

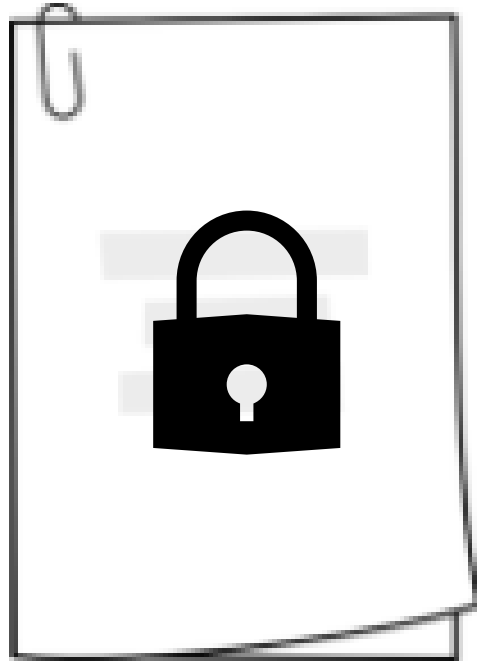
# **The Corporate Attorney-Client Privilege**

**Presented by Kim Steuterman, Jayna Marie Rust, and John Kingston**



**THOMPSON  
COBURN LLP**

# Basic Privilege Requirements



1. Communication between a lawyer and a client
2. For the purpose of securing legal advice
3. Made and kept in confidence
4. Privilege was not waived

# Common Misconceptions

- The privilege does not protect underlying facts
- The privilege does not protect non-legal advice
- The privilege does not apply retroactively

*“Looping in” a lawyer does not protect prior discussions*

# Corporate Client Complications



Who speaks for the client?

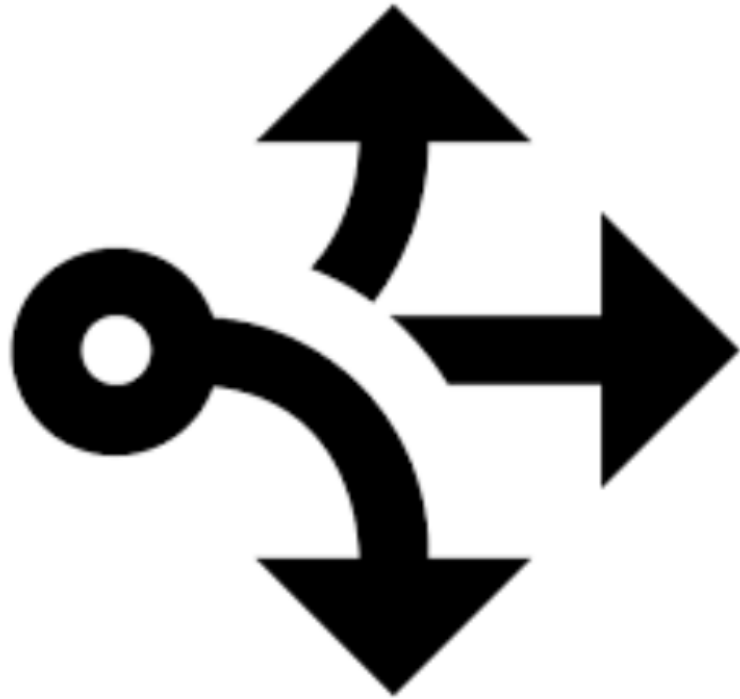
What is the lawyer's role?

What communications are confidential?

Different Jurisdictions apply Different Tests

Privilege Decisions are fact-specific and policy-driven

# Choice of Law



Matters most in disputes over who communicates on the client's behalf

Generally controlled by the law governing the subject of a given dispute.

--FRE 501

- Federal common law (*Upjohn*, etc.) should govern federal claims (Lanham Act, False Claims Act, etc.)
- State law should govern state claims (contract, tort, etc.)

