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How Not to Lose the Privilege in Opinions, Prosecution, and Litigation

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Agenda

- Definitions of attorney-client privilege and attorney work product
  - Issues during pre-litigation
  - Issues during litigation
- Common interest privilege and maintaining privilege
- Waiver of privilege and scope of the waiver
- In-house privilege
- Issues surrounding privilege in foreign jurisdictions

Attorney-Client Privilege and Work Product

Privileges

- **Attorney-Client Privilege; Fed. R. Evid. 502**
  - Confidential communications between attorneys and clients concerning legal advice are privileged under the doctrine of attorney-client privilege
- **Attorney Work Product Privilege; Fed. R. Civ. P. 26(b)(3)**
  - Party's documents and notes – including those of the parties' representatives and attorneys – made primarily in anticipation of litigation are privileged under the work product doctrine.

Why is the Attorney-Client Privilege Important?

- Privilege exists to encourage complete and honest communications between an attorney and client in the most sensitive and difficult situations.
- The Attorney-Client privilege enables these communications to remain confidential. If the privilege does not attach, or is waived:
  - Such communications can be used in litigation by an adversary or in an investigation by the government.
  - A litigation adversary or the government may call the author or recipients to give testimony regarding the communication in a deposition, witness interview, or at trial.
  - The communications could be published in the press or otherwise made public.

Privileges – Attorney-Client

- **Protects communications going from the attorney to the client and from the client to the attorney**
- **Designed to allow full disclosure and communication between attorneys and their clients**
- **Controlled by the client – but we need to be the guardians**
- **Requirements – must be:**
  - Communication – oral or written
  - Made between privileged persons
  - In confidence at time of communication; cannot do this retroactively
  - For the purpose of seeking, obtaining, or providing legal assistance to the client
- **IF these conditions are satisfied, then the communication typically need not be disclosed to third parties in litigation**

Privileges – Attorney-Client

> What we've actually been asked to do (by Larry and Sergei) is to investigate what technical alternatives exist to Java for Android and Chrome. We've been over a bunch of these, and think they all suck. We conclude that we need to negotiate a license for Java under the terms we need.

- **Email from senior engineer to vice-president marked CONFIDENTIAL**
- **No lawyer involved – communication not privileged**
- **Communication could be (and was) used during litigation**

RCHFU v. Marriott Vacations Worldwide

- ***RCHFU v. Marriott Vacations Worldwide,* 2018 U.S. Dist. LEXIS 198355 (D. Colo. May 23, 2018)**
- **Case type: Breach of fiduciary duty, constructive fraud, unjust enrichment**
- **Plaintiff moved to compel the production of a unredacted version of the strategic plan memorandum to the Corporate Growth Committee on multiple grounds, including that the memorandum was not or not completely legal advice so the attorney-client privilege does not apply**
- **Colorado law applied**
- **Difference between business and legal advice was highlighted:**
  - "Business communications are not protected merely because they are directed to an attorney, and communications at meetings attended or directed by attorneys are not automatically privileged as a result of the attorney's presence."
  - "The corporation must clearly demonstrate that the communication in question was made for the express purpose of securing legal not business advice." (internal quotations omitted)

Epic Games, Inc. v. Apple Inc.

- ***Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR (N.D. Cal. Apr. 28, 2021)**
- **Case type: Antitrust**
- **Apple clawed back three documents as being inadvertently produced, asserting they were privileged**
- **Court rejected Apple's privilege claims**
  - For one email, the Court noted "It is entirely a business discussion, and nothing in it sounds remotely like a request for [the attorney's] legal advice, or for [the attorney] to say anything at all. This is a clear example of business people including a lawyer in an email chain in the incorrect belief that doing so makes the email privileged. It does not."
- **Another withheld document was a draft presentation that purportedly "reflects the legal advice that they provided to Apple business people in connection" with the program described in it**
  - "Lots of documents are reviewed and revised by attorneys and therefore reflect legal advice they provided to business people...The attorney-client privilege protects the communications between attorney and client involved in the drafting of those documents, such as emails with redlined documents reflecting legal advice or oral conversations giving legal advice. But that's it."

