

# Ethical Issues in Representing or Litigating Against Organizations

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# Ex Parte Communications

- Communication with Class/Collective Action Members
- Contact with class members in EEOC action
- Former Employees
- Current Employees

# Conflicts of Interest/Joint Representation Issues

- Simultaneous Representation of Potentially Adverse Clients
- Advance conflict waivers
- Joint Defense Agreements
- Virtual Client Issues

# Privilege Issues

# Choice of Law

Always be sure to check the rules that apply to your specific jurisdiction!

- Don't assume that the local law of the jurisdiction provides the substantive privilege rule in litigation.
- Majority of U.S. states will look to the law of the state with the most significant relationship to the communication. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643 (Tex. 1995).
- Federal courts sitting in diversity look to the choice-of-law analysis of the forum state.

# Attorney Client Privilege: General Rules

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . .

# Lawyer-Client Privilege: General Rules

- Holder of the privilege is, or sought to become, a client, and
- Communicated with a member of the bar of a court, or his/her representative,
- Who, in connection with the communication, was acting as an attorney, and
- The communication was for the purpose of securing legal advice.

# "Representatives" of client and lawyer

- Client representative:
  - person with client's authority to get or act on legal advice, or
  - employee of client, acting in scope of employment, who is effectuating legal representation (paralegals)
  - Note: some jurisdictions apply a different, "control group" standard for determining who qualifies as the "client" in the corporate context
- Lawyer representative:
  - employee of lawyer assisting rendition of legal services, or
  - accountant reasonably necessary to provide legal services

# Attorney-Client Privilege

- Applies to communications made by the client
  - Attorneys' communications may also be protected if an attorney's communication reveal the substance of a client communication
  - Some courts impose "necessary and inevitable" standard instead of "based on" standard for determining whether a lawyer's communications to a client are privileged
- Client cannot protect a document unless such document prepared for purpose of communication with lawyers
- Redaction may be an option if document has both privileged and non-privileged material

# Communications between non-lawyer employees *may* be privileged if made for purpose of facilitating attorney's advice to the corporate client.

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- *In re JDN Real Estate-McKinney, L.P.* (Tex. App.--Dallas 2006)  
Single email from CEO & president of corporation protected by privilege, as part of string of privileged emails; although email itself did not reveal confidential information, it was part of the context and subject of the privileged string of communications.
- *Clover Staffing Inc. v. Johnson Controls World Services, Inc.* (S.D. Tex. 2006)  
Emails from corporate official to other corporate officials were protected by the attorney-client privilege; although none of the officials were attorneys, emails were sent at the suggestion of the corporate legal department to gather information that could be used by attorneys in negotiating with subcontractor to resolve contract issues.

## Involving a lawyer in the communication doesn't necessarily make it privileged

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- *Baran v. Walsh Construction Co.* (N.D. Ill. 2007)  
Emails between officials of defendant construction company and its vice president in charge of insurance department were not protected by the attorney-client privilege; although vice president also worked in the legal department of the company, he was acting in his capacity as the head of the insurance department, not in his capacity as company's legal counsel.
- *SmithKline Beecham Corp. v. Teva Pharmaceuticals USA, Inc.* (E.D. Pa. 2005)  
“What would otherwise be routine, non-privileged communications between corporate officers or employees transacting general business of the company do not attain privileged status solely because in-house or outside counsel is ‘copied in’ on correspondence or memoranda.”

# Some Exceptions to Lawyer-Client Privilege

1. Furtherance of crime or fraud.
2. Breach of duty by a lawyer or client. [In-house counsel claims may qualify]
3. Document attested by a lawyer.
4. Joint clients.

# Joint Defense Agreements/Common Interest Privilege

- May preserve privilege for communications between multiple parties with common interests. But:
- Communications prior to entry of joint defense agreement might NOT be privileged (Strong v. State (Tex. Crim. App. 1989))
- Some jurisdictions (TX, AK, KY, OK, S.D.) do not recognize common interest privilege without pending litigation

# Joint Defense Agreements

- Such agreements may create potential for disqualification in later action against the co-defendant
  - *National Med. Enterprises v. Godbey* (Tex. 1998)
    - 
    - Firm represented employee of corporation in connection with criminal investigation; did not represent corporation but had JDA with it
    - Firm later sought to represent plaintiffs in suit against corporation
    - Court: JDA did not create attorney-client relationship between firm and corporation, BUT law firm disqualified because the JDA created a duty to maintain co-defendant corporation's confidences to the same extent as the firm's own client.

# Waiver

- Generally, disclosure to third parties constitutes waiver as to the subject matter.
- Offensive use of some privileged communications can waive the privilege generally (sword/shield doctrine).
- Limited waiver may be possible in the context of cooperation with a government investigation.
- Disclosures to auditors are often held to be waivers.
- Inadvertent production
  - "Snap Back" rules (Texas)
  - Fed. R. Evid. 502

# Waiver — Disclosure to Third Parties

- Voluntary Disclosure –
  - To any party not necessary to facilitate confidential communication between attorney and client
  - Public Relations Specialists--Split Decisions
- Compelled Disclosure –
  - Few courts recognize exception

# Waiver — Implied Waiver

- Putting confidential communication "at issue"
  - Cox v. Administrator U.S. Steel & Carnegie (11th Cir. 1994) "Having gone beyond mere denial, affirmatively to assert its good faith [in an FLSA case], [the defendant] injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege."



