



# **DO THIS, NOT THAT. HOW TO (BETTER) PROTECT THE ATTORNEY-CLIENT PRIVILEGE**

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# ATTORNEY-CLIENT PRIVILEGE IN INVESTIGATIONS

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



# TODAY YOU WILL LEARN:

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- 1 PRIVILEGE AND WORK-PRODUCT BASICS**
- 2 RECENT TRENDS IN STATE AND FEDERAL COURTS**
- 3 CONSIDERATIONS FOR THE C SUITE**
- 4 SUMMARY OF BEST PRACTICES**



# THE ATTORNEY-CLIENT PRIVILEGE

Codified in Wisconsin at Wis. Stat. Sect. 905.03:

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client...”



# THE ATTORNEY CLIENT PRIVILEGE IN WISCONSIN

- May be claimed by the client or by the lawyer at the client's direction. May also be claimed by the corporate representative of the client
- Includes the lawyer and the lawyers representatives as well as the client and the client's representatives
- Includes common interest protections between counsel for clients with common interests
- Includes communications between lawyers representing the client
- Includes all communications, written and oral, unless an exception applies

*Wis. Stat. Sect. 905.03; State ex rel Dudek v. Circuit Court, 34 Wis. 2d. 559 (1967)*



## LAWYERS HAVE ETHICAL DUTIES, TOO

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c)."

SCR 20:1.6(a)

GOVERNS THE ETHICAL BOUNDARIES OF DISCLOSING CLIENT CONFIDENCES.

# YOU CAN'T TOUCH THIS

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Video

**"The privilege means that potentially critical evidence may be withheld from the factfinder.... But our system tolerates those costs because because the privilege is 'intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'"**

*In re Kellogg Brown & Root Inc.*, 756 F.3d 754, 764 (D.C. Cir. 2014)

# THE ATTORNEY WORK-PRODUCT DOCTRINE

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- Wisconsin also recognizes a qualified privilege in the attorney work-product doctrine
- Adopted in *Dudek* and codified in Wis. Stat. Sect. 804.01(2)(c)
- Litigation must be anticipated, but not commenced
- Gives way only upon a "substantial need" and undue hardship that information is unavailable through other means



# THE ATTORNEY WORK-PRODUCT DOCTRINE

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"The test should be, whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."

*Lane v. Sharp Packaging Sys. Inc.*, 2002 WI 28, p. 61





# THE FEDERAL COUNTERPART: FED. R. CIV. P. 26

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"Ordinarily, a party may not discover documents and tangible things prepared in anticipation of litigation or for trial by another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent). But ....

A party may overcome this presumption and access the materials only if it "shows that it has a substantial need for the materials to prepare its case, and cannot, without undue hardship, obtain their substantial equivalent by other means."

Fed. R. Civ. P. 26(b)(3)

# RECENT COURT TRENDS SHOW EROSION OF THE PRIVILEGE



**Video**

# THE PRIVILEGE PROTECTS COMMUNICATIONS, NOT FACTS



**"[T]he attorney client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."**

*Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S. Ct. 677 (1981).

# THE PRIMARY PURPOSE DOCTRINE

"Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task."

*In re Kellogg Brown & Root Inc.*, 756 F.3d 754 (D.C. Cir. 2014)