Privileges – Attorney-Client

- **Appreciate the difference between legal advice and business advice**
  - Legal advice – advising on existing law, advising on litigation
  - Business advice attending business meetings, acting as a note-taker
- **Mark communications "Confidential," "Attorney-Client Privileged," and "Attorney Work Product" as appropriate**
- **Limit recipients of privileged information (i.e. be careful with investment bankers, independent auditors, etc.)**
- **Insert note/educate teams on importance of not forwarding legal advice**
- **Always remember who the client is**

Privileges – Attorney Work Product

- **Protects certain materials prepared by or for an attorney in the course of legal representation**
- **Requirements:**
  - Documents and tangible items
  - Prepared in anticipation of litigation/trial
  - By or for a Party or a representative of a Party

Privileges – Attorney Work Product

- **Label documents or materials created in anticipation of litigation**
- **Litigation holds should be in place**
- **Generating memorandum from interviews, you can separate out your thoughts and impressions from the facts section to protect the impressions should the memorandum ever need to be produced in redacted form**
- **Be very careful when conducting pre-suit testing**

FRCP Rule 26. Duty to Disclose; General Provisions Governing Discovery

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows:

> Parties may obtain discovery regarding any **nonprivileged matter** that is **relevant to any party's claim or defense and proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Communication

What is “COMMUNICATION”?

All kinds of communication (meeting, telephone, email, letters, etc.) between an Attorney and a client

- Including an attorney in the **cc of the email** communication does not automatically provide protection under the privilege
  - *Willnerd v. Sybase, Inc.* (D.Id. 2010)
- Email Attachments: Non-privilege documents attached to emails between attorneys are **not privileged**.
  - *Women’s Interart Ctr., Inc. v. N.Y.C. Econ.*, (S.D.N.Y. 2004)
- Email drafts not sent: Unsent draft emails are not communication, so will not be subject of a privilege
  - *In re Google, Inc.* (2012)

Practical Tips: Privilege & Confidential

- No legal effect in adding the sign “Privilege & Confidential”
- Aim is to **evidence intent of the communication** and **ease the distinguishing of** communication from other non-privileged communication during document review/production process
- Any documents presented to third parties (other than with common interest) will not be privileged, so **do not leave** the “Privilege & Confidential” sign!! Use “RE408” sign instead.

Attorney-Client Privilege: Corporate Situations

- Communications between attorneys and employees of related entities and subsidiaries may be considered privileged when the confidential information is critical to the representation by the attorney(s).
- Some courts have required corporations claiming privilege to show that communications to in-house counsel were primarily for the purpose of obtaining legal advice as opposed to ordinary business advice or other purposes.

Generally Unprotected Communications

- Client identity (except under very rare circumstances)
- Client fee arrangements
- The existence of attorney-client relationship (the fact of it)
- The purpose for which the lawyer was retained
- The factual circumstances surrounding communications, i.e. the date of the communication, persons present, means of communication, etc.
- The whereabouts of a client
- Billing statements/hourly records, with the exception that such communications are not discoverable to the extent they reveal client confidences (in which case such information is typically redacted)

United States v. Stewart (SDNY July 22, 2016)

- In connection with a high-profile insider trading trial, JPMorgan waived its attorney-client privilege for certain communications related to a FINRA inquiry.
- In response to a FINRA inquiry, JPMorgan conducted an internal investigation and submitted a written response to FINRA – affirming that none of its employees with knowledge of a stock acquisition – including employee Stewart – knew the investors involved in insider trading.
- In Stewart's criminal case the government moved to compel JPMorgan's in-house counsel to testify regarding the Stewart interview and to disclose her interview notes.

United States v. Stewart (Continued)

- JPMorgan asserted the attorney-client privilege and work product doctrine over the communications between Stewart and in-house counsel as well as the notes taken during the interviews.
- Government argued that JPMorgan waived privilege by disclosures to FINRA.

