

Safeguarding Attorney-Client Privilege:

In-House Counsel and
Internal Investigations



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Presenters:

Amy Blaisdell

Partner

UB Greensfelder LLP

Andrew Ricke

Vice President, Professional Services Counsel

Lockton Companies

Agenda

- ❖ Refresher: Attorney-Client Privilege, Work Product & Duty of Confidentiality
- ❖ In-House & Organizational Considerations
- ❖ Employee Witness Interviews
- ❖ Internal Investigations
- ❖ Key Takeaways & Best Practices

Intro: A/C Privilege, Work Product & Confidentiality

Attorney-Client Privilege

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graph TD; A[Attorney-Client Privilege] --> B[Work Product Doctrine]; B --> C[Confidentiality];
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Work Product Doctrine

Confidentiality

Privilege and Protection: a Cautionary Tale

In re FirstEnergy Corp. Sec. Litig., 2023 WL 8290917
(S.D. Ohio Nov. 29, 2023)

- ❖ **Class action lawsuit:** bribery and corruption schemes involving Company and employees.
- ❖ **Internal investigations:** conducted by outside law firms prior to suit.
- ❖ **Issue:** whether internal investigations were protected by *attorney-client privilege* or as *work product*?



Privilege and Protection: a Cautionary Tale

❖ **Ruling:**

- Investigation was NOT protected.
- Primary purpose of investigation was NOT to render legal advice.
- Evidence showed investigation was predominantly initiated for fact-finding and “non-litigation purposes.”
 - E.g., Audit/SEC filing purposes, HR decisions, public relations, etc.

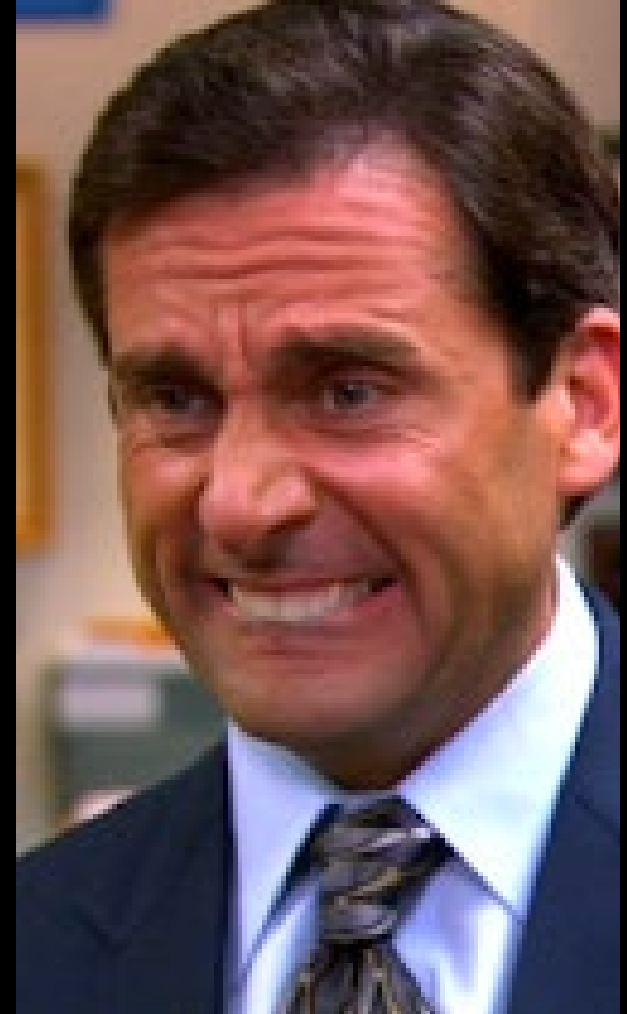


In re FirstEnergy Corp. Sec. Litig., 2023 WL 8290917
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Privilege and Protection: a Cautionary Tale

❖ Ramifications:

- No privilege or protection over investigation.
- Company must produce all investigation documents.
- Witnesses must answer all fact-related questions re: the investigation.



Attorney-Client Privilege

— Elements & Scope

**I DON'T KNOW WHAT
ATTORNEY-CLIENT PRIVILEGE IS**

**AND AT THIS POINT I'M TOO AFRAID
TO ASK**

makeameme.org

A/C Privilege: Elements

To claim privilege, invoking party must prove:

1. Communication;
2. Between privileged persons (i.e., attorney-client);
3. In confidence; and
4. For the purpose of seeking or providing legal advice.