# Waiver — Attorney Investigative Materials

- Investigative report generally not privileged where defendant raises adequacy of investigation as affirmative defense (Harding v. Dana Transp. Co. (D.N.J. 1999))
- Only limited waiver if privileged materials can be reasonably segregated from the "investigation" report
- No privilege if attorney acting solely as investigator rather than as an attorney
  - In re Texas Farmers Ins. Exchange (Tex. App. 1999)
  - Compare Harlandale Indep. School Dist. v. Cornyn (Tex. App. 2000)

# Boundaries of the Privilege in the Corporate Context

- Attorney-Client Privilege and Interviews of Non-Client Corporate Constituents
- Attorney-Client Privilege and Deposition Preparation of Non-Client Corporate Constituents
- Attorney-Client Privilege and Communications with Former Corporate Constituents

# "Business Advice" Not Privileged

- *Baran v. Walsh Construction Co.* (N.D. Ill. 2007) -
  - Emails between various officials of construction company and its vice president in charge of insurance department were not protected by the attorney-client privilege, even though the vice president also worked in the legal department of the company, where the vice president was acting in his capacity as the head of the insurance department, not in his capacity as the company's legal counsel.
- *In re Sealed Case* (D.C. Cir. 1984) - Must be clear showing that attorney gave advice acting in professional legal capacity

# "Business Advice" Not Privileged

- Neuder v. Battelle Pacific (D.D.C. 2000) 194 F.R.D. 289

The decision to fire an employee is primarily a business decision, not legal advice; presence of attorney at a meeting where decision is made does not render documents or discussions privileged:

“Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.”

# Attorney-Client Privilege — In-House

- Privilege usually exists for full time in-house counsel/in-house business person. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).
- Applies even if in-house lawyer is not full time in legal department, so long as communication made by the lawyer acting in capacity as lawyer for company
- Privilege applies to any corporate employee, regardless of position, when the communications relate to matters within the scope of the employee's duties and the employee is aware that the purpose of the information is to enable the attorney to provide legal advice
- But...some courts erect a higher standard given the concerns about the lawyer wearing both the "business" and "law" hat.

# Attorney-Client Privilege — Cell Phones and Emails

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- Privilege applies to communications by email, cell phones if requirements of privilege otherwise met.
- Beware of inadvertent disclosure:
  - Client discussions on cell phone or pay phone at the airport
  - Leaving voicemails and (i) leaving message on the wrong number (ii) forgetting to hang up
- Note: Emails, like diamonds, are forever: email is rarely deleted
  - "Emails that can be used by the Government, or an Opponent: It's Not A Good Thing."



# Attorney-Client Privilege — Practical Tips — General

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- The attorney-client privilege can become an attorney-conflict problem
- Be discreet
- Our clients also need to be careful
- Label appropriate emails and memoranda as privileged
- Existence of a conversation/communication and contents of a conversation/communication are two different things
- In communicating with employees, document all Upjohn factors and give the Upjohn "Miranda" warnings

# Practical Tips — In-House Counsel

- Clearly separate legal from business advice, if possible
- Treat privileged documents carefully. Counsel can waive privilege with a bad distribution list.
- Consider starting with "I am addressing the following legal issue(s)" in communications
- Direct any meeting that has a "legal" purpose
- Keep legal and business documents separate
- Three Words:  
Remember Admiral Stockdale

(Oops!)

Inadvertent Disclosure Issues

# Inadvertent Disclosure/Improper Acquisition Issues

- *Ethical Obligations Concerning Inadvertent Disclosure*
- *Privilege Waiver*
- Improper Acquisition (Theft) of Client Documents

# Employee's Use of Employer-Owned Computers/Laptops for Privileged Communications

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- *Importance of Warnings*
- Employer Policies

# Ethics and Metadata

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# Social Media/Internet Issues: Attorney-Client Relationships in Cyberspace

- Inadvertent Creation of an Attorney-Client Relationship
- Use of electronic media, including unencrypted email, to engage in privileged communications generally permitted, provided client is aware of the risks associated with such communication forms.

# Social Media— Why Can't We Be “Friends”?

- *To what extent may a lawyer monitor a represented party's website, Twitter accounts and social media postings? A juror's?*
- Waiver of privilege due to social media activity

# Settlement Issues

- Multiple Client/class Settlements
- Settlement Conditioned on Lawyer Agreement to Refrain from Future Lawsuits Against the Same Defendant
- Confidentiality Clauses
- Duty of Candor in Settlement
- "Puffing" Statements in Settlement Discussions

# Offers of Judgment

- Class/collective action “pick-off” strategies—*Genesis Healthcare*
- Attorney Fee Issues

# Lawyer Departure Issues

- Imputed Disqualification Issues
- Rules for Notification to Client of Departure
- “Ownership” of Client Files, Attorney Work Product and Forms
- Solicitation Rules