# THE PRIMARY PURPOSE DOCTRINE

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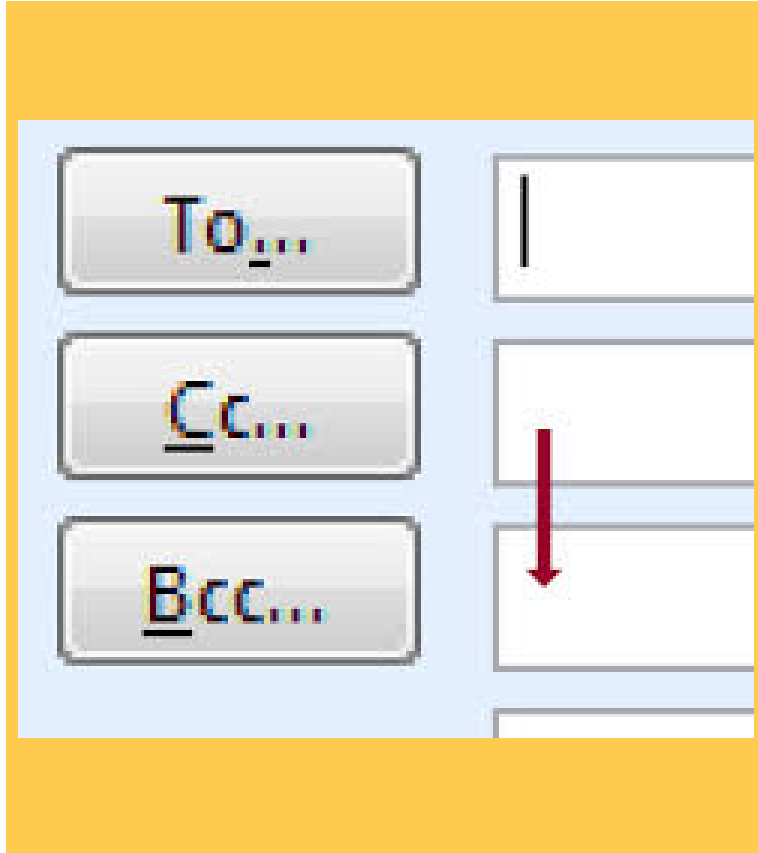
"Rather, it is clearer, and more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice **a** primary purpose of the communication, meaning one of the significant purposes of the communication?"

*Id.* at 760.





# COMMON ISSUES COURTS CONSIDER



USE OF CC OR BCC



FYI & EMAIL FORWARDS



IMPLICIT REQUEST FOR LEGAL ADVICE

# DON'T DO JUST THIS

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- **High Burden to Protect the Privilege**
- More than a Designation or Label
- Individual consideration by the fact-finder
- **Consider "after the fact" evidence including a declaration from in-house counsel or the author or recipient to justify the privilege**
- Don't make assumptions about *in camera* review

# LESSONS LEARNED

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Employee's use of employer-provided email to communicate with counsel for legal case relating to employment dispute had no "reasonable expectation" of confidentiality.

*Doe 1 v. George Washington Univ.*, 2021 WL 5416631 at \*2-3 (D.D.C. Nov 19, 2021)

# COURTS DISLIKE OVERREACH

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## BLANKET OBJECTIONS, NO PRIV LOG = NO DICE

*Stagger v. Experian Info. Solutions*, 2021 WL 5299791 (N.D. Ill. Nov. 15, 2021)

## BEWARE OF INADVERTENT DISCLOSURE

Courts can punish what they view as “reckless” disregard of the privilege. But recent modifications to Federal Rule 37 can provide safe harbor.

## CLIENT CONSENT MATTERS

In *Harold Sampson Childrens' Trust*, 2004 WI 57, held that a lawyer cannot waive the privilege for the client without their consent. Found no waiver even though lawyer authorized production of privileged materials.

## BOARD MINUTES AND STRATEGIC PLANS

Addressed on a case by case basis, but isolating legal advice into separate sections and limiting dissemination will help.

# PRACTICAL WORK PRODUCT POINTERS

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- Party work product is protected
- Even if "substantial need" is met, court must protect "pure opinion work product" and order disclosure only of underlying facts
- Does not protect ordinary business documents or communications, cannot simply label documents as work product
- Designation of work product may trigger a duty to preserve