A/C Privilege: “Privileged Persons”

1. **The Client** – Individual or org retaining attorney for legal advice.
2. **Client’s Attorney** – Authorized to practice law and acting in professional capacity of giving legal advice vs. business capacity.
3. **Agents/Reps Necessary to Facilitate the Representation**
– May include employees, paralegals, assistants, consultants, experts.



A/C Privilege: Made in Confidence

Communication must be made with a “**reasonable expectation of confidentiality.**”

- **Attachment:**

- Privilege does NOT attach if a stranger to attorney-client relationship is present.

- **Waiver:**

- Privilege may be waived by subsequent disclosure to third party.

A/C Privilege: Purpose = Legal Advice

- **Attorney involvement, alone, does not grant privilege!**
- Central inquiry: what was the primary purpose of the communication?
 - Seeking or providing legal advice?
- Legal vs business communications
 - In-house: dual roles – legal vs business purpose



A/C Privilege: Legal Advice vs Facts

Underlying facts are NOT protected.

- Cannot cloak fact with privilege.

Example: employee committed a regulatory violation. Admits it to Company's executive, who then relays it to in-house counsel. The executive and in-house lawyer then discuss legal ramifications and what to do about employee.

- Discussion of legal ramifications and advice → ***protected***.
- Underlying facts (i.e., employee's admitted wrongdoing) → ***NOT protected***.

WORK PRODUCT DOCTRINE

— Elements & Scope

Work Product: Elements

Opposing party may not discover docs and tangible things:

1. Prepared in anticipation of litigation or for trial...
2. By or for another party or its representative (including attorney, consultant, agent, etc.)...
3. UNLESS:
 - a. They are otherwise discoverable; AND
 - b. A substantial need is shown and the party can't, without undue hardship, obtain the equivalent by other means.

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

Work Product: Qualified Immunity

- ❖ **Protection is NOT absolute.**
- ❖ **Balancing Act – Competing Policies:**
 - Safeguarding the fruits of trial prep;
 - vs.
 - Free and fair disclosure of facts.
- ❖ **Qualified Immunity:**
 - Protection may be overcome by showing of justifiable need and inability to obtain by other means.



Tangible vs Opinion Work Product

Tangible (or “Fact”) Work Product:

- Factual information prepared or gathered for litigation.
- Documents and things – e.g., investigative reports, witness statements.
- Qualified Privilege: showing of substantial need and undue hardship.

Opinion Work Product:

- Attorneys’ mental impressions, theories, conclusions or opinions.
- Receives *almost* absolute protection. Adversary must show:
 - (1) opinion work product must be at issue in the case; and
 - (2) compelling need for it.

Comparing A/C Privilege & Work Product

Attorney-Client Privilege

- Evidentiary protection.
- Lawyer-client communications.
- Beyond adversarial process.
- Narrowly construed.
- Absolute privilege.

Work Product Doctrine

- Evidentiary protection.
- Litigation-related materials.
- Focused on adversarial process.
- Broadly construed.
- Qualified immunity.

Waiver of Protections

—
Manner & Scope

Waiver of Privilege/Protection

(1) Waiver By *Voluntary* Disclosure

- E.g., forward to or include third party that's outside the scope of protection.
- E.g., purposeful use in litigation - advice of counsel defense.

(2) Failure to preserve in litigation.

- Failure to assert/object.

(3) Inadvertent or mistaken disclosure.



Scope of Waiver

❖ **No bright-line rule**

- Jurisdictional variations; case-by-case analysis.

❖ **Narrow view** – Only the communication or document(s) at issue.

❖ **Broad view** – Subject matter waiver.

- Waiver as to other – or even all – communications or documents on the same subject matter.

Confidentiality



Ethical Duty

Duty of Confidentiality

Model Rule of Professional Conduct 1.6: Confidentiality of Information (excerpts)

- “(a) A lawyer shall not reveal **information relating to the representation of a client** unless...
 - the client gives informed consent,
 - the disclosure is impliedly authorized in order to carry out the representation or
 - the disclosure is permitted by [an enumerated exception].”
- “(c) A lawyer shall make **reasonable efforts to prevent the inadvertent or unauthorized disclosure** of, or unauthorized access to, information relating to the representation of a client.”



Duty of Confidentiality

Notable Exceptions:

- Informed consent of the client.
- Disclosure is “impliedly authorized in order to carry out the representation.”
- Other recognized exceptions, e.g.:
 - Prevent death or bodily harm;
 - Prevent fraud or crime by client;
 - Disputes between lawyer and client;
 - Detect and resolve conflicts of interest;
 - Comply with other law or a court order.

See Model Rule Pro. Conduct 1.6(a), (b).