Don't expect state courts to apply federal law

# Who is the “client”?



- Default Position:  
In-house counsel represents the company—*not its agents*
- Frequently misunderstood by company agents
- Counsel should be aware of perverse incentives

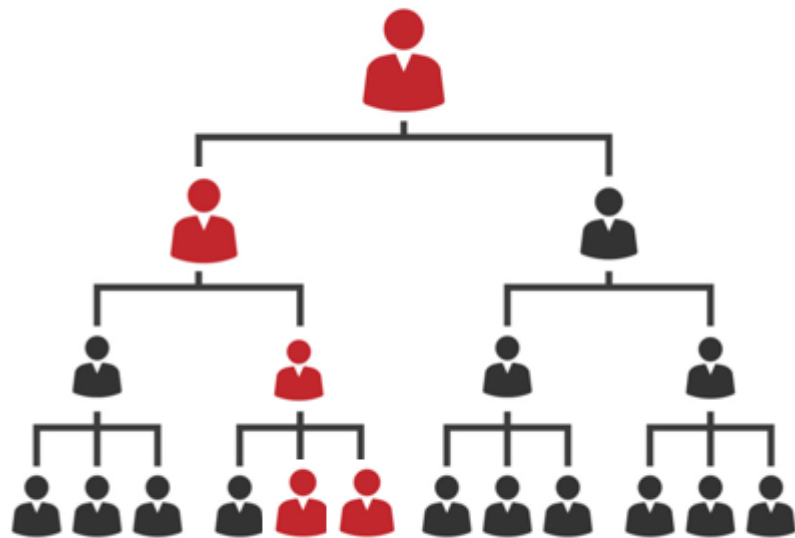


**Feb. 2020** – Penn State General Counsel sanctioned where Penn State administrators mistakenly believed she was their lawyer



**Jan. 2022**—Elizabeth Holmes convicted of fraud after she was prevented from invoking privilege for communications with Theranos lawyers

# Who speaks for the corporate client?



Includes officers, employees, and their  
“functional equivalents”

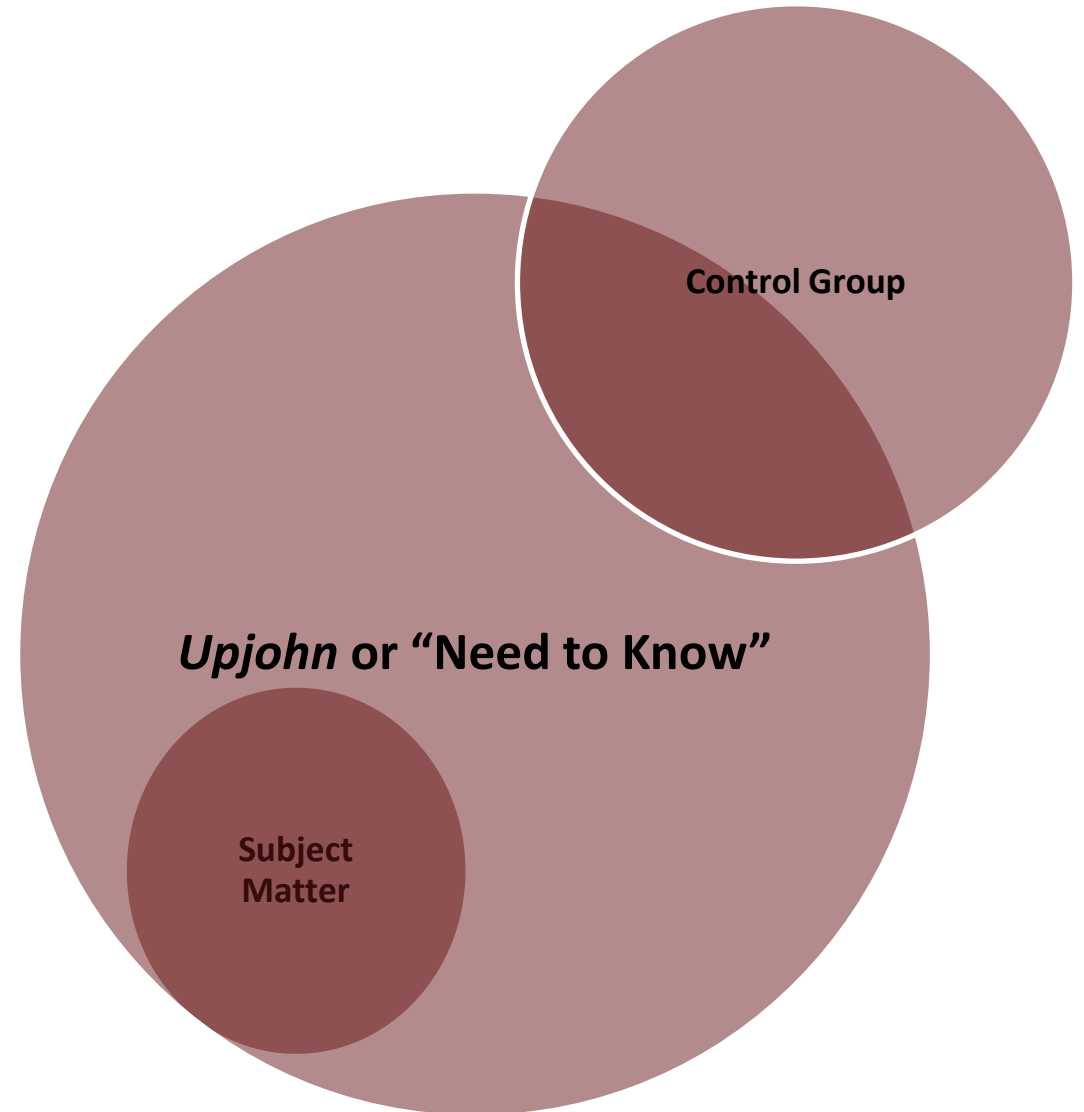
*Generally* a corporate client communicates through those who