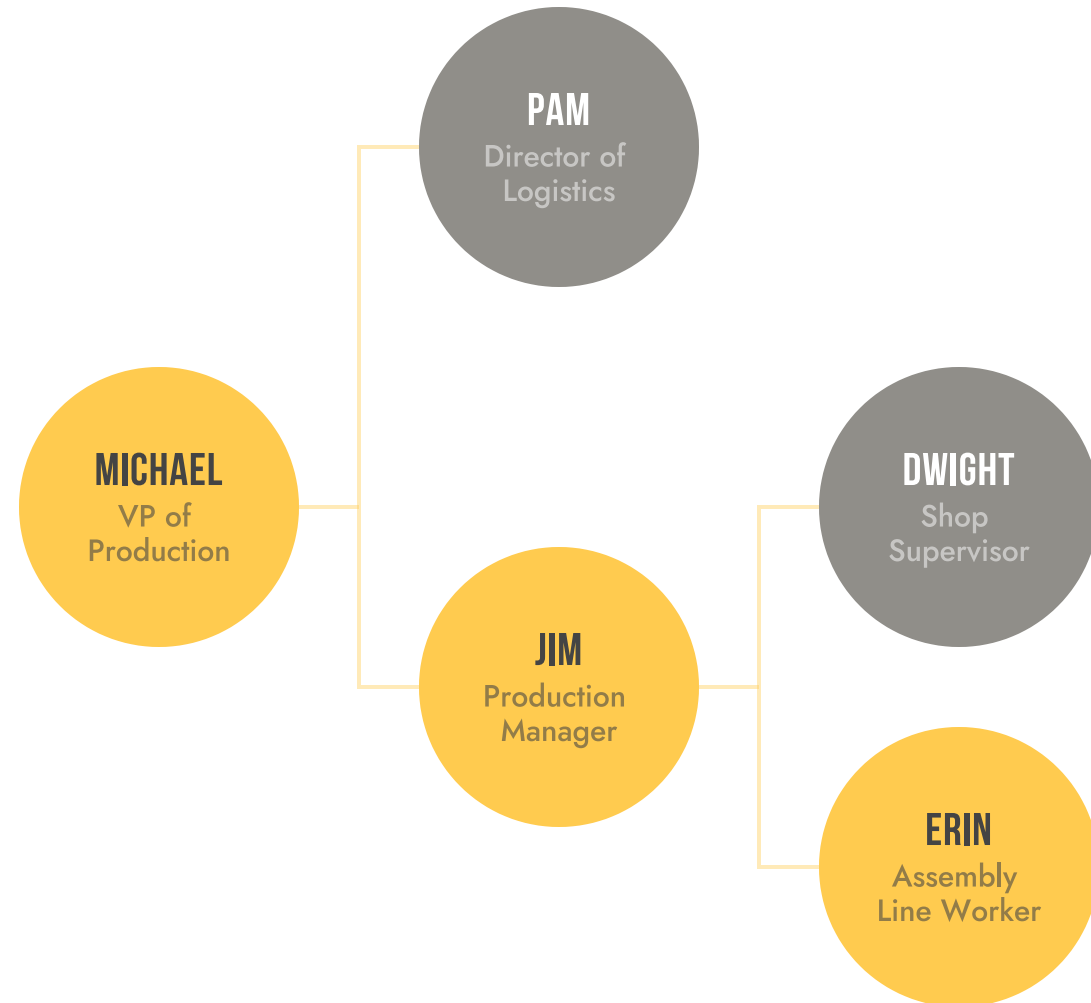


# Considerations for the C Suite

RESPOND WITH LEGAL ADVICE  
NEED TO KNOW  
EXPLICIT OR EXPRESS ASK  
SPECIFIC SHOWING  
REPLY ALL  
NO FORWARDING  
PRACTICES  
SHARING  
CONTROL GROUP  
AFFECTED  
START A NEW CHAIN  
MAINTAIN CONFIDENTIALITY  
BCC  
CC  
BURDEN  
DESIGNATE AS CONFIDENTIAL  
INTRACOMPANY  
MARK PRIVILEGED

# CONSIDER THE “CONTROL GROUP”

Only share privileged information with employees or managers that “need to know” - either actively need the information to make decisions or if their job is affected by the decision