Duty of Confidentiality



- **Ethical duty on lawyers**
 - Breach: possible disciplinary action or sanction vs lawyer.
- **Focus:** Any info. relating to representation of a client.
- **Broad application:**
 - Beyond judicial proceedings.
 - Beyond attorney-client communications.

Privilege & In-House Counsel:

Organizational Considerations

Organizations & Privilege— Generally

❖ **Organization/Company = Client**

- Artificial construct.
- Acts/speaks through authorized agents/employees.
- See MRPC 1.13.

❖ **Key Privilege Considerations for In-House Counsel:**

- Who: which employees' communications are privileged?
- What: what *type* of communications are protected?
- Complexities re internal investigations and witness interviews.

Organizations: Whose Communications are Privileged?

Not all employees may fall under the A/C privilege....

- E.g., executives and management vs rank-and-file employees

Critical for internal investigations & witness interviews

- Does the privilege attach in the first place?

❖ **Courts apply two tests (generally):**

1. "Control Group Test"
2. "Subject Matter Test"

Whose Communications are Privileged?

Key jurisdictional differences...

Missouri

Subject Matter Test (majority)



Illinois

Control Group Test (minority)



Whose Communications are Privileged?

Subject Matter Test

Subject Matter Test = majority approach

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981)
- Most jurisdictions use some form (including MO).

General Test: Privilege extends to employees if...

- (1) information is being provided to enable lawyer to provide legal advice to the company; and
- (2) the subject matter is within the employee's duties or responsibilities

Employee's position or status is irrelevant.

Whose Communications are Privileged?

Control Group Test

Control Group Test = Minority Approach

- A few courts use (IL is one).

Test: Privilege extends to employees if...

- Employee has authority to control, or substantially participate in, a decision about action to be taken on legal advice.

Control/Decision-Making Ability is Key.

- E.g., senior management (officers, directors, departments heads)

Illinois: Relaxed Control Group Test

- May extend to employees with advisory role to decision-makers.

Communications with Former Employees

❖ Majority Approach (subject matter test states):

- Generally, communications about events or matters that *occurred **while the former employees worked for the organization*** are privileged.
- Privilege does NOT protect communications potentially affecting testimony (e.g., efforts to refresh recollection).

❖ Minority Views:

- A few courts refuse to recognize privilege for former employees.
 - E.g., control group test states (Illinois).
- Other courts: narrow view of privilege
 - E.g., confidential matters within former employee's knowledge when employed.

Communications with Former Employees

Practical Considerations:

1. Be cautious about communications with former employees.
2. Assume communications are NOT privileged.
3. Keep conversations narrow and factual.



Employee Witnesses:

Avoiding Unwanted Clients & Conflicts

Employees: Avoiding Unwanted Client Relationships

Generally, the company controls the privilege. But what if an employee claims personal privilege?

Common example: Officer or employee confiding in corporate counsel for personal purposes.

- E.g., seeks advice on company-related legal matter with embedded purpose of gauging individual liability.

Issues:

- Is there an attorney-client relationship with individual officer or employee?
- Who controls the privilege over communications?

Blurred Lines

Risks of unwanted employee client relationships:

1. Unintended A/C duties to employee.
2. Conflicts of interest and/or disqualification.
3. Disputes over who holds/controls the privilege....



Ethical Duties: *Dealing with Unrepresented Persons*

ABA Model Rules of Professional Conduct (excerpts):

- **Rule 4.3:** When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, *the lawyer shall make reasonable efforts to correct the misunderstanding.*
- **Rule 1.13(f):** lawyer must *identify representation of the corporation alone* "when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents."

❖ Main Points:

- Duty to ensure there's no misunderstanding of lawyer's role.
- Duty to clarify role as corporation's lawyer if interests may be adverse.

The “*Bevill* Backstop”



The *Bevill* Doctrine

- *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986).

Judicial presumptions:

- Consultation was in corporate capacity.
- No attorney-client relationship with employee.
- Corporation controls privilege.

