



ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

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Attorney-Client Privilege: Unique Challenges In-House Counsel Face In Preserving Privilege

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The Privilege Is Valuable, But Vulnerable.

- The in-house attorney is the only employee whose contributions may combine in-depth business acumen with virtually absolute confidentiality.
- This attorney-client privilege arises from a presumption that communications with a lawyer have unique value. **Confidentiality** is necessary to the provision of frank and honest legal counsel.
- But the privilege can be lost, sometimes inadvertently.
- In-house counsel must be especially conscious of threats to privilege in particular contexts: **“dual purpose” communications**, **mergers and acquisitions**, and **internal investigations**.



Fundamentals (A Refresher)



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What Is The Attorney-Client Privilege?

■ A rule of evidence

- CAL. EVID. CODE § 950, *et seq.*
- *Cf.* FED. R. EVID. 501 (federal common law for federal questions)

- “[T]he client... has a privilege to refuse to disclose, and to prevent another from disclosing, **a confidential communication between client and lawyer**” CAL. EVID. CODE § 954 (emphasis added).

- “confidential communication between client and lawyer” = “**information transmitted between a client and his or her lawyer in the course of that relationship and in confidence** by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” CAL. EVID. CODE § 952 (emphasis added).



“Client”

- “[A] person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity” CAL. EVID. CODE § 951.
- Who is an “**authorized representative**” of a corporate entity?
 - An employee communicating “information which emanates from the corporation” who is “such a person who would ordinarily be utilized for communication to the corporation’s attorney.” ***D. I. Chadbourne, Inc. v. Superior Court of San Francisco***, 60 Cal. 2d 723, 736–37 (1964).
 - More than just the corporate “control group.” ***Upjohn Co. v. United States***, 449 U.S. 383 (1981).



“Lawyer”

- “[A] person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.” CAL. EVID. CODE § 950.
 - In-house counsel need not be a member of the CA Bar
 - **BUT**, unlicensed in-house counsel must qualify for the “safe harbor” under Cal. Rules of Court, rule 9.46: (1) Be “an active licensee in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency”; (2) register with CA Bar; and (3) otherwise meet criteria for admission to CA Bar
- But see ***Gucci Am., Inc. v. Guess?, Inc.***, 2011 U.S. Dist. LEXIS 15 (S.D.N.Y. Jan. 3, 2011).
 - Held that Gucci could claim privilege over communications with its in-house counsel, despite being an inactive member of the CA Bar, because Gucci demonstrated that it had acted under a reasonable belief that he had an active license.



Who Does The Privilege Belong To?

- The “holder of the privilege” is “[t]he client.” CAL. EVID. CODE § 953(a).
- Only the client “has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer” CAL. EVID. CODE § 954.
 - The attorney must assert the privilege unless the client instructs otherwise.
- Only the client, the “holder of the privilege,” may cause waiver.
 - Waiver occurs if “any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.” CAL. EVID. CODE § 912.



What About Attorney Work Product Protection?

- **NOT** an evidentiary privilege
- A policy codified in law to protect lawyers, not their clients. See CAL. CODE CIV. PROC. § 2018.010, *et seq.*
- In CA, litigation or anticipation of litigation is **not** a necessary element.
 - But that element is necessary under federal law. See ***Hickman v. Taylor***, 329 U.S. 495 (1947).
- Two tiers of protection:
 - **Absolute** – “A writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.” CAL. CODE CIV. PROC. § 2018.030(a).
 - **Qualified** – Any other type of work product is “not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery . . . or will result in an injustice.” CAL. CODE CIV. PROC. § 2018.030(b).



Mixed Purpose Communications



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When Is A Dual Purpose Communication Privileged?

- **Primary Purpose Test:** The privilege protects in-house lawyers' communications involving business and legal advice *if the primary purpose of the communication is to obtain or give legal advice.* *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065 (N. D. Cal. 2002).
- Probably not the “**because of**” standard, which requires in-house lawyers to prove that, under the totality of the circumstances, including the nature of the document and the factual situation, the document was prepared because of litigation or a legal purpose. See *In re CV Therapeutics, Inc. Sec. Litig.*, 2006 WL 1699536 (N.D. Cal. June 16, 2006).



How Do You Protect The Privilege In A Business Environment?

- Educate your **client**:
 - Only legal advice is **privileged**
 - Proper use of email
- Discuss the issue with your client, then document the legal advice.
- On sensitive issues that may head to litigation, consider writing a separate memorandum or email to ensure **privilege** attaches to the legal advice that you give.



Investigations



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Who Is The Client?

- The company?
- A board committee?
- Individual officers or directors?

Dual representation may be permitted subject to normal conflict rules, but some or all of the above may require **separate counsel** in an investigation.

The nightmare conflict scenario is easier to fall into than one might think: See ***United States v. Ruehle***, 583 F.3d 600 (2009).



Interview And Report Findings With Care.