Holding

- District Court concluded:
  i. JPMorgan waived its attorney-client privilege by disclosing to FINRA the communications with Stewart. Court said JPMorgan was not compelled to make the Stewart disclosure to FINRA – JPMorgan could have asserted its privilege and refused disclosure.
  ii. However, court ruled no subject matter waiver. A limited form of implied waiver applies when the waiver occurs in an extra-judicial setting. Thus, waiver is limited to the communications already disclosed to FINRA.

Between Privileged Persons

Who is the “CLIENT”?

- **Control Group Test**: Some courts may only deem the communication privileged for communication within the “control group” of the corporation (**CEO, CFO, GC, Division Managers**) and the attorney

- **Subject Matter Test**: Communication will be protected by privilege if the subject matter of the communication is **within the realm of the employee’s area of duty** and there was an instruction from the supervisor
  - *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)

Who is an “ATTORNEY”?

Privilege is extended to communications with agents working under the direction of an attorney

- **Internal company communication** without attorneys involved may still be protected, if the participants to the communications are acting under the **direction of counsel**
  - Requires establishing an actual “**request**” from the attorney
  - Privilege may be waived once the dissemination exceeds the “**need to know**” test

Who is an “ATTORNEY”?

In-house attorneys are deemed as attorneys. However, communication must be a “legal advice” in order to be protected under the A-C privilege

- An attorney belonging to a business division was denied A-C privilege due to his corporate status
  - *Breneisen v. Motorola, Inc.*, (N.D. Il. 2003)

- A-C privilege was denied due to lack of legal advice, although an in-house attorney was present at the meeting
  - *Giardina v. Fertel, Inc.*, (E.D. La. 2001)

The Special Role of In-House Counsel

- Distinguishing legal advice from business advice sounds more straightforward than it is in practice.
- Factors to consider:
  - The attorney's role – i.e., how and why did in-house counsel become involved?
    - To negotiate a business transaction?
    - Because litigation is anticipated?
  - What other offices does in-house counsel hold?
  - Did in-house counsel conduct or convey any legal analysis or strategy?
- What will not suffice:
  - The mere physical presence of in-house counsel during a conversation.
  - Merely copying in-house counsel when sending an email or circulating a memorandum.

The Special Role of In-House Counsel

Keeping in mind fact-specific nature of the inquiry . . .

- Legal functions may include:
  - Advising company on existing law
  - Undertaking and reporting legal research
  - Analyzing conduct for conformity with law or judgments
  - Advising on imminent litigation
  - Opining on applicable law
- Business functions may include:
  - Negotiating terms of a contract
  - Attending business meetings
  - Soliciting advice from outside professionals
  - Performing duties of another office – e.g., corporate secretary
  - Acting as a scribe

Who is an “ATTORNEY”?

Foreign in-house legal personnel may be granted A-C privilete in some cases

- An in-house non-attorney legal personnel in France was granted an attorney status in a case in Delaware.
  - *Renfield Co. v. E. Remy Martin & Co., S.A.,* (Del. 1982)
- An in-house non-attorney legal personnel in Japan was denied an attorney status
  - *Honeywell Inc. v. Minolta Camera Co., Ltd.,* (N.J. 1990)

*Generally, courts will look to and apply privileged status based on jurisprudence of the foreign country

Work Product Doctrine

Work Product FRCP 26(b)(3)(A)

26(b)(3) Trial Preparation: Materials,

(A)Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things **that are prepared in anticipation of litigation or for trial by or for another party or its representative** (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and **cannot, without undue hardship, obtain their substantial equivalent by other means.**

Work Product FRCP 26(b)(3)(A)

- Ordinarily, a party **may not discover** documents and tangible things of another party that are **prepared in anticipation of impending or ongoing litigation**
- Materials are otherwise discoverable under Rule 26(b)(2); [if] it has **substantial need** for the materials to prepare its case; and cannot, **without undue hardship**, obtain their substantial equivalent by other means.
- Court "must protect against disclosure of the **mental impressions, conclusions, opinions, or legal theories** of a party's attorney or other representative concerning the litigation."

