTORNEY CLIENT PRIVILEGE

## Attorney-Client Privilege

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- To be protected, a communication must be:
  - between a **lawyer** and **her client**,
  - in the **course of a professional relationship**,
  - for purpose of **obtaining legal advice** (if from client), or for purpose of **facilitating legal advice or services** (if from lawyer), and
  - be **confidential**, i.e., not shared with a third party.
    - Upjohn Co. v. United States, 449 U.S. 383 (1981)

## Attorney-Client Privilege

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- Why does the law recognize this privilege?
  - Tension between (1) need for full disclosure in fact-finding process and (2) social good derived from proper performance of the functions of lawyers acting for their clients.
  - Courts acknowledge that the latter outweighs the former but recognize privilege must be applied narrowly because it limits full disclosure of the facts.
    - *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981);  
*Commonwealth v. Goldman*, 395 Mass. 495, 502 (1985)

## Attorney-Client Privilege

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- What is not protected?
  - Communications seeking / providing business advice.
    - *Am. Nat'l Bank & Tr. Co. v. Axa Client Sols.*, No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805, at \*10 (N.D. Ill. Mar. 20, 2002)
  - Crime-fraud exception.
    - *In re Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. 2011)
  - Note that it is the client's intent – not the attorney's intent – that governs whether the exception applies.

## Privilege vs. Confidentiality

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### ○ **Privilege is Narrow:**

- The attorney-client privilege only protects the communications actually had by the client and lawyer and only extends to information given for the purpose of obtaining legal advice.

### ○ **Confidentiality is Broad:**

- By contrast, the ethical duty of client-lawyer confidentiality is quite extensive in terms of what information is protected. It applies not only to matters communicated in confidence by the client but also to all information relating to the representation regardless of whether it came from the client herself, or from another source.

## Attorney-Client Privilege: Special Considerations for In-House Attorneys

- How does privilege apply to communications between in-house attorneys and employees?
  - Courts generally recognize that in-house counsel's communications are deserving of protection.
    - *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)
  - The communications will be more carefully scrutinized for claims of privilege.
  - Courts have acknowledged that in-house counsel sometimes wear other hats – this can cut both ways.
    - *Leazure v. Apria Healthcare Inc.*, No. 1:09-cv-224, 2010 U.S. Dist. LEXIS 105301, at \*11 (E.D. Tenn. Sep. 30, 2010)

## Attorney-Client Privilege: Special Considerations for Legal Professionals

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- Paralegals cannot establish the attorney-client relationship
- Paralegals may not give legal advice
- Paralegals generally may not appear in court on behalf of a client (e.g., taking on duties of counsel at deposition, signing of pleadings or other court filings)

## Attorney-Client Privilege: Special Considerations for Legal Professionals

- No automatic protection for paralegal activity with respect to Attorney-Client privilege:
  - Paralegal's fact finding efforts in investigation, although supervised by attorney, not protected attorney-client.
    - *Segway, Inc. v. Special Olympics, Conn.*, 2015 Conn. Super. LEXIS 2711 at \*\*17-18 (Sup. Ct. Oct. 29, 2015)
- Inclusion of paralegals on correspondence does not constitute waiver
  - Paralegals must preserve all confidential information provided by the client or acquired from other sources before, during, and after the course of the professional relationship.
    - Model Code of Professional Ethics and Responsibility and Guidelines for Enforcement, EC-1.5

# Attorney-Client Privilege: Special Considerations for In-House Attorneys

- Mixed Business and Legal Advice – How Will the Court Decide if it is Privileged?
  - Substance of the communication – WHAT IS WRITTEN
  - Purpose of the communication - WHY IT IS WRITTEN
  - Title of the in-house counsel – WHO WROTE IT
  - Responsibilities of the in-house counsel – WHAT THAT PERSON DOES
  - Parties to the communication and their titles – WHO IS PARTY TO IT
  - Does communication concern “legal rights and obligations”?
  - Does communication evidence “other professional skills such as lawyer’s judgment and recommended legal strategies.”