■ *Upjohn* warning

- Attorney represents the company, **not** the individual employee
- Anything said to the attorney will be reported to the company
- The company holds the **privilege** and may choose to waive it
- If you have any concerns, you should retain your own lawyer

■ Attorney investigative notes as protected work product? See *Coito v. Superior Court*, 54 Cal. 4th 480 (2012).

■ Board committee vs. entire board of directors: Who holds the privilege in an investigation context?

- What about an advisory board?



Cooperation Does Not Force Waiver Of Privilege, But Choose Wisely.

- Disclosure to the SEC or another government agency in an investigation waives the privilege, but the company can choose whether to waive privilege.
 - That is typically an “**all or nothing**” choice. See *Pac. Pictures Corp. v. United States District Court*, 2012 U.S. App. LEXIS 7643 (9th Cir. Apr. 17, 2012) (rejecting “**selective waiver**” theory and holding that company could not claim privilege in private civil litigation over material that had been shared with the government in the course of an investigation).
 - The theory of “**selective waiver**” was initially accepted by the Eighth Circuit in 1978 but has since been rejected by virtually every other U.S. Court of Appeals.
- Consider whether a government investigation has commenced or is expected in connection with an internal investigation.



Privilege Challenges In Data Incident Investigation And Response

- These investigations move fast. Have an incident response plan that addresses preserving privilege.
- Outside counsel should lead and engage the forensic investigator on behalf of the company. The goal of the investigation is to give the company legal advice on breach notice obligations.
- Educate staff ahead of time about privilege and the importance of restricting written communications, especially in the immediate aftermath.
 - Stick to the facts when you must email internally
 - Ideally, all communications with customers and the rest of the outside world go through counsel
- Treat investigative analysis as attorney work product. Don't commit to creating a written forensic report, or giving one to third parties, until you know the full scope of the incident. Offer a telephonic summary from counsel first.



Mergers & Acquisitions



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1. “We Sold What?”

- Under Delaware law, as of November 2013, **all** sell-side attorney-client privilege passes to buyer when the company is sold. See ***Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP***, 80 A.3d 155 (Del. Ch. 2013).
 - Previously, Delaware had cited the New York rule, which distinguishes between the “**merger-related privilege**” (which remains with seller) and “ordinary course privilege” (which passes to buyer). ***Tekni-Plex, Inc. v. Meyner & Landis***, 89 N.Y.2d 123 (1996).
- Default rule: The **buyer** will control the privilege applicable to the **seller’s** pre-closing communications. That includes:
 - Communications about disclosure to the buyer
 - Communications concerning interpretation of agreement or deal structure
 - Communications unrelated to the merger
- Privilege is more likely to remain with the seller in a sale of assets, unless it’s a sale of substantially all assets and the buyer is continuing the seller’s business



“How Much Do You Want For That Privilege?”

- In *Great Hill*, Chancellor Strine said the parties could have “negotiated special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger.”
- Options:
 - Provisions that generally preserve control of some or all sell-side privileges
 - In a merger, who will control the privilege post-closing if not the buyer?
 - Carve out the privilege or the information itself?
 - Provisions that limit use of information, or discovery of particular categories of information, in post-closing disputes
 - Provisions that limit waiver or permit claw-backs
 - Placing a value on the privilege



2. If You Are Keeping The Privilege, Be Sure Not To Waive It.

- **Absent precautions**, sharing privileged information with a counter-party in negotiating a deal may result in waiver.
- Some examples:
 - Seller shares its counsel's evaluation of liability and damages in pending litigation, and related communications, with buyer as part of due diligence in a merger or asset purchase
 - To support insistence on more **favorable** terms in a proposed patent license agreement, licensor shares its counsel's analysis of validity, infringement, or pending enforcement, with licensee
 - Seller shares its counsel's analysis of labor laws and regulations, and related communications, with buyer in negotiating sale of **out-of-state** subsidiary



Find Your Common (Legal) Interest.

- Most jurisdictions recognize some version of the common interest doctrine: Parties sharing privileged information in furtherance of a “**common legal interest**” may do so without waiving privilege.
- This protection is an extension of waiver doctrine, not a privilege in itself. See **OXY Resources California LLC v. Superior Court**, 115 Cal. App. 4th 874, 889 (California has not recognized a “**joint defense privilege**” or “**common interest privilege**” by statute).
- The common interest doctrine may protect shared attorney work product as well. See **Oxy Resources**, 115 Cal. App. 4th at 891.
- Elements:
 - Independently privileged information (or work product)
 - Shared with an expectation of confidentiality
 - In a manner that is “reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted” CAL. EVID. CODE § 912(d).
 - Between parties that “have in common an interest in securing legal advice related to the same matter” in furtherance of that interest. **Oxy Resources**, 115 Cal. App. 4th at 891.



Make A Record To Guard Against Waiver.

- Augment pre-negotiation **NDA**s to identify common legal interests and a mutual intention to preserve privilege.
- Include express provisions in the final agreement memorializing prior or ongoing common legal interest.
- Mark the end of the **common legal interest**, which may precede the conclusion of a common business interest.





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