PRACTICAL TIPS: Work Product Doctrine

- Treat any documents **prepared in anticipation of litigation or for trial** involving “Attorneys” as Work Products
- Documents prepared in-house under instructions by “Attorneys” **prepared in anticipation of litigation or for trial** may also qualify as Work Products, as long as the **Confidentiality is not waived**
- Make sure to evidence involvement or instructions of “Attorneys” in order to later claim application of Work Product Doctrine

Confidentiality / Common Interest / Legal Advice

What is “CONFIDENTIALITY”?

“Need to Know” Test

- “The key concept here is need to know. While involvement of an unnecessary third person in attorney-client communications destroys confidentiality, involvement of third persons to whom **disclosure is reasonably necessary** to further the purpose of the legal consultation preserves confidentiality of communication.”
  - *U.S. v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968)

PRACTICAL TIPS: Need to Know Test

- Be mindful of access rights to **shared folders** containing privileged information
- Be mindful of who are included in the **CC or Bcc** of communication including privileged information
- Disclosure to subsidiary may break the confidentiality requirement, unless the **Need to Know** test is satisfied or common interest exists
- Hiring a same law firm with the subsidiary or related third party (e.g. supplier) may resolve the issue of waiving A-C privilege

Legal Opinions – How to Share Information While Minimizing Risk of Waiver

How to disclose legal opinions to "the other side"

- Is there a common legal interest/joint privilege between the parties?
  - And assume there isn't
- If so, have the parties executed a common interest/joint privilege agreement?
  - Steps to ensure confidentiality?
- **If "No", share FACTS only:**
  - Did you receive an opinion of counsel? Answer: Yes or No
  - On what date and by whom?
  - What references were relied on
- **Even if "Yes", still consider sharing FACTS only**

Common Interest Doctrine

Common interest doctrine requirements:

1. The underlying communication is privileged;
2. The parties disclosed the communication in the course of a joint defense effort;
3. The parties shared a common legal interest;
4. The parties have not waived the privilege.

Doctrine does not apply when parties share only a common business or commercial interest.

Common Interest Doctrine

- Courts have not uniformly defined the boundaries of “common interest”
- Some courts require “identical” legal interest. (see e.g., Delaware)
- Other courts do not require a complete unity of interests among the participants. (See, e.g., California, Florida)
- Courts are not in agreement whether the common interest doctrine can apply absent anticipated or pending litigation, an element similarly required under the work product doctrine.
- Some courts require actual or pending litigation at the time of the privileged communication. (see e.g., Colorado)
- Other courts have found it unnecessary that there be actual or pending litigation. (See, e.g., Second and Seventh Federal Circuits)

Joint Defense Agreement

- Advisable to document the existence of a common legal interest in a joint defense agreement prior to the exchange of information.
- Some courts have refused to acknowledge the existence of a joint defense agreement in the absence of a written agreement. (See e.g., California)
- The written agreement should include the following:
  - the parties intend their communication to be privileged;
  - the communication shall remain confidential;
  - any party is permitted to withdraw from the agreement upon notice to all other parties;
  - each party retains the right to independently settle the underlying lawsuit; and
  - parties should address how to resolve potential conflicts.
- The written agreement in and of itself does not ensure that the common interest protection will be sustained.

Waiver of Privilege and the Scope of the Waiver

Waiver

- **Several types (most bad)**
  - Purposeful disclosure
  - Compelled disclosure (subpoena)
  - Careless disclosure
  - Inadvertent (this tends to be more curable)
  - Conveyance to third parties
- **Once waived, or breached, privilege cannot be resurrected.**

How is Privilege Waived?

- Even if a communication is originally privileged, Attorney-Client privilege can be waived:
  - By disclosing the substance of the legal advice or privileged communication;
  - By sharing the privileged information with a third party (government, potential investors, data room, certain consultants, insurers)
- **Waiver can be intentional or unintentional.**

How to Avoid Waiving Privilege

- The privilege is not waived:
  - By disclosing that you have a lawyer or received advice on a particular issue.
  - By disclosing the mere fact of a communication's occurrence or existence, the parties to a communication, or its date (i.e. "I asked my lawyer about the contract on Tuesday").
- To avoid waiver from inadvertent disclosure,
  - Party asserting the privilege must show:
    - It intended to maintain confidentiality and took reasonable steps to prevent disclosure.
    - Then promptly sought to remedy the situation once learning of disclosure.