# IMPLICIT REQUESTS FOR LEGAL ADVICE



**VP RECEIVES  
INFORMATION THAT  
MIGHT REQUIRE  
LEGAL'S INPUT**

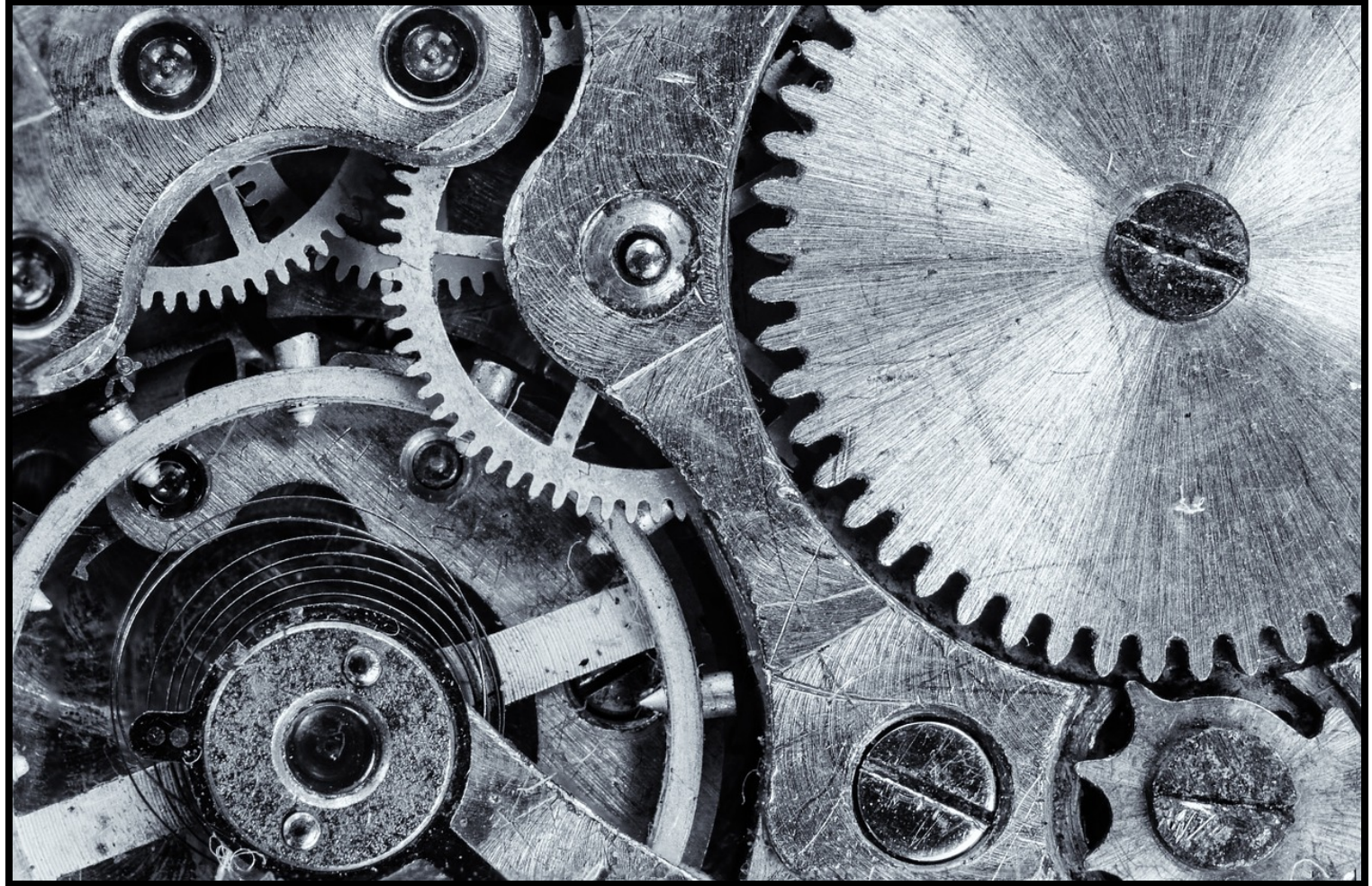
**LEGAL RECEIVES  
EMAIL FORWARD  
WITHOUT CLEAR  
DIRECTION OR ASK**

**LEGAL'S RESPONSE  
SHOULD CLEARLY  
STATE THAT LEGAL  
ADVICE SOUGHT**

# PROTECTING TRADE SECRETS

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- Limit the types of information you consider "trade secrets"
- Limit dissemination of confidential information in ordinary course of business
- Require those with access to sign a confidentiality agreement (with consideration)
- Consider a protective order in litigation
- Be prepared in litigation to provide specific and detailed support as to why materials are a trade secret and what the company does (and did) to protect it and limit its disclosure







