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  - Docket Magazine & Newsstand (searchable legal news feed)
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# Threading the Needle of Corporate Privilege: When Legal and Business Advice Intertwine

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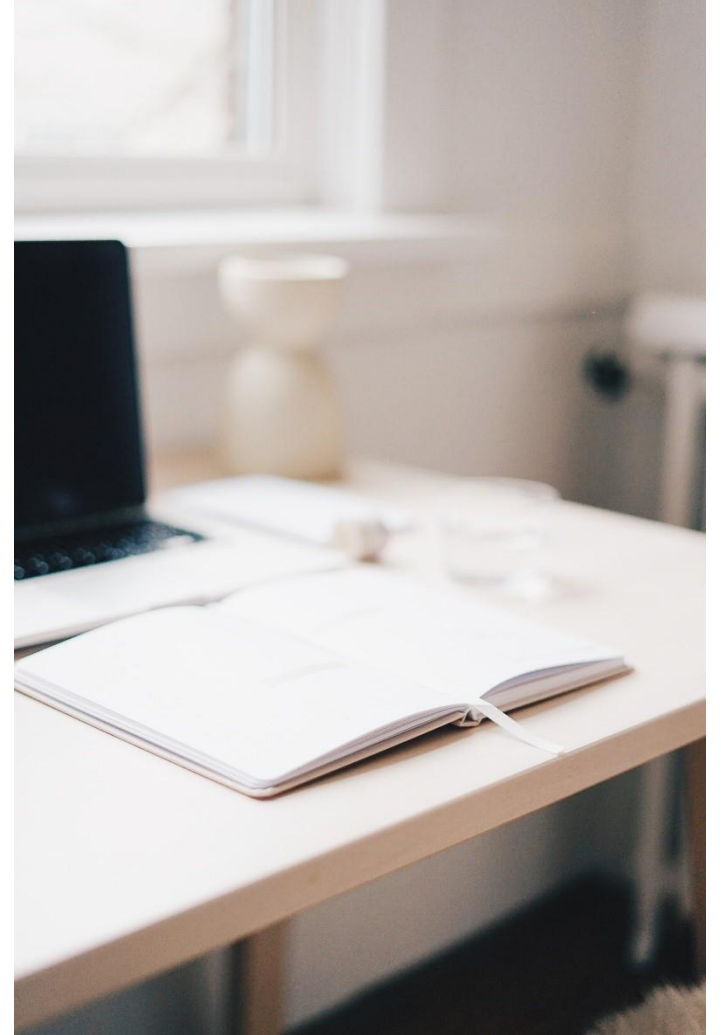
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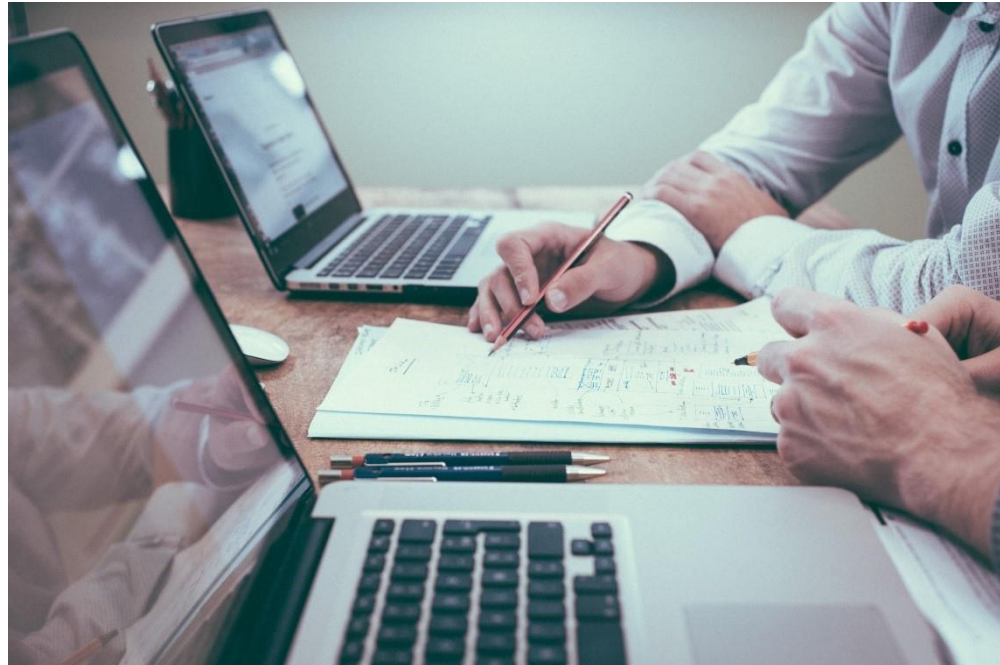
# Overview

