

Attorney Ethics – Who is your client? & Other Crucial Questions

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Why are we here?

- Most General Counsels would say they act as the lawyer to the institution, the board, and management
- You will frequently ask yourself, “Who is the client?”
- But, you will also frequently ask yourself...“am I even acting as a lawyer?”
- This presentation will address these and other crucial questions

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Roadmap

- Why attorney-client privilege exists; elements of privilege
 - What is a communication?
 - Who is the client?
 - What is “in confidence”?
 - What is legal advice?
 - Dual purpose communications
 - Cross-border issues

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Roadmap (cont.)

- Practical tips for college and university counsel
 - Protecting work product
 - Managing joint defense and common interest
 - Related-entity concerns
 - Waiving privilege
 - Internal investigations
 - Third party vendors

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Why does the attorney-client privilege exist?

A balance of interests, as explained by the United States Supreme Court:

- “[T]he public interest in fair and accurate judicial proceedings . . . would be defeated if judgments were founded on a partial or speculative presentation of the facts, [and hence it is] imperative that compulsory process be available for the production of evidence needed either by the prosecution or the defense.”

BUT

- “Human experience . . . teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”

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Why does the attorney-client privilege exist? (cont.)

- So, privilege is rooted in public policy:
 - To be effective, lawyers must have full and frank disclosures from and communications with their clients; and
 - Clients will only make full and frank disclosures to their attorneys if those communications are confidential.
- Because, it otherwise renders otherwise relevant information undiscoverable

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What are the elements of the attorney-client privilege?

Attorney-client privilege applies to any communication that satisfies the following elements:

- 1) a communication
- 2) made between the client and their attorney (or the attorney's agents)
- 3) in confidence
- 4) for the purpose of obtaining or providing legal advice to the client

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What is a communication?

- All communications made in pursuit of legal advice, not just those made in anticipation of litigation
- Runs both ways: client's provision of information and lawyer's rendering of advice

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Who is the client?

- Model Rule of Professional Conduct 1.13:
 - A lawyer employed or retained by an organization represents **the organization** acting through its duly authorized constituents.
 - Cmt 2: When one of the constituents of an organizational client communicates with the organization's lawyer **in that person's organizational capacity**, the communication is protected by Rule 1.6 [confidentiality].
- "Subject Matter" test
- "Control Group" test

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Who is the client? (cont.)

- More on Model Rule of Professional Conduct 1.13:
 - (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- Who is **not** a client?
 - Employees with respect to personal interests
 - Employees with objectives different than those of the corporation
 - Interviewees in internal investigations
 - But, in-house and outside counsel may represent one or more employees

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What is "in confidence"?

- "The attorney-client privilege does not apply to communications that are intended to be disclosed to third parties or that in fact are so disclosed. . . . [T]he disclosure of any meaningful part of a purportedly privileged communication waives the privilege as to the whole."
- Three exceptions:
 - Inclusion of a third party is necessary, or at least highly useful, for effective consultation between client and lawyer
 - The communication pertains to a joint defense or other legal strategy in the context of reasonably anticipated litigation
 - The third party was functionally equivalent to an employee

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What is legal advice?

- The lawyer must guide future conduct by interpreting and applying legal principles to specific facts.
 - Put another way, the lawyer must be acting as a lawyer – giving advice with respect to the legal implications of a proposed course of conduct.
- Privilege does not protect the communication of facts: a person may not refuse to disclose facts within their knowledge merely because they incorporated a statement of such facts in a communication to their attorney.
- Copying a lawyer on an email or having a lawyer at a meeting does not automatically protect communications.

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Dual Purpose Communications

- In-house counsel can be a legal counselor and a businessperson – a dual role
- Communications from corporate counsel often “integrally involve both legal and non-legal analyses”
- When are such dual purpose communications privileged?
- Circuits are split over how to analyze such communications:
 - **“Primary purpose” test:** When the “primary purpose” of the communication was to give or receive legal advice
 - **“Significant purpose” test:** When providing legal advice was one of the “significant purposes” of the communication (i.e., a primary purpose, not necessarily the primary purpose)

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Cross-Border Privilege Considerations

- Authority for the privilege varies by jurisdiction (common law, statutory law)
- Federal law looks to the common law for federal law claims
- For state law claims, state privilege law governs
- No bright line rule for how / whether cross-border communications will be protected by a privilege
 - US courts typically apply a choice-of-law analysis to determine whether domestic or foreign law of privilege applies to particular communications
 - “Touch base” test