**PRACTICE NOTE:** If you get to this point you are already having motion practice on the issue; a Court is conducting an *in camera* review.

# Attorney-Client Privilege: Special Considerations for In-House Attorneys

- Who is the “client” of an in-house attorney?
  - Your client is the **company**
  - Not the **individuals** in the organization



# Attorney-Client Privilege: Special Considerations for In-House Attorneys

## **PRACTICE NOTES:**

1. **Transactions:** Communications between in-house lawyers representing parties on opposite sides of transactions are not privileged
  - Even when your interests seem aligned.
  - This includes discussions about settling/resolving disputes.
2. **Waiver:** The privilege belongs to the client organization
  - *In re Vargas*, 723 F.2d 1461, 1466 (10th Cir. 1983)
  - The organization has the power to waive its privilege – inadvertently or strategically.
    - Recent Example: *Luna v. Marvell Tech. Grp., Ltd.*, No. C 15-05447, 2017 U.S. Dist. LEXIS 155343, at \*1 (N.D. Cal. Sep. 22, 2017)
  - Your privileged email may still be disclosed.

# Mixed Purpose Communications from In-House Attorneys

- **PRACTICE NOTES ON MIXED PURPOSE EMAILS:**

- Consider sending two e-mails when business and legal advice are both being conveyed



- Carefully review the “TO” and “CC” lines:
  - Does this person need this email?
  - Does he/she have a need to know?
  - Is he/she part of the “control group” on this issue?

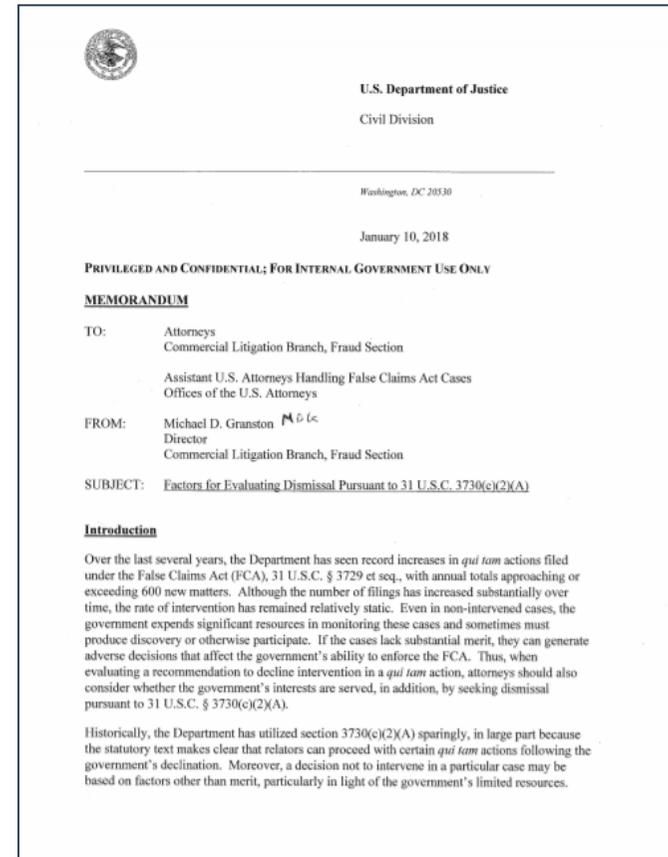
## Labeling E-mails As Privileged & Other Practice Tips

- **Selective Use of ACP Label**
  - Stating that an email is “privileged” will not automatically transform that communication into privileged material.
  - In fact, over labeling can cut against you in a privilege fight. The label can mean nothing if it is placed on every calendar invite or call-in number.
  - Write it as if it will be on front page.