- Key considerations
- Distinguishing between legal and business advice
- New technologies
- Practical suggestions



# Attorney-Client Privilege

- Defining the Scope
  - *Upjohn Co. v. United States*, 449 U.S. 383 (1981)
- Policy Justifications



# Elements of Attorney-Client Privilege

- Four elements necessary to establish existence of the attorney-client privilege:
  1. A communication
  2. made between privileged persons
  3. in confidence
  4. for the purpose of obtaining or providing legal assistance for the client.

# Attorney-Client Privilege -> Element 1: Communication

- Communications or exchanges between a client and his or her attorney are generally covered by the attorney-client privilege



# Attorney-Client Privilege -> Privileged Persons

- Corporation as Client
  - “Client” is the legal corporate entity in the context of corporations
- Only communications between or among “privileged persons” are protected under the attorney-client privilege

# Privileged Person – Control Group Test

- Popular standard used by lower courts prior to decision in *Upjohn*
- Only applied in a few jurisdictions, including Illinois



# Privileged Persons – Subject-Matter Test

- *Harper & Row Publishers Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd. per curiam by an equally divided court*, 400 U.S. 348 (1971)
- Under this test, attorney's communication with any employee may be privileged under certain circumstances

# Privileged Persons – Modified Subject-Matter Test

- Adopted by Eighth Circuit in *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978)
- Under this test, a corporate employee's communications are privileged if certain conditions are met
- “Need to know” element

# Privileged Persons – Functional Equivalent Test

- Consultants and Agents
- Exclusively adopted by the Eighth and Ninth Circuits
- Jurisdictions cannot agree on its application and look to different factors when applying
- Recent case law
  - *In re Bieter Company Co.*, 16 F.3d 929 (8th Cir. 1994)

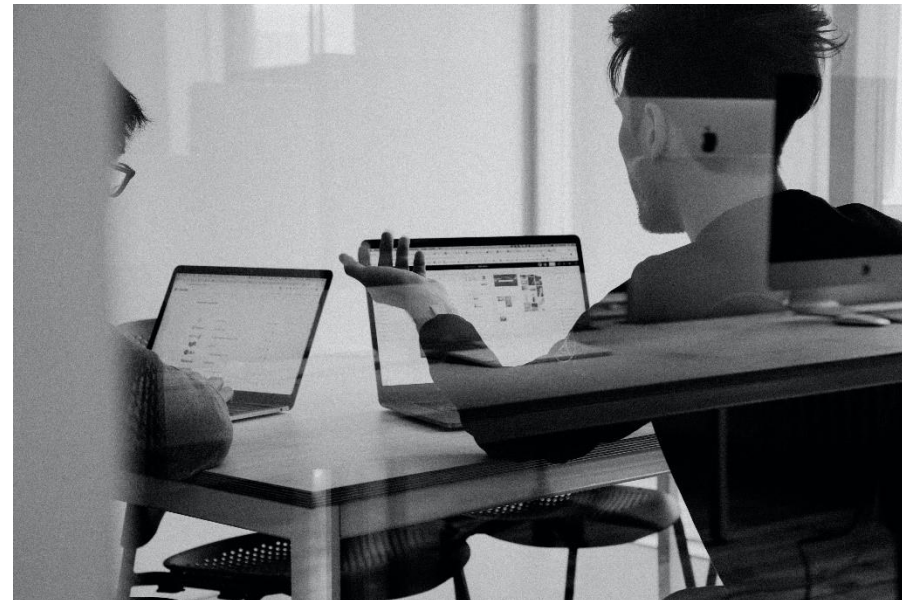
# Attorney-Client Privilege -> Element 3: Confidentiality