- Must decide
- Can provide relevant information
- Must follow counsel’s instructions
- Will assist in litigation or any other legal proceeding

# Who speaks for the corporate client?



1. “Control Group” test – Only corporate decisionmakers  
(now applied in few jurisdictions)
2. “Subject Matter” test – Subject of the privileged communication is within the scope of employment
3. *Upjohn* or “Need to Know” test –  
Does the lawyer *need to know* information possessed by the corporate agent or does the agent *need to know the* lawyer’s advice





# Upjohn Factors



- Employee must provide information *necessary* for the company *to secure legal advice*
- Information sought is *unavailable to higher management*
- Information sought is *within the scope* of employee's duties
- Employees are *aware of the purpose* for the communications—securing legal advice
- Communications are *ordered to be kept confidential*—and so kept
- Policy considerations

# “Upjohn Warning”

## Two Goals:

- I. Protect corporate privilege
- II. Avoid ethical difficulties

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1. We have been asked by the company to investigate [the issue] **so that we can provide legal advice.**

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2. We think you may have relevant information that you obtained **because of your status as an employee.**

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3. The company is our **only client.** You can retain your own lawyer if you wish.

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4. Our communications must be **kept confidential** and are **protected** by the company’s attorney-client privilege.

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5. The privilege **belongs to the company.** It may choose to waive the privilege and disclose our communications to others.

# Upjohn – Best Practices



- Make privilege explanations a habit—but try not to call them “*Upjohn* warnings”
- Conduct—and memorialize—regular privilege training that includes *Upjohn* explanations
- Consider including an *Upjohn* explanation in litigation hold notices

# In-House Counsel



- Frequently serve multiple roles
- No presumption that communications are privileged **(in law or practice)**
- Courts apply heightened scrutiny to ensure the attorney is acting as a lawyer

# What is “Legal Advice”?



## Advice From a Lawyer to Secure

1. A Legal Opinion,
2. Legal Services, or
3. Assistance in a Legal Proceeding

- Mixed Purpose Communications
- *Primary Purpose* (state) vs. *Significant Purpose* (federal)
- *In re Grand Jury*  
S.Ct. No. 21-1397

Explicitly say “primary purpose”

# Drafts of Public Documents



**Note: Work Product protection is not available for non-litigation drafts**

Prevailing view is that drafts remain privileged.

