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TEACHING YOUR TEAM HOW ATTORNEY-CLIENT PRIVILEGE AND DOCUMENT DISCOVERY WORKS (AND DOESN'T) BEFORE THE LAWSUITS OR INVESTIGATIONS START

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- Teaching Your Team: Why It Is Important
  - It is important they understand the rules before and after the game starts.
  - Many of the rules are consistent with good business practice as well as risk management.
  - Not knowing the rules in advance can lead to unfortunate consequences later.
  - Many executives and other employees have wild misconceptions about the rules.
  - It is our obligation as attorneys to teach them.
- "Document the Right Way" Power Point Presentation for Employees
  - What Every In-House Lawyer Should Know About The Attorney-Client Privilege.
    1. The scope and applicability of the attorney client privilege are uncertain.
    2. Observe formalities: If it is a secret, treat it as such.
    3. Edit communications as if a judge might see them some day or as if someone with great incentive to take things out of context will distort them.
    4. The transaction costs of the fight to compel production may not be worth the likely result.
    5. Everything doesn't have to be in writing (but some things do).
    6. The privilege has never been as broad as people think.
       - "Because the public generally has a right to every man's evidence, we narrowly construe constitutional, common law, and statutory privileges for they are in derogation of the search for truth." *Ariz. Indep. Redistricting*

Comm'n v. Fields, 75 P.3d 1088, 1094 (Ariz. Ct. App. 2003); *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991) ("[T]he privilege ought to be strictly confined within its narrowest possible limits."); *but see Gordon v. Superior Court*, 65 Cal. Rptr. 2d 53 (Cal. Ct. App. 1997) ("The term 'confidential communication' is broadly construed, and communications between a lawyer and his client are presumed confidential, with the burden on the party seeking disclosure to show otherwise.").

- Communications must be both confidential and made for the purpose of providing legal advice or obtaining information to provide legal advice. Ariz. Rev. Stat. § 12-2234; *Rounds v. Jackson Park Hosp. & Med. Ctr.*, 745 N.E.2d 561 (Ill. App. Ct. 2001) ("To be entitled to the protection of the attorney-client privilege, a claimant must show that the statement originated in confidence that it would not be disclosed, was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential.").
- A communication is "confidential" only if it is "not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Wis. Stat. § 905.03(1)(d); *see also State v. Sucharew*, 66 P.3d 59, 65 (Ariz. Ct. App. 2003) ("The presence of a third person will usually defeat the privilege on the ground that confidentiality could not be intended with respect to communications that the speaker knowingly allowed to be overheard by others foreign to the confidential relationship"); Cal. Evid. Code § 952 ("'[C]onfidential 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 . . . .").
- Courts applying a narrow construction of the privilege may hold that attorney-to-client communications fall outside the privilege more readily than client-to-attorney communications. *See Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788 (Wis. 2002) ("While the lawyer-client privilege readily protects statements from the client to the lawyer, the privilege only protects communications from the lawyer to the client if disclosure of the lawyer-to-client communications would directly or indirectly reveal the substance of the client's confidential communications to the lawyer." (internal quotation marks omitted)); *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products LLC*, 2015 WL 1120321, at *2 (E.D. Wis. Mar. 12, 2015) ("Under a narrow view of attorney-client privilege, communications made by the attorney to the client are only privileged if the communication reveals client confidences. Under a slightly broader view, attorney-to-client communications are also privileged if the communication constitutes legal advice (which must be, of course, provided in confidence).").

Yet even if they are not privileged, attorney-to-client communications often will be independently protected as attorney work product. *See State ex rel. Dudek v. Circuit Court for Milwaukee Cnty.*, 150 N.W.2d 387 (Wis. 1967) ("[A] lawyer's work product consists of the information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means.").

7. Different jurisdictions have different rules—and if the jurisdiction is foreign, there may be no privilege.

   - The European Union's "legal professional privilege" protects only communications with an "independent" lawyer—*i.e.*, not in-house counsel. *See Akzo Nobel Chemicals Ltd. v. Akcros Chemicals Ltd.*, Case C-550/07 P (Sept. 14, 2010).
   - The courts of some E.U. countries, however, extend the privilege to communications with in-house counsel. For example, in 2013 the Brussels Court of Appeal held that the *Akzo Nobel Chemicals* rule did not apply in a Belgian national case and ordered the Belgian Competition Authority to return materials seized from a company's in-house counsel.

