



PROGRAM MATERIALS

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Ethics-Attorney Client Privilege for In-House Counsel

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ATTORNEY CLIENT PRIVILEGE FOR IN-HOUSE COUNSEL

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Overview

- Confidentiality, Attorney Client Privilege and Work Product
- State and Federal Law
- Business vs. Legal Advice
- International Law & Attorney Client Privilege
- Email Communications
- Internal Investigations
- Joint Defense/Common Interests

Confidentiality, Attorney Client Privilege and Work Product

Ethical Duty of Confidentiality - ABA MR 1.6

- Attorney cannot reveal confidential information relating to the representation
- unless the client gives informed consent or
- Disclosure is implied authorized
- Exceptions:
 - Death/substantial bodily harm
 - Prevent/mitigate/rectify injury to financial interests
 - Prevent/mitigate/rectify crime of fraud
 - Etc.

Attorney Client Privilege

What is the Applicable Law?

- Does the claim arise under federal or state law?
- Federal common law principles regarding attorney client privilege apply unless the claim involves state law
- Where claim is based on state law, privilege is a substantive matter and governed by state law
- Where foreign law is involved, privilege may differ significantly

Federal Attorney Client Privilege Elements

- Confidential
- Communication
- Between client and lawyer
- For purpose of rendering legal advice

Federal Attorney Client Privilege - Corporate

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

- (i) communication between employee and corporate counsel;
- (ii) information was not available to upper management;
- (iii) the employee communicating with attorney at direction of superior;
- (iv) superior direction to secure legal advice for the corporation;
- (v) subject matter of communication within scope of employee's duties;
- (vi) employee aware that they were being questioned to obtain legal advice for the corporation; and
- (vii) communication was intended to be confidential.

State Law - California Evidence Code Section 952

“confidential communication between client and lawyer” means

- ☐ information transmitted between a client and his or her lawyer
- ☐ in the course of that relationship and
- ☐ in confidence by a means
- ☐ which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted,
- ☐ and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

State Law - California Evidence Code Section 954

- Client has privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:
 - The client or client's agent or
 - The lawyer
- The relationship of attorney and client shall exist between a law corporation ... and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons.
- The word “persons” as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

DOMINANT PURPOSE TEST

***D.I. Chadbourne v. Superior Court*, 60 Cal. 2d 723 (1964)**

- employee of a defendant corporation is also a defendant
- communication emanates from the corporation
- employee has no connection with those matters other than as a witness
- employee's statement is required in the ordinary course business
- employer directs the making of the report in confidence to its attorney
- the dominant purpose of report will control
- a communication does not lose its privilege merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency
- number of hands through which the communication travel
- intent of the person from whom the information emanates
- intent of the employer

Work Product

- Common Law: *Hickman v. Taylor*, 329 U.S. 495 (1947)
- Fed. Rule Civ. P. 26: documents and tangible things prepared in anticipation of litigation or for trial
 - Qualified work product: discoverable only upon showing of substantial need & inability to obtain without undue hardship
 - Absolute work product: impressions, conclusions, opinions and legal theories are not discoverable
- Fed. R. Crim. P. 16: protects reports, memoranda and internal defense documents made in connection with an investigation to defendant, agents and attorneys

Business or Legal Advice

Business vs. Legal Advice

- Business advice is not protected
- Generally, attorney-client privilege is inapplicable where the attorney merely acts as negotiator or providing business legal advice.
 - *Aetna Cas. & Sur. Co. v. Sup.Ct.* (1984) 153 Cal. App. 3d 467.
- California courts consider the “dominant purpose” of the in-house counsel. Court must “determine the dominant purpose of the relationship between the insurance company and its in-house attorneys, i.e., was it one of attorney-client or one of claims adjuster insurance corporation.”
 - *Costco Wholesale Corp. v. Superior Court of Los Angeles County* (2009) 47 Cal. 4th 725.

Application of Dominant Purpose Test

- The key question is whether the dominant purpose behind each was or was not the furtherance of the attorney-client relationship,
- recognizing that even though an attorney is hired to conduct business affairs, he or she may be called on to give legal advice during the course of the representation, and
- documents related to those communications should be protected notwithstanding the original purpose of employing the attorney.
- *Kaiser Foundation Hospitals v. Superior Court* (1998) 66 Cal. App. 4th 1217.