Waiver

- ***TransWeb LLC v. 3M Innovative Props. Inc.*, 2012 WL 2878076, at *14 (D. N.J. Apr. 12, 2012)**
- **Technology: Materials science**
- **Issue: Whether Defendant 3M properly asserted attorney-client privilege and/or work product doctrine over a sample of 20 documents**
- **Applied Third Circuit law**
- **The Special Master assessed the application of the attorney-client privilege in a corporate setting:**
  - "[D]ocuments subject to the privilege may be transmitted between non-attorneys…so that the corporation may be properly informed of legal advice and act appropriately. [T]here must be 'some nexus' between the non-attorney, the privileged communication and a specific attorney." (internal quotes and cites omitted)
  - "Still, a corporation may waive the attorney-client privilege by disclosing otherwise protected communications to employees who do not possess the need to know the information."

Waiver of Attorney-Client Privilege

Claw Back of Privileged Documents

FRE 502(b) – Claw back provision provides:

Inadvertent Disclosure.

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

1) the disclosure is inadvertent;
2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Real Life Situations

Negotiating Transactions

- Drafts of Agreements/Documents are privileged if:
  - Draft was created by/for or at the direction of attorneys, and
  - Only shared between attorney and client.
  - Once a draft is shared with a counterparty to a transaction, the attorney-client privilege is waived.
- Consider the impact of an acquisition on the attorney-client privilege.
  - If new management is attempting to run the pre-existing business entity and manage its affairs, new management stands in the shoes of prior management and should control the attorney-client privilege with respect to the company's operations.
  - If, for example, only a discrete set of assets has been transferred, and the acquirer is not attempting to manage or run the pre-existing business, the attorney-client privilege is unlikely to pass to the acquirer.

Sharing Information Outside the Company

- Communications with Public Relations Firms/Consultants:
  - Likely not privileged unless the communication is necessary to obtain informed legal advice.
  - Consult with counsel first to determine the scope of a particular PR firm's engagement, and whether privileged information can be shared.
  - Certain communications can be privileged if the consultant is hired to "translate" complicated concepts for counsel.
- Communications with Insurers or Auditors:
  - Generally not privileged. Consult with counsel to determine whether non-privileged information can be isolated to satisfy insurer request.

Sharing Information with Affiliates

- The law is not well developed, but whether communications among affiliated entities, portfolio companies, or joint venture partners will be privileged generally depends on whether the entities are sufficiently interrelated and share legal interests.
  - Courts have held that corporate entities under common ownership and control have a shared legal interest such that privileged communications can be shared without waiver.
- When two different companies jointly control an entity or project, communications about the entity or project should be protected.
- A shared legal interest is always key - when interests are not aligned, communications between affiliated companies and joint venture partners may not be privileged.
- ***Always use greater caution when communicating about sensitive issues outside of the Company, and when in doubt about sharing information with an affiliated entity, portfolio company or joint venture partner, consult with counsel.***

Privilege Issues in Foreign Jurisdictions

Privilege Issues in International Settings

- Communications are often global and may involve documents and information from countries with varying privilege laws and privacy laws.
- Depending on the country, work product and communications may or may not be privileged.
- Do not assume US Privilege law is the law of all jurisdictions
- **BEST PRACTICE – consult lawyers in each jurisdiction to understand that country's privilege law/issues and then develop a plan for the treatment of information and maintenance of the privilege in that country. Also understand the players involved at a company level.**

Privilege in EU

- Majority of EU countries recognize confidentiality obligations between a lawyer and client but do ***not*** recognize privilege for in-house counsel. These include:
  - Italy
  - Austria
  - Belgium
  - Finland
  - France
  - Greece

Privilege in EU

- Some member states ***do*** recognize the privilege for inside counsel:
  - Denmark
  - Germany
  - Netherlands
  - Portugal
  - Spain
  - Sweden
  - UK
- Denmark, Greece, and Romania, and do not distinguish between inside and outside counsel.
- Germany, Netherlands, Portugal and Sweden recognize a limited privilege for inside counsel.