8. There are varying rules for how corporate clients are covered by the privilege. In federal court and most state jurisdictions, communications "made by [low-level corporate] employees to counsel for [the corporation] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel," are covered by the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); *see also Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1495 (9th Cir. 1989) (extending *Upjohn* to cover "communications between employees of a subsidiary corporation and counsel for the parent corporation," plus "communications between former employees and corporate counsel," so long as the employee "possesses information critical to the representation of the parent company and the communications concern matters within the scope of employment"). But a minority of states depart from *Upjohn* by holding that the attorney-client privilege can extend only to those individuals in the corporation who are authorized to make legal decisions on the corporation's behalf, or at least have authority to bind the corporation in some way. *See AU Electronics, Inc. v. Harleysville Grp., Inc.*, 2014 WL 2429104, at *2 (N.D. Ill. May 28, 2014) (holding that under Illinois law, "privileged communications lose their privileged status if disseminated to persons not in [the corporation's] control group"); *see also Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982) (defining the "control group" to include "top management who have the ability to make a final decision," as well as "employee[s] whose advisory role to top management in a particular area is such that a decision would not normally be made without [their] advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority"); *compare Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993) (adopting a narrow version of the

Upjohn doctrine under which, "[w]here someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege [only] if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client").

9. In-house privilege claims are more highly scrutinized. *See Solis v. Milk Specialties Co.*, 854 F. Supp. 2d 629, 632 (E.D. Wis. 2012) (demonstrating privilege "is more difficult in the context of in-house counsel because counsel is often involved in business matters as well as legal"); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) ("[T]o minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny."); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (requiring a "clear showing" that communications with in-house counsel were made for the purpose of obtaining legal advice, because "the presumption [of privilege] that attaches to communications with outside counsel does not extend to communications with in-house counsel"); *see also Casey v. Unitek Global Servs., Inc.*, 2015 WL 539623 (E.D. Penn. Feb. 9, 2015) (holding that the defendant lacked an attorney-client relationship with a lawyer it hired to run its risk management and safety departments).

10. There are many other trap doors where you can lose protection:

- Crime/fraud. *See RMS of Wisconsin, Inc. v. Shea-Kiewit Joint Venture*, 2014 WL 4748844, at *2 (E.D. Wis. Sept. 24, 2014) (no attorney-client privilege upon a showing of "reasonable cause to believe that the attorney's services were utilized in furtherance of [an] ongoing unlawful scheme"); *People v. Radojcic*, 998 N.E.2d 1212, 1223 (Ill. 2013) (no privilege upon "evidence from which a prudent person would have reasonable basis to suspect (1) the perpetration or attempted perpetration of a crime or fraud, and (2) that the communications were in furtherance thereof" (internal quotation marks omitted)); *State v. Fodor*, 880 P.2d 662 (Ariz. Ct. App. 1994) (no privilege upon "a *prima facie* showing . . . the attorney was retained by the client for the express purpose of promoting intended or continuing criminal or fraudulent activity"); Fla. Stat. § 90.502(4)(a) (no privilege where "[t]he services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud"); *Swortwood v. Tenedora de Empresas, S.A. de C.V.*, 2014 WL 895456, at *12 (S.D. Cal. Mar. 6, 2014) (no privilege upon a showing "that the (1) client was engaged in or planning a criminal or fraudulent scheme when he or she sought the advice of counsel to further the scheme; and (2) attorney-client communications for which production is sought are sufficiently related to, and were made in furtherance of, the scheme—*i.e.*, the attorney was consulted not with respect to prior wrongdoing but, rather, to facilitate or conceal a continuing or contemplated crime or fraud." (internal quotation marks omitted)).

- Sharing information with insurer. *See In re Imperial Corp. of Am.*, 167 F.R.D. 447, 451-53 (S.D. Cal. 1995) (privilege waived by disclosure of communications to representatives of a directors' and officers' liability insurer that had no duty to defend the directors and officers, only a potential duty of indemnification); *Longs Drug Stores v. Howe*, 657 P. 2d 412 (Ariz. 1983) (employee statements to the defendant's insurer, who took the statements at the request of in-house counsel and provided them to in-house counsel to use as part of his case evaluation, were not subject to attorney-client privilege, although they still had limited work-product protection).