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Practical Tips for Counsel

- Be conscious of the potentially high threshold to claim privilege over communications that involve both legal and business advice
- Distinguish and label written communications and other documents to make it clear when they pertain to legal advice
- Restrict circulation of privileged communications to those who need to know
- Clearly express that the communication is intended to involve legal, not strategic or business, advice
- Train (and remind) employees about privilege and provide prescriptive advice on how to preserve the privilege
- Consider how you would defend assertion of the privilege if called to do so

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Protecting Work Product

- Attorney work product doctrine protects documents prepared by an attorney (or agents) reflecting counsel's mental impressions in anticipation of litigation
- Work product protection applies when:
 - There is an actual claim OR potential claim following events that reasonably could result in litigation
 - The attorney's work product would not have been prepared in substantially similar form but for the prospect of that litigation
- Materials must be prepared in anticipation of litigation, and not in the ordinary course of business or pursuant to public requirements unrelated to litigation

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Protecting Work Product (cont.)

- Two types of work product:
 - **Fact Work Product:** Attorney's collection of factual information central to the case.
 - Discoverable upon showing of substantial need by opposing side.
 - **Opinion Work Product:** Attorney's mental impressions, conclusions, strategy, opinion, or legal theories regarding litigation.
 - Protection from disclosure is near absolute.

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Protecting Work Product (cont.)

• Two types of work product:

Practical Tip

- Mark work product – and be specific
 - Mark documents themselves, and carefully reference in attached correspondence
- impressions, conclusions, strategy, opinion, or legal theories regarding litigation.
- Protection from disclosure is near absolute.

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Managing Joint Defense and Common Interest

- Joint defense privilege can apply when one lawyer represents multiple parties in the same matter.
- Common interest privilege can apply when separate counsel represent multiple parties in the same matter.
- The parties must have a shared legal interest against a common adversary.
- Jurisdictions differ over whether you must reduce the joint defense/common interest agreement to writing.

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Managing Joint Defense and Common Interest

- Joint defense privilege can apply when one lawyer

Practical Tips

- Identify common legal interest*
- Agree to preserve privilege and not use material without disclosing party consent*
- Destroy disclosures in event of withdrawal

* Document if required

defense/common interest agreement to writing.

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Related-Entity Concerns

- Sometimes in-house counsel will represent multiple related entities in a corporate family (e.g., a University, its Foundation, a related entity)
- Communications that relate to shared, common legal interests will be protected by privilege
- **But**, there is a risk that work that an attorney does on behalf of an entity that does not employ the attorney that does not relate to a common legal interest may be unprotected
- **And**, privilege (and the authority to waive it) generally passes to new ownership after an acquisition.

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Related Corporate Concerns

- Sometimes in-house counsel will represent multiple related

Practical Tips

- Outsource work where there is a clear lack of common interest
- Be mindful that if a sale or acquisition is approaching, the new owners may have control of your communications with the affiliate

passes to new ownership after an acquisition.

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Waiving Privilege

- **Attorney-client privilege** is waived when communication is shared outside the institution or need-to-know group – but **not** when shared with attorney's agent, when necessary to obtain legal advice
- **Work product protection** is only waived if disclosed to the adversary or a third party who might share with the adversary, and/or if disclosure was not made in anticipation of litigation

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Waiving Privilege (cont.)

- What about “intentional” disclosures of privileged material in response to government investigation?
- Courts vary when deciding whether disclosures to government waive the privilege
 - Even when the government agreed not to treat disclosure as a waiver, some courts find waiver as to adversaries in later civil proceedings

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Waiving Privilege (cont.)

What about “intentional” disclosures of privileged

Practical Tip

If disclosure is mandated by the government:

- Keep the details to a minimum
- Avoid quoting privileged communications
- Even when the government agreed not to treat disclosure as a waiver, some courts find waiver as to adversaries in later civil proceedings

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Internal Investigations

- Not likely to be privileged:
 - Investigations conducted in the ordinary course of business
 - Investigations mandated by regulation or company policy
 - Investigations where the primary purpose is to provide business advice
- More likely to be privileged:
 - Primary purpose is to provide legal advice to the company
 - Engagement of outside counsel bolsters assertion of privilege over investigation

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Engaging other third-party vendors?