Business or Legal Advice

- Test applies only if the communication includes both business and legal advice
- Court vary in applying the dominant purpose test broadly or narrowly
- Widespread circulation may suggest the communication is business rather than legal advice
 - *In re Vioxx Prods. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007)

International In-House Attorney Client Privilege

International Corporate Setting

- US courts recognize privilege protection for foreign attorneys
- Some countries allow in-house attorneys to provide legal advice
- EU countries do not extend privilege protection to communications to and from in-house attorneys
- Some US courts recognize foreign privilege law and do not protect in-house communications

“Touch Base” Test

- US courts will look at whether the communications touched base with the US,
 - Came to or from the US
 - Had a significant relationships to the US.
 - Discussed a U. S. issue
- Under such circumstances, courts will apply US privilege law

Communications that Did Not Touch Base

- Some courts may still apply US law
- If court determines that the privilege law of another country is applicable, expert testimony may be required as to the privilege
 - *Gucci Am., Inc. v. Guess, Inc.*, No. 09 Civ. 4373 (SAS) (JLC), 2010 U.S. Dist. LEXIS 65873 (S.D.N.Y June 29, 2010)

INTERNATIONAL CORPORATE EXAMPLES

Court examined numerous documents, finding:

Germany had a compelling interest and some documents were privileged under German law,

Korean law would not require disclosure of other documents,

Some documents “touched base” with the US, and were protected under US law, and

Other documents did not contain confidential information, and were not protected

Other documents could be produced in redacted form.

- *Astra Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92, 102 (S.D.N.Y. 2002)

International Attorney Client Privilege

Swiss in-house attorneys' communications not protected by Swiss confidentiality protections and must be disclosed.

— *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69 (S.D.N.Y. 2006)

Chinese law does not recognize attorney-client privilege or work product doctrine; does include a duty of confidentiality; but Chinese courts would allow disclosure under some circumstances. Chinese in-house legal counsel need not be members of a bar or have legal credentials. Held: attorney client privilege does not apply to communications between legal department members who are not attorneys.

— *Wultz v. Bank of China*, 979 Fed. Supp. 479 (S.D.N.Y. 2013)

International Corporate Examples

- European Union's legal professional privilege rules do not protect communications between companies and their in-house counsel.
 - *Akzo Nobel Chem. Ltd. v. European Comm'n*, Case C-550/07 P, 26 Law. Man. Prof. Conduct 584 (Euro. Ct. Justice, Sept. 14, 2010).
- U.S. courts may take the “touch base” approach where the law of the country with which the communications “touch base” matters. In *Anwar*, neither laws of the Netherlands or the U.S. protected the communication when the Dutch in-house attorney was not a member of the bar in the Netherlands.
 - *Anwar v. Fairfield Greenwich Ltd.*, No. 09 Civ. 118 (S.D.N.Y. July 8, 2013).

Handling Email Communications

E-Mails

- Important to consider who requested a response
 - company's management or
 - company's attorney
- Purpose of the communication

See *In Re Google, Inc.*, 462 Fed. Appx. 975 (Fed. Cir. Feb. 6, 2012)(finding no privilege when employee responded to the email at the request from Google's management and in-house counsel was merely "cc'd". Also finding purpose of communication was not for legal strategy but negotiation strategy.)

Sodexomagic, LLC v. Drexel University, Memorandum re: Privilege Logs, No. 16-5144 (E.D. Penn. February 23, 2018)

President of Food Service Corporation A sends email to General Counsel: “*What are the requirements of a binding contract for food service contract with College X?*”

VP to President: “*Sales Manager reached a great deal for us. Let’s keep the written contract simple and direct to close the deal ASAP.*”

President to Corporation A’s VP, who as part of her job is engaged in negotiations with College X: “*Our General Counsel has advised me that in order to form a binding contract with College X, we need to agree on requirements 1, 2, and 3.*”

Sodexomagic, LLC v. Drexel University, Memorandum re: Privilege Logs, No. 16-5144 (E.D. Penn. February 23, 2018)

General Counsel to in-house Paralegal: “*The President wants a contract with 1 through 6. Please take language from our prior contract with College Z to get the process started.*”

VP to Paralegal: “*I heard you are working on our contract with College X. Please write these exact words into provision 6: ‘It is hereby agreed that the amount is \$400.’*”

General Counsel to VP: “*Here is my proposed contract attached to this e-mail. Show this to College X, but tell them it is non-negotiable.*” – is the attachment privileged?