# Labeling E-mails As Privileged & Other Practice Tips

## Practice Tip: It Happens to the “Best”

- Jan. 10, 2018: DOJ Memo (“Granston Memo”) labeled **“Privileged & Confidential: For Internal Government Use Only”**
- Director of DOJ Commercial Litigation Branch (Fraud Section) directed DOJ attorneys to consider more closely dismissing meritless False Claims Act cases filed by whistleblowers.
- **Leaked – It is Now Out There.**



# Protecting Privilege During Negotiations

- Solicitation of legal advice during vs. purely business negotiations
- What skills were being used by in-house attorney?
  - Legal acumen
  - Negotiation skill
- **Practice Tips:**
  - State the Purpose
  - Know the Audience
  - Reference legal issues
  - Identify legal position
  - Be careful when combining business and legal advice
  - Use of **outside** counsel
  - Draft memoranda memorializing the roles of the parties involved

## Part 2

# ATTORNEY WORK PRODUCT

## Attorney Work Product Doctrine:

### Federal Rule of Civil Procedure 26(b)(3)

protects attorney work product from discovery, including:

“[1] documents and tangible things that are

[2] prepared in anticipation of litigation or for trial

[3] by or for another party or its representative.”

**PRACTICE TIP:** An attorney should be engaging outside vendors to do work (for the purpose of advice on anticipated litigation) if there is to be any chance of protection. Document the engagement and its purpose in anticipation of litigation.

## Attorney Work Product Doctrine:

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- AWP will not protect work done for business purposes.

*What does this mean....*

# Attorney Work Product: Special Considerations for In-House Attorneys

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- AWP Does **Not** Apply To:
  - Materials “assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation”  
Fed. R. Civ. P. 26(b)(3).
  - “Documents prepared . . . pursuant to regulatory requirements are not classified as attorney work-product.”  
*Syngenta Crop Prot., Inc. v. U.S. Env'tl Prot. Agency*, 2002 WL 31778791, at \*5 (M.D.N.C. Nov. 5, 2002) (rev'd in part on other grounds).

# Attorney Work Product Doctrine: Overview of U.S. Law

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- Example:
  - Company A hires an outside law firm to do an investigation.
  - Company A's Board of Directors' documents say investigation is “aimed at ‘formula[ting] and recommend[ing]’ changes to the ‘policies, standards and procedures’ of the Board of Directors . . .”
  - Court considered that a “business – not litigation – goal.”
  - AWP did not apply.

*Banneker Ventures, LLC v. Graham*, No. 1:13cv00391(RMC) (D.D.C. May 16, 2017)

## Attorney Work Product & Privilege - Waiver

- **Attorney Client Privilege – Waiver**

- Easier to waive.
- The attorney-client privilege is waived when it is disclosed beyond the attorney/client relationship.

- **Attorney Work Product –Waiver**

- Harder to waive – if done the right way.
- The attorney work product doctrine can still apply even if it is shared with a third party, so long as the third party has a common interest (at least a non-adverse interest).
- Opposing party may access AWP if shows a substantial need.
  - Fed. R. Civ. P. 26(b)(3)(A)(ii)

## Attorney Work Product: Special Considerations for Legal Professionals

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- Applies to lawyers and non-lawyers working at the direction of counsel
  - Investigators, agents of attorneys, etc.
- Paralegal work may be protected under work product privilege
  - Fact-specific inquiry – formulaic invocation of privilege will not suffice.
    - *Segway, Inc. v. Special Olympics, Conn.*, 2015 Conn. Super. LEXIS 2711 at \*\*22-23 (Sup. Ct. Oct. 29, 2015).

# Attorney Work Product: Special Considerations for In-House Attorneys

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- Key Areas of Concern:
  - Audits
    - Litigation reserves
    - Tax reserves
  - Regulatory Filings
    - “Dual function” documents
  - Internal Investigations
    - Waiver of work product privilege to show conclusions of investigation - sometimes

## Part 3

### **FIDUCIARY EXCEPTION – When privilege is not privileged**

# Fiduciary Exception

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- Fiduciary
  - Person holding the character of a trustee to principal.
  - Duty involves scrupulous good faith, trust, special confidence and candor.
  - Highest duty of care.