- Other vendors do not necessarily have privilege protection
- See *In re: Capital One Consumer Data Security Breach Litig.*, 2020 WL 3470261, at *3 (E.D. Va. June 25, 2020)
 - Capital One data breach compromised consumer data
 - Class action plaintiffs discovered Capital One commissioned cybersecurity firm investigation, and sought firm's report
 - Capital One claimed work-product protection and **lost** – forensic report **not** protected
 - Would have been prepared regardless of threat of litigation
 - Capital One had a pre-existing relationship with the forensic firm and broadly distributed report

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Engaging other third-party vendors?

• Other vendors do not necessarily have privilege protection

Practical Tips

- Retain consultants through outside counsel
- Run communications through counsel
- Make clear in engagement letter / SOW that it is in anticipation of litigation, to enable lawyers to provide legal advice to corporate client
- Limit circulation of vendor's reports
- Pay vendor from legal budget

forensic firm and broadly distributed report

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Internal Investigations (cont.)

Witness interviews

- Current employees: generally subject to attorney-client privilege
- Former employees: interview topics within the scope of their former employment are generally privileged
- Upjohn warning:
 - Represent the college/university, not you
 - Purpose of the interview is for attorney to provide legal advice to the college/university
 - Conversation is privileged and should be kept confidential
 - Privilege is held by – and can be waived by – the college/university

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Internal Investigations (cont.)

Assertion of Privilege over Findings

- How should results of the investigation be shared?
 - Oral presentation
 - Written report
- Pros and cons to written report
 - Documents investigation steps and findings for future reference
 - Can be used as evidence of compliance or adequate response to issue
 - BUT may be discoverable or subject to waiver

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Internal Investigations (cont.)

Increasing the Odds of Privilege Protection

- See *Rudolf v. Am. Int'l Grp., Inc.*, 2022 WL 5883366 (W.D. Pa. Dec. 13, 2021)
 - AIG internal investigation into employee resignation
 - AIG investigation documents did not state purpose of providing legal advice
 - Plaintiff sued, seeking AIG's investigation documents
 - Since materials did not **state investigative purpose of providing legal advice, or legal analysis or findings**, AIG's investigation documents **not** protected by attorney-client privilege

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Internal Investigations (cont.)

Increasing the Odds of Privilege Protection

Practical Tips

- Prominently mark notes/summaries as subject to attorney-client and work product privileges;
- Make clear that summaries reflect mental impressions of counsel;
- Document that an *Upjohn* warning was given and the witness understood;
- Agents should indicate preparation at request of counsel for purpose of seeking legal advice

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Higher Education Cases

Privilege Upheld

- *State ex rel. Oregon Health Sci. Univ. v. Haas*, 942 P. 2d 291 (Or. 1997): a university department head and members of the departmental faculty were representatives of the university, so advice to them **was** privileged, even when repeated and not direct from the attorney himself
- *Kobluk v. Univ of Minnesota*, 574 N.W. 2d 436 (Minn. 1998): drafts of a letter denying tenure which were shared with legal counsel **were** privileged, although final version was submitted to faculty member

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Privileged?

Re: Agreement for Legal Services

Dear Ms. [REDACTED]:

Thank you for selecting [REDACTED] LLP to provide legal services. This letter is to confirm our discussion about the engagement and to set forth the terms under which we will provide the requested services.

We are being retained to represent you in an independent review of issues and allegations relating to racial disparities within the football program. In the event that we are asked to provide additional services, we will confirm such engagement in writing. Absent specific modification, any additional services will be governed by the terms and conditions of this agreement.

[REDACTED] (the "University") retained [REDACTED] LLP to conduct an external review of alleged racial inequities within the football program, including mistreatment of Black student-athletes and a racially charged climate. We recognize that this matter has generated widespread attention and strong emotions have been expressed about the football program on various media platforms. Our task was to set that aside and impartially examine the football program's culture and perceptions of current and former players with respect to these matters. This report provides a summary of the information gathered during that review.

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Higher Education Cases (cont.)

Privilege Not Upheld

- *Wadley v. Univ. of Iowa*, 2022 WL 18780000 (S.D. Iowa June 24, 2022): investigative report regarding football team (see previous slide) was **not** privileged because the law firm conducting the investigation had not "provided any advice...for the purpose of an opinion on law, in anticipation of litigation, in preparation for trial, or any other service which only a lawyer is authorized to perform" and "made no factual determinations, [but] simply gathered the information to create a record of the concerns"
- *Doe 1 v. Baylor Univ.*, 320 F.R.D. 430 (W.D. Tex. 2017): investigative report was **not** privileged, as university waived privileged by releasing summaries of the investigation, its results, its conclusions, and its recommendations

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Any Questions?



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