- Communication must not be shared with a third party and made in confidence



# Attorney-Client Privilege -> Element 4: Seeking Legal Advice

- Dual role of corporate counsel as trusted advisor and business advisor complicates the issue of attorney-client privilege
- Distinction between legal and business advice



# Dual-Purpose Communications; *In re Grand Jury*, No. 21-1397

- Contain legal advice, but also discuss non-privileged matters
- In *In re Grand Jury*, Supreme Court determined which test governs whether dual purpose communications are privileged
  - Primary purpose
  - Significant purpose

# Dual-Purpose Communications; Circuit Split

- Three-way circuit split on the proper test for applying the attorney-client privilege to dual purpose communications:
  - The Primary Purpose Test (Narrow) – Second, Fifth, Sixth, and Ninth Courts
  - Most Significant Purpose Test (Broad) – adopted by the D.C. Circuit
  - Per Se Test – Seventh Circuit
  - State Courts

# Raising and Waiving Privilege

- Waiver of attorney-client privilege can occur in two ways:
  - Express waiver
  - Implied waiver
    - Strict liability approach
    - Subjective intent approach
    - Circumstances approach





# Exemptions to the Privilege

- Common Interest Doctrine
- Crime-Fraud Exception

# Work Product - Introduction

- Defining the Scope
- Policy Justifications

# Work Product - Elements

- Key elements of the work product doctrine:
  - Documents or information;
  - Prepared by or at the direction of an attorney;
  - During or in anticipation of litigation.

# The Impact of Advancements on Privilege

- “The Cloud”
- Online Collaboration Tools
- Artificial Intelligence

# Cloud Computing Services

- The Benefits
- The Risks
- The Attorney-Client Privilege

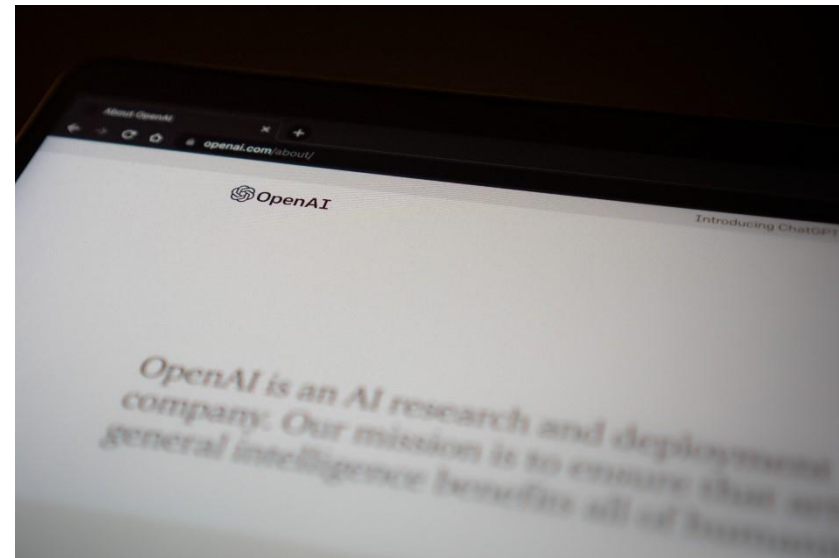


# Online Collaboration Tools

- Provide team members a way to collaborate in three ways:
  - Communication
  - Creation
  - Collection

# Artificial Intelligence and Privilege

- Generative AI
  - ChatGPT
  - Model Rules of Professional Conduct R. 1.6(a)
- Ethical duty to stay up-to-date on new advancements that impact the legal industry



# Practical Suggestions to Preserving Privilege

- Make clear requests for legal advice and communicate business advice separately
- Label communications appropriately
- Limit communications when possible
- Corporate meetings
- Internal investigations
- Use of an affidavit when asserting privileges in litigation
- Educate clients about the attorney-client privilege



# Questions?





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# Thank You!

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