Drafts likely protected if

1. Prepared or reviewed by lawyer at the client's request
2. Submitted to lawyer with request for advice
3. Contain lawyer's notes or comments

# Crime / Fraud Exception

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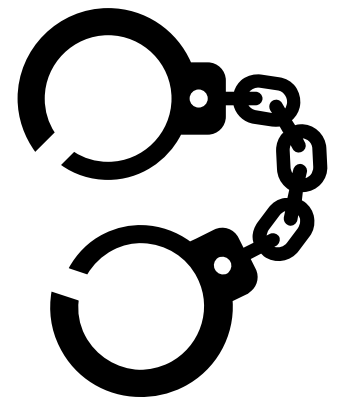
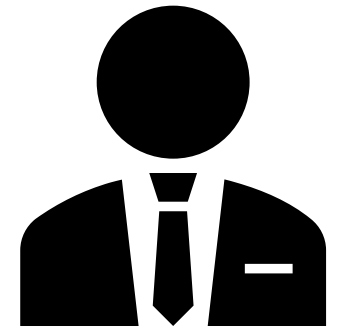
Privilege does not protect communications made “for the purpose of getting advice for the commission of a fraud or a crime”

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Exception applies to **future wrongdoing**, not wrongdoing in the past  
*But* wrongfully concealing past wrongdoing can be construed as future wrongdoing

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Scope of the exception is gradually being expanded by the courts through lowered thresholds of proof and expanding the conduct considered “criminal”



# Electronic Mail Chains



From: [JDoe@company.com](mailto:JDoe@company.com)  
Date: June 23, 2021 at 6:59 PM EDT  
To: [BJones@company.com](mailto:BJones@company.com)  
Subject: FW: Operations Incident – Confidential Legal Advice – DO NOT FORWARD

Bobby,

See below. Looks like the company might have a problem here.  
-jd

From: [Hwilliams@company.com](mailto:Hwilliams@company.com)  
Date: Wednesday, June 23, 2021 4:53 PM  
To: [JDoe@company.com](mailto:JDoe@company.com)  
Cc: [Jcash@company.com](mailto:Jcash@company.com); [Dsmith@company.com](mailto:Dsmith@company.com)  
Subject: FW: Operations Incident – Confidential Legal Advice – DO NOT FORWARD

John,

I spoke to David in legal and he agreed that you might be able to provide some information on this. He asked that you call him as soon as you can.

Hank

From: [Dsmith@company.com](mailto:Dsmith@company.com)  
Date: Wednesday, June 23, 2021 2:48 PM  
To: [Tsmith@company.com](mailto:Tsmith@company.com); [Hwilliams@company.com](mailto:Hwilliams@company.com); [Dparton@company.com](mailto:Dparton@company.com)  
Cc: [Jcash@company.com](mailto:Jcash@company.com)  
Subject: Operations Incident – Confidential Legal Advice – DO NOT FORWARD

All,

The company has asked the legal department to provide legal advice regarding possible litigation exposure from last week's operations incident. John Cash, the vice president in charge of your group, is unable to provide information we need to provide legal advice and suggested we seek the required information from you. As usual, the legal department is the company's counsel in this investigation and is not acting as your attorney. (Employees are always welcome to retain counsel of their own should they so desire.) Please note that you are not permitted to share the content of any discussions or correspondence with counsel inside or outside the company. In certain circumstances, the company may decide to waive its attorney-client privilege and share information generated during this investigation with third parties.)