## TEXT MESSAGES AND INTERNAL CHAT MESSAGES

1. Treat them the same way you do other documents - prepare to screen shot or download or preserve them if you think they could be critical evidence
2. Limit dissemination of information in text messages
3. Be prepared to support that the messages are privileged with counsel or principal declaration
4. Be aware of your company or provider's default storage terms

- **CONSIDER LEGAL'S ROLE**

Consider whether legal should lead or direct the investigation or if outside counsel should be retained.

Appoint a task force. Give them broad authority.

- **ASSUME THAT ALL WORK PRODUCT COULD BE DISCOVERABLE**

Designate work product with appropriate markers and agree on reporting protocols in advance. Consider whether a privilege waiver may be appropriate. Show that the investigation was done for legal, not business purposes.



# INTERNAL INVESTIGATIONS

- **THE GOOD NEWS**

*Smith-Brown v. Ulta Beauty, Inc.* 2019 WL 2644243 (N.D. Ill. June 27, 2019)

District Court found that the emails to/from General Counsel to the employees were primarily legal advice, even though the legal advice was directed to address a public-relations (business) issue.

- **PROTECT IT IN COURT**

Show the “Why”

Show that legal was involved for a specific purpose and actively involved in the process

Provide specific, document-by-document analysis for why each document should be protected by the privilege



# WHEN IS A CORPORATION'S DUTY TO PRESERVE TRIGGERED?

## THE SEDONA CONFERENCE

“The Sedona Conference has recommended that a ‘reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation....’ ”

*Franklin v. Howard Brown Health Ctr.* (N.D. Ill., Oct. 4, 2018).





# PRIVILEGE AND DEPOSITIONS

## Beware of inadvertent waiver through preparation



Under FRE 612, preparation materials for a 30(b)(6) witness may be discoverable if:

**A witness reviewed privileged materials for the purpose of refreshing recollection**

**The witness then "substantively testifies" about the privilege documents**

Court found that review of the privileged memos was not required to adequately prepare for the noticed topics - review of them by the witness (even when the witness was the lawyer who prepared them) waived the privilege

*Baxter Int'l Inc. v. Becton et al.*, 2019 WL 6258490 (N.D. Ill. Nov 22, 2019)

# BEST PRACTICES

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- **LIMIT DISSEMINATION TO THE NEED TO KNOW**
- **DESIGNATE WHAT IS PRIVILEGED**
- **ANTICIPATE THAT YOUR EMAILS WILL BE EXHIBITS**
- **SPLIT UP EMAILS THAT ARE BOTH BUSINESS AND LEGAL**
- **USE TEAMS, ZOOM OR PHONE IF YOU DON'T NEED IT IN WRITING**
- **CONFIRM THAT YOU ARE PROVIDING LEGAL ADVICE IN RESPONSE**
- **CONSIDER WHAT PREP MATERIALS TO SHARE WITH WITNESSES**
- **MAINTAIN CONFIDENTIALITY**

# USEFUL RESOURCES

1. **PRESNELL ON PRIVILEGES (POP)** <https://presnellonprivileges.com>
2. **Privilege Points by Thomas Spahn**  
<https://www.mcguirewoods.com/resources?t=privilegepoints>
3. **The American College of Trial Lawyers White Paper on Internal Investigations**  
<https://presnellonprivileges.com/wp-content/uploads/2020/11/ACTL-Internal-Investigations.pdf>
4. **Discovery Law and Practice**, Wisconsin State Bar Books, *Scope of Discovery*, Chapter 2, Sections 2.24-2.58.
5. **Ask your friends at LLG**





# QUESTIONS





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