Foreign Privilege in U.S. Courts

- In international disputes, where alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, courts defer to the law of the country that has the "predominant" or "most direct and compelling interest." Astra Aktiebolag v. Andrx Pharmaceuticals, Inc., 208 F.R.D. 92, 98 (S.D.N.Y. 2002); Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 522 (S.D.N.Y. 1992).
- Court notes difficulty in applying foreign country's privilege rules within US discovery.
- Comity requires consideration of context.
- Courts will often apply the laws of the country in which the privileged communication took place.

Best Practices

For In-House Counsel

- Whenever possible, separate legal and business advice.
  - For example, maintain separate email chains (or start a new email chain) and edit the list of recipients for each chain.
- When serving in both legal and non-legal roles:
  - Use titles as appropriate (e.g., in email signature block)
  - Segregate legal files from non-legal files
  - Maintain a written record of the legal aspects of a communication
- Identify legal advice as privileged and confidential.
  - Important to use labels / designations consistently and correctly – do not overuse when clearly providing only business advice.

For In-House Counsel

- When attending meetings or conference calls:
  - In-house or outside counsel leads discussion of legal issues.
- When attending board meetings for the purpose of discussing legal matters, the minutes should indicate clearly that:
  - In-house counsel attended in his / her role as legal advisor.
  - Discussions were for the purpose of providing legal advice.
  - Those discussions were confidential, intended to be privileged.
- Note meeting participants and exclude those who may waive privilege.

Guidance for Employees

- If the communication is privileged, you should keep it confidential:
  - Do not forward emails.
  - Do not provide copies.
  - Do not openly discuss with others.
- If you don’t know whether the communication is privileged, you should keep it confidential until you have had an opportunity to consult with counsel.
- Communications are not privileged merely because in-house counsel is physically present or copied on the communication.

Guidance for Employees

- When emailing:
  - Write “privileged and confidential” in the subject line and header of the email.
  - Remind recipients: “Do not forward”
  - Include in-house counsel in the to: or cc: line, depending on circumstances
  - Where including in-house counsel in an email is not appropriate, make sure communications are labeled “at the direction of counsel”
  - Start a new email chain where appropriate.
- Properly identifying privileged communications and other protected materials will help both maintain the privilege or protection and reduce expenses.

Guidance for Employees

- Be mindful who participates in discussions that potentially may be protected by the privilege.
- Exclude non-employees who are not necessary for the discussion.
- Take care when including non-employees who are not counsel, such as investment bankers and auditors.
  - When in doubt, the best practice is to exclude advisors, consultants, and other third parties from the discussion.
  - Always ask in-house counsel before communicating with any third party.
- Whenever in doubt, contact in-house counsel as a first step.

Defensive Strategies: Protecting Privilege

- **Foundations**. To the extent practicable, identify the foundational elements of the privilege (e.g., "This memorandum responds to management's request for legal advice relating to compliance with California law."; "This study was undertaken at the direction of counsel, and is part of an internal compliance audit.").
- **Mental Impression**. In preparing work product, lawyers should include mental impressions and analysis, not a recitation of what people said or did. ("This memorandum memorializes my interview of X. It is not intended as a transcript of verbatim summary of our meeting, and contains my thoughts and mental impressions.").
- **Waiver**. Avoid partial, selective, total, inadvertent, or any other type of waiver -- but recognize that there are no guarantees.

Final Takeaways

Final Takeaways

- Privilege questions are fact-specific inquiries.
- Properly identifying privileged materials will both protect the privilege and reduce expenses.
- Measures taken to keep information confidential will protect against a claim of waiver.
- If in doubt, the best practice is to exclude advisors, consultants, *etc.*, from discussions.
- Don’t be afraid to pick up the phone.
- ***Questions??***