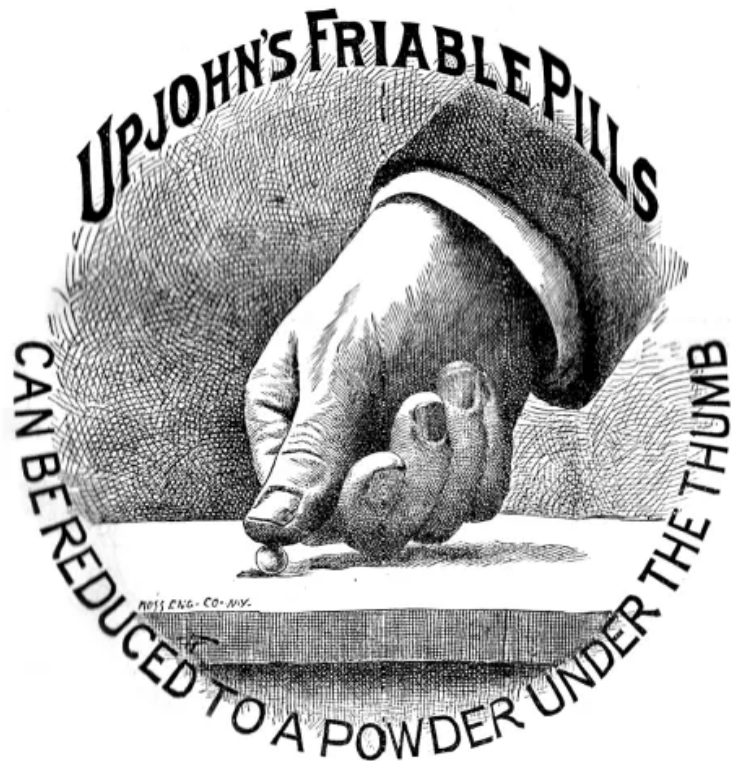
Presumptions may be overcome, but difficult test for employee to do so....

The *Bevill* Test: Five-Factor Analysis

To overcome default assumptions and invoke a personal attorney-client privilege, employee must show:

1. Sought legal advice from the lawyer;
2. They made it clear that they were seeking legal advice in their individual rather than in their representative capacity;
3. Company lawyer agreed to provide individual advice regardless of possible conflicts;
4. Communications were confidential; and
5. Communications' substance "'did not concern matters within the company or the general affairs of the company.'"

Setting Boundaries: *Upjohn* Warnings



***Upjohn Co. v. United States*, 449 U.S. 383 (1981)**

- Privilege is between lawyer and company, only.
- Employee has no control over waiver of privilege.
- Unless individual attorney-client relationship with employee.

Decision gave rise to “*Upjohn* warnings”:

- Given to employees before interviews.
- Remove doubt about lawyer’s role and purpose of the communication.
- Avoid individual claims of privilege.

Upjohn Warning – Example:

1. We represent the company; not you, the employee.
2. For our investigation, we're gathering info. for the purpose of providing legal advice to our client, the company.
3. This interview is part of that investigation. Anything discussed may be shared with company.
4. Our conversation is protected by the A/C privilege. However, the privilege is held by the company. The Company, alone, can decide to waive it and disclose our discussion to third parties.
5. The company may decide to share this discussion and any info. it learns with third parties, without your permission or notice.
6. For this discussion to be privileged, it must be kept in confidence. Please keep our discussions confidential. Do not share this conversation with anyone, including other employees, without authorization or unless required by law. That is what keeps this conversation privileged.

Upjohn Warnings – Practical Tips

- ❖ Administer full *Upjohn* warning whenever interviewing employees.
- ❖ Document *Upjohn* warning was given.
- ❖ If possible, have another lawyer present.



Tricky Questions from Employee Witnesses

"Do I need a lawyer?"

- Response: "I cannot provide advice on that issue, but you have the right to consult with your own, separate counsel."
- Be willing to suspend interview, if needed.

"What if I refuse to cooperate in this investigation?"

- Response: advise of pertinent corporate policies applicable to internal investigations (if any). May result in discipline.

ABA Formal Ethics Op. 514 (Issued 1/8/25)

Issue:

- ❖ What are lawyers' obligations when advising an org-client about a potential course of conduct that may pose legal risks to the org's constituent(s) (i.e., employees, officers, board members, etc.)?
 - E.g., lawyer advising organization's executive about potential action – such as statements or conduct to be made by executive on the org's behalf – which may subject the executive to civil or criminal liability.

ABA Formal Ethics Op. 514 (continued)

Opinion:

- ❖ **Disclosure to org-client:** ethics rules may require lawyer (inside or outside counsel) to advise organization if future action may pose a legal risk to org's constituents, depending on particular facts.
- ❖ **Dealing w/ nonclient constituents:** be truthful; don't mislead; and take reasonable steps to avoid or dispel any misunderstandings about lawyer's role.

In-House Counsel & Privilege:

Dual-Role Considerations

In-House Counsel: What *Type* of Communications are Privileged?

Privilege does NOT attach to all communications with in-house counsel!

- Cannot create privilege by cycling through in-house lawyer.
- E.g., executive copying in-house counsel – does not render privileged.

Inquiry: what was the purpose of the communication?