Likely not privileged  
But employee lacks  
authority to waive  
for company

Likely privileged, but  
would be preferable  
for counsel to forward

Reasonable efforts to  
protect confidentiality

*Upjohn* Warning



# The Attorney Work-Product Doctrine



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# Work-Product Protection



- Protects tangible things prepared by the attorney or on the attorney's behalf in anticipation of litigation
- Held by the client and the attorney
- Two types
  - Ordinary -- facts, photographs, surveys, databases
  - Opinion -- attorney opinions, judgments, thought processes, notes, memos, etc.

# Ordinary vs. Opinion Work Product



**Ordinary** work product may be discoverable upon a showing of substantial need



**Opinion** work product is discoverable only in extraordinary circumstances

# Anticipation of Litigation Considerations



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Was a lawsuit filed? If so, would the material be prepared absent litigation?

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Were the disputed legal issues or potential adversaries identified when the materials were created?

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Was a litigation hold in place when the materials were created?  
*(hold should be implemented as soon as litigation is reasonably anticipated)*

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Were the materials prepared outside the ordinary course of business?

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Was a lawyer involved in the creation of the material? (not required, but useful)

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Was the material created for management, regulatory, or lawsuit-related purposes?

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Does the subject matter of the material necessarily or inevitably lead to litigation?

# Waiver



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# Waiver Distinctions



## **Attorney-Client Privilege**

Waiver of a privilege for one communication waives privilege for all communications on the same subject matter

Disclosure to any third party potentially waives

## **Work-Product Protection**

Waiver operates one document at a time (no subject matter waiver)

Only disclosure to an adversary waives

# Jane Doe, et al. v. Baylor University



- Baylor hired Pepper Hamilton to conduct an internal investigation of alleged mishandling of sexual assault claims
- Baylor released summaries of findings to demonstrate accountability and transparency
- Because public disclosures were related to material created in preparation for litigation in subsequent Title IX lawsuit, the district court ordered the production of tens of thousands of documents and text messages
- District court suggested Baylor should have hired separate law firms one for public relations investigation and a second for litigation preparation



# Involuntary/Compelled Disclosure



- Generally, compelled disclosure or involuntary disclosure (such as seizure by foreign prosecutors) is not a waiver
- U.S. courts may consider whether opportunity or mechanism to challenge or stop seizure existed
- BUT, even an involuntary disclosure could be considered a waiver if the company fails to take steps to protect and preserve the privilege



# Non-Waiver Disclosures to Third-Party “Facilitators”



Privilege protection not waived  
by including third parties  
“necessary to facilitate  
communications” between  
lawyer and client

## Narrow Approach

Third party consultant’s  
role must essentially be  
analogous to that of a  
translator

## Broad Approach

Any third party who  
provides services that  
facilitate the ability to  
provide legal advice

# Facilitator Disclosures



- Limited authority for extending privilege to:

• <b>Auditors / Accountants</b>	• <b>Investment Bankers</b>
• <b>Public Relations Firms</b>	• <b>Potential Acquirors</b>

- Non-waiver “facilitator” disclosures are limited and fact-specific
- Courts will not extend the privilege for “ordinary course” activities

# Best Practices and Practical Tips



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# Dual Role Lawyers – Best Practices



- Segregate legal and non-legal files
- Document law-related reasons for consultation
- Control tone of communications  
***Advise, Don't Report***

# Privilege Recommendations



- When in doubt, use the telephone
- Make sure all message recipients either need to know legal advice or have information that you need to know
- Legal memoranda should include opinions and analysis and avoid unadorned recitations of facts
- Where possible, outside counsel should retain and communicate with “facilitator” consultants during litigation
- Explain privilege limits and waiver to employees at the beginning of each project, remind them frequently, and memorialize your instructions

# Remote Meetings and Data Exchange



- Control and monitor distribution groups
- Include *Upjohn* warning in calendar invites
- Prevent recording and inform participants of prohibition
- Prevent eavesdropping by employing virtual waiting rooms
- Use encrypted messaging and data transfer; if possible, use a virtual private network service
- Disable smart speakers and virtual assistants while providing legal advice from home

# Best Practices: Email Format



- Sender Identity: In-house counsel should be the sender rather than the management team that counsel is working with.
- Contents: The contents of the message should be clearly legal, stating that it contains legal advice or legally privileged information.
- Confidentiality: The message should state that it is confidential and instruct recipients to maintain confidentiality.
- Recipients: Recipients should be identified and the necessity of their inclusion in confidential correspondence should be stated.