Sodexomagic, LLC v. Drexel University, Memorandum re: Privilege Logs, No. 16-5144 (E.D. Penn. February 23, 2018)

VP to College X: *"Here is our proposed contract. Our General Counsel says since we are giving you such a good deal, we must insist on these terms as written. Please send it back with your signature."*

Emails by non-lawyers within each party, and between Corporation A and College X, following execution of the contract, disputing its interpretation, and at times indicating they rely on their counsel's advice.

As a result of a dispute on contract interpretation between the parties, VP discusses this with President and then contacts General Counsel about her interpretation of the contract and GC responds. VP forwards this email to College X.

PRIVILEGE AND INVESTIGATIONS

INTERNAL CORPORATE INVESTIGATIONS

- Consider application of attorney client privilege
 - Who is the client?
 - Corporate constituents
- Consider application of work product doctrine
 - Anticipation of litigation
- Split as to materials prepared in anticipation of one matter being discoverable in another matter
- Voluntary disclosure of a communication to a third party results in waiver as to subject matter of the communication
 - Disclosure to auditors
 - Disclosure to government
- Reliance on advice of counsel waives attorney client privilege

***United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)**

- CFO contended he reasonably believed that counsel represented both the company and him as an individual during an internal investigation
- Trial court found that in the absence of any written consent regarding conflict of interest, statement provided by CFO must be suppressed.
- Ninth Circuit overturned decision
 - the disclosures were not made in confidence for the purpose of providing information to the outside auditors and SEC, and the CFO was aware of this.
 - When the disclosure occurred, the CFO did not claim it was privileged.
- Also, at meeting with CFO, attorneys gave him an *Upjohn* warning stating that anything said to the lawyers is within the company's attorney client privilege, and subject to waiver at the sole discretion of the company, and that he might wish to consult with his own attorney.

Employment Context

- “[The employer] cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney client privilege and work product doctrine are thereby waived.”
- *Wellpoint Health Networks, Inc. v. Sup.Ct.* (1997) 59 Cal. App. 4th 110, 128.

Warning the Witness - ABA Model Rule 1.13 and 4.3

- Attorney for corporation represents the entity.
- Concurrent representation of constituents may be reasonable
- Attorney must clarify identity of the client to a constituent when the constituent's interests are adverse to the entity
- Attorney dealing with a person who is not represented shall not state or imply the lawyer is disinterested
- Attorney shall correct any misunderstanding regarding the lawyer's role
- Attorney shall not give legal advice to an unrepresented person, other than to secure counsel, if interests conflict

Warning the Witness - Trends

- Warnings discourage candor
- Watered down warnings
- Employees cooperate to avoid termination
- Advise constituents that facts may change
- Verbal vs. written warnings
- Arrange for separate counsel/pool counsel

Warning the Witness – Additional Considerations

- Consider supplemental warnings
- “Are you my lawyer?”
- “Do I need a lawyer?”
- “What if I don’t cooperate?”
- Advice regarding disclosure of information to the company & to the government

Joint Defense Agreements

- Two or more parties have a “common interest”
- Communications by one party to a lawyer in the presence of another lawyer are not discoverable by a third party
 - Each party has separate counsel
- Entering a joint defense agreement may limit the company’s later ability to disclose information to the government in exchange for leniency

Advantages and Disadvantages of Joint Defense Agreements

- Advantages
 - *Ability to share selected communications*
 - *Expands privilege protection beyond clients*
- Disadvantages
 - *Most courts require anticipation of litigation*
 - *Difficult to predict judicial scrutiny*
 - *Courts disagree over extent of commonality required*
 - *Increased likelihood of adversaries seeking documents*