# Fiduciary Exception

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- Attorney-Client communications may not be privileged:
  - Legal advice rendered to fiduciaries
  - In execution of fiduciary duties
- Not applicable where advice touches non-fiduciary matters.
  - No disclosure if communication is for ERISA trustee's own protection.

# Fiduciary Exception

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- Reasoning for Exception:
  - Duty to Disclose
    - Trustee's duty to disclose all information regarding plan administration to beneficiaries.
    - ERISA fiduciary obligated to provide full and accurate information including “any communications with an attorney that are intended to assist in the administration of the plan” and therefore cannot use attorney client privilege to shield disclosure.
  - Trustee's Role
    - In advising a plan administrator or other fiduciary, the attorney's client is the *plan beneficiary*, not the administrator.

# Fiduciary Exception

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- Case-by-Case Inquiry
  - Is the communication related to plan administration?
  - Seeking legal advice for beneficiary's own benefit?
  - Key Question:

Whether communication was made *before* or *after* the final decision to deny benefits.

## Fiduciary Exception

- Smith v. Jefferson Pilot Fin. Ins. Co., 245 F.R.D. 45 (D. Mass. Aug. 2, 2007)
  - Plan administrator claimed privilege as to 13 documents.
  - Fiduciary exception applied to 12 of 13 documents.
    - Privilege applied to portion of document discussing “internal settlement considerations” only.
  - Defendant sought legal advice from in-house counsel.

# Part 4

## WRAP UP, CHECK LISTS, DISCUSSION

## Practice Tips: What to Do in an Uncertain World

- **Attorney-Client Privilege and Fiduciary Exception do NOT provide complete protection for in-house legal teams**
- **Your work may be subject to disclosure in litigation**
  - Email
  - Handwritten notes/personal hardcopy files
  - Internal chat histories
  - Data stored on c: drive of work computer, personal computers, cell phones, thumb drives, etc.

## Practice Tips: What to Do in an Uncertain World

- **The Phone Still Works**



- Encourage in-house lawyers' regular use of phone calls / video conference over email or other written correspondence.

**PRACTICE NOTE:** Text messages, iMessages, WhatsApp – they are all discoverable writings subject to privilege review.

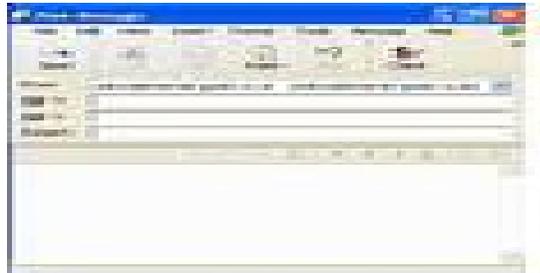
## Practice Tips: What to Do in an Uncertain World

- **Protection of Local Outside Counsel**

- Most, if not all, jurisdictions recognize the confidentiality of communications between outside counsel and their corporate clients.
- Hiring and communicating through local outside counsel likely will protect sensitive legal communications.

## Practice Tips: What to Do in an Uncertain World

- **When a Writing is Necessary:**



- Restrict distribution to those with “need to know.”
- Discourage forwarding.
- Label, when applicable, “for the purpose of giving legal advice.”
- Try to segregate – if possible – legal and business advice.
- Limit the storage of records in locations where the privilege does not exist or is not strong.
- Write the email like it will be on the front page.

## Training Your Business Partners: A Checklist

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- ❑ Pause Before Pressing Send
  - ❑ Do I Need to Write or Can I Call?
- ❑ Ask Yourself:
  - ❑ Am I asking for or receiving LEGAL advice? – **GO**
    - ❑ Could I ask a non-lawyer just as well? - **STOP**
  - ❑ Am I including anyone outside the company? - **STOP**
  - ❑ Am I including anyone within the company who does not NEED to know to make a decision? – **STOP**
- ❑ If you hit a **STOP** – pick up the phone and ask counsel what to do before writing.

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# Questions/Discussion

## Contact:

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