# Key Words and Phrases



- Don't rely on boilerplate buzzwords
- Invoking Attorney-Client Privilege:
  - State that the “primary purpose” is providing legal advice
  - “information needed to provide requested legal advice”
- Invoking Work Product
  - “related to potential litigation”
  - “my thoughts and mental impressions”
- Protecting Confidentiality
  - Consider “DO NOT FORWARD” instead of conclusory “Privilege” and “Work Product” labels on e-mails



# Communicating with Foreign Counsel / Clients / Others



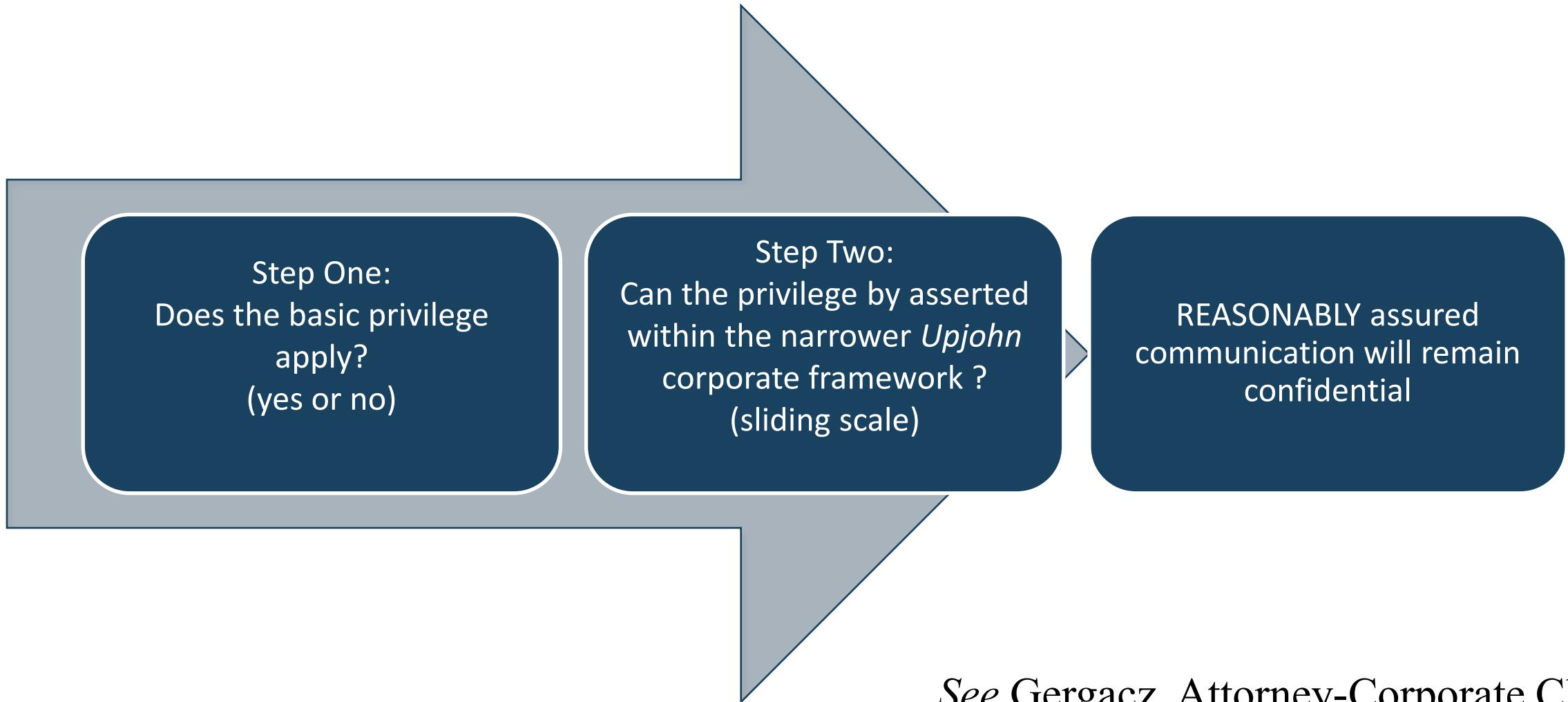
- Understand the privilege laws of applicable foreign jurisdictions
- Use separate email threads for communications relating to U.S. legal proceedings and U.S. laws, with clear identification
  - Ensure American-barred attorney is involved in these communications
  - Store these communications only in United States
- Consider governing law of your international transactions
  - May be able to assert privilege protections as a matter of contract terms