- Seeking or giving legal advice?
- Operational or business communications?

In-House Counsel: Wearers of Many Hats

Other/Additional Roles

- Business or operational duties
- Supervision of other groups/departments
- Compliance roles

Legal vs. Business Advice

- May give both
- Intertwined roles
- Multipurpose communications



What Was the *Purpose* of the Communication?

❖ **Primary Purpose Test (Majority)**

- Was the *primary* or *predominant* purpose to render or solicit legal advice?
- If legal advice is just *one purpose* – and not primary – only the legal advice is privileged.

❖ **Significant Purpose Test (Minority)**

- Was a “significant purpose” to solicit or render legal advice?
- If so, typically the entire communication is privileged.

Judicial Presumptions re: Legal vs Business Advice



Courts use different, rebuttable presumptions:

➤ **Outside Counsel:**

- Presumption it's legal advice.

➤ **In-House Counsel:**

- Some courts: presume more likely business than legal.
- Others: presume legal advice if lawyer is in legal department / working for GC.

Internal Investigations

Specific Privilege Issues & Considerations

Internal Investigations

Issue: Adversary in litigation seeks communications and documents related to internal investigation performed by company.

Is the investigation within the scope of A/C privilege and/or work product protections?



1. Bring in the *Suits*



In-House Counsel

- As soon as legal risk is identified.
- Trigger privilege /protection.
- Document that they are engaging legal to provide legal advice and legal guidance for investigation.

2. Consider Engaging Outside Legal Counsel for Risky/Complex Complaints

- **When to Call Outside Counsel?**

- If a complaint is likely to lead to litigation, consider engaging outside counsel to investigate.

- **Don't Overlook the Engagement Letter!**

- Make sure it is clear that outside counsel is being retained for the purposes of rendering legal advice and in anticipation of potential litigation.

3. Keep Facts Separate From Analysis and Recommendations

Attorney-Client Privilege:

- Arguable privilege if communications otherwise qualify.
 - E.g., confidential investigative report prepared by attorney and submitted to client for purpose of providing legal advice.
- Underlying facts are still discoverable.
 - E.g., events/acts that are the subject of the investigation.

Work Product Protection:

- If prepared in reasonable anticipation of litigation, it's more likely to be protected.
- Especially if created, directed or requested by legal counsel (in-house or outside).

4. Be Mindful of the Impact of Communications with Third Parties

➤ **Regulators**

- Statutory examination authority: may override privilege/protection.

➤ **Independent Auditors**

- Privilege – generally, disclosure of privileged materials results in waiver.
- Work product – it depends; not necessarily a waiver.

➤ **PR Consultants**

- Disclosure to facilitate legal representation?
- E.g., May apply in high-profile cases where PR advocacy may be important to address claims that may result in litigation.

4. Be Mindful of Impact of Communications with Third Parties (continued)

➤ **Board of Directors**

- Board = Client → privileged
- Written Reports
 - Most often privileged, assuming other criteria are met.
 - But consider outlines or executive summaries with no legal conclusions.
- Oral Presentations Preferred

Key Takeaways & Tips



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Key Takeaways & Tips

- **Be vigilant about triggering and protecting privilege:**
 - Keep the privilege circle small and “need to know.”
 - Keep it narrow and factual with non-decision-making employees.
 - Assume communications with former employees are *not* privileged.
- **Identify and clearly delineate that the org is the client:**
 - Regularly remind or correct constituents that you’re counsel for the organization only.
 - Be mindful that client constituents are not your “client.”
- **Engagement letters: carefully define the client and the scope of the representation**
 - Indicate if work is for the purpose of providing legal advice and if in anticipation of litigation (especially for investigations).

Key Takeaways & Tips

- Pick up the phone: favor verbal over written communications.
- Segregate legal versus business matters/communications, where feasible.
- Use “privilege” and “work product” labels where appropriate, but avoid overuse.
- Educate employees personnel to safeguard privilege.

Key Takeaways & Tips

Internal Investigations:

- Conduct under attorney direction/supervision; involve counsel ASAP.
- Document purpose in engagement letters (conducting to provide legal advice and is in anticipation of possible litigation).
- Carefully select attorney investigators to avoid potential disqualification in the event of litigation.
- Provide *Upjohn* warnings to witnesses every time.
- Be careful with public disclosure of findings or results.

Contact Us:

Amy Blaisdell

Partner

UB Greensfelder LLP

ablaisdell@ubglaw.com

(314) 516-2642

Andrew Ricke

VP, Prof. Services Counsel

Lockton Companies

Andrew.Ricke@Lockton.com

(785) 691-6441