# Quick Reference



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# Two Step Analysis



# Step One: Basic Privilege



- The privilege holder speaks for the corporate client (See *Upjohn* Step Two).
- The communication was with a person who
  - is a member of the bar of a court (or his or her subordinate), and
  - is acting as a lawyer in connection with the communication.
- The communication relates to a fact of which the attorney was informed by the client
- without the presences of third parties, and
- for the primary purposes of obtaining
  - a legal opinion,
  - legal services, or
  - assistance in a legal proceeding
- (and not for the purpose of committing a future crime or fraud).
- The privilege has been claimed and has not been waived by the company.

# Step Two: Upjohn Factors



- Was the employee ordered to provide information so the company can secure legal advice?
- Was the information sought from the employee unavailable to higher management?
- Was the information sought within the scope of the employee's duties?
- Was the employee aware that he or she was communicating for the purpose of securing legal advice?
- Was the employee ordered to keep communications confidential and did he or she do so?
- Is a privilege assertion consistent with public interest in ensuring the observance of law?

# Intra-corporate Project or Investigation



- Prepare writing confirming purpose of project is the provision of legal advice and identifying general legal problems to be addressed
- Determine whether probable venue is a “control group” jurisdiction
- Provide and memorialize *Upjohn* warning to all participating non-lawyer employees
- Confirm segregation of relevant confidential material
- Identify and memorialize list of “need to know” employees
- Determine whether litigation is anticipated and, if so, initiate a hold
- If investigation relates to U.S. law, ensure investigation is by U.S.-barred attorney, even if investigation is not in United States
  - Unless otherwise necessary, maintain documents only in United States

# *Upjohn Warning*



- We have been asked by the company to investigate [the issue] so that we can provide legal advice to the company.
- We think you may have relevant information obtained in your capacity as an employee.
- The company is our client; we are not your personal lawyers. If you want to retain your own lawyer, you may do so.
- Your communications with us are confidential and protected by the attorney-client privilege. You must keep our communications confidential.
- The attorney-client privilege belongs to the company. It may choose to waive the privilege and disclose our communications to third parties.

# Privilege Resources



- John W. Gergacz, Attorney-Corporate Client Privilege (3d Ed. Thompson Reuters)
- Jenner & Block, Protecting Confidential Legal Information
  - [https://jenner.com/system/assets/updates/1496/original/2019%20Jenner%20&%20Block%20Attorney-Client%20Privilege%20Handbook%20\(Final\).pdf?1566852778](https://jenner.com/system/assets/updates/1496/original/2019%20Jenner%20&%20Block%20Attorney-Client%20Privilege%20Handbook%20(Final).pdf?1566852778)
- McGuire Woods, Practitioner's Summary Guide to the Attorney-Client Privilege and the Work Product Doctrine
  - <https://media.mcguirewoods.com/publications/Practitioners-Summary-Guide-Attorney-Client-Privilege.pdf>



# Questions?



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