- Other selective disclosures. *See Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option."); *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (rejecting the theory of selective waiver and citing similar decisions of the First, Second, Third, Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits); *but see Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 368-69 (Ill. 2012) (holding "that subject matter waiver does not apply to disclosures made in an extrajudicial context when those disclosures are not thereafter used by the client to gain a tactical advantage in litigation").

- Mistaken/inadvertent disclosure. *See Constr. Sys. of Am., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 118 So. 3d 942, 943-44 (Fla. Ct. App. 2013) (using "a five-factor relevant circumstances test to determine whether a party waived privilege through inadvertent disclosure"); *but see Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust*, 679 N.W.2d 794 (Wis. 2004) ("[A] lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents (which the attorney does not recognize as privileged) to an opposing attorney in response to a discovery request."); *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999) ("'[W]aiver" does not include accidental, inadvertent disclosure of privileged information by the attorney.").

- Unauthorized use of employer e-mail system. *See In re High-Tech Employee Antitrust Litig.*, 2013 WL 772668, at *6-8 (N.D. Cal. Feb. 28, 2013) (finding no waiver of privilege attaching to emails that a part-time Google employee sent from his @intuit.com address, but only because Intuit did not impose "an all-out ban on personal use" of @intuit.com email addresses and did not monitor employee emails, despite having reserved the right to do so); *see also In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (employing a widely-cited, four-factor test "to measure [an] employee's expectation of privacy in his computer files and e-mail" for purposes of determining if emails sent from the employee's work account are covered by attorney-client privilege).

- Internal investigation. *See Bickler v. Senior Lifestyle Corp.*, 266 F.R.D. 379 (D. Ariz. 2010) (holding that when a nursing center's in-house counsel directed the human resources department to interview employees about

alleged negligence at the center, the employees' responses were not privileged under Arizona law because they were not made directly to a lawyer, although the responses still qualified for limited work-product protection).

- Individual judicial discretion / judge's more narrow definition
- Joint clients waiving
- Advice of counsel
- Internal investigation
- Information from or shared with non-client
- Former employees
- Conflict trap if too broad
- Unauthorized-unlicensed practice
- At issue rule
- Writing used to refresh recollection
- Government pressure
- Over-designation

11. Challenges to claims of attorney client privilege/work product doctrine and confidentiality designations are more frequently being made for strategic reasons.

12. Courts often review in camera and see it anyway; the bell cannot be unrung. *But see Costco Wholesale Corp. v. Superior Court*, 219 P.3d 736 (Cal. 2009) ("[A] court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege . . . ."); *In re Marriage of Decker*, 606 N.E.2d 1094 (Ill. 1992) ("Because of the inherent problem involved in a trial court's viewing information that may in fact be privileged, and then later ruling on an issue which the privileged information may affect, it would be prudent, where possible, to have another trial judge conduct the *in camera* inspection once the initial threshold has been met and the court has determined that an *in camera* inspection is proper.").

13. Privilege—let alone claims of confidentiality—does not survive real explosions (Enron, suits against law firms, shifting or new constituencies, government investigation).

14. Disclosure is often not surprising to other attorneys but can be to juries, judges and newspapers.

15. Document retention/production is being put on trial; privilege/ethics are next.

16. Consultants' work may be protected, but only if proper procedures are in place.

17. Run your business, but observe formalities.

18. Recent Arizona Cases (see attached).

19.

EXHIBIT A
EXAMPLES OF ATTORNEY-CLIENT PRIVILEGE CASE LAW

Case	In-house counsel communication at issue or merely an interesting case?	Court; Law Applied	Facts	Holding	Reasoning	In-Camera Review
In re: Bard IVC Filters Products Liability Litigation, 2016 WL 3970338 (D. Ariz. 2016).	In-house counsel communications at issue	District of Arizona (applying AZ law)	Motion to compel production of 133 disputed documents. The documents fell into different categories, some involving emails between a Bard employee and Bard's in-house counsel, some involving communications between Bard's in-house counsel and the in-house counsel's assistant, others involving communications between Bard's in-house counsel and an outside consultant.	Privileged	The court cited Arizona's privilege statute providing that communications between corporate attorneys and employees of the corporations are privileged if made for the purpose of providing legal advice. *Id.* at *5; A.R.S. § 12-2234. The court analyzed whether each communication was made for the purpose of seeking legal or business advice. The court recognized that some jurisdictions use a "primary purpose" standard to distinguish between business and legal advice, and others use a "because of" test. The court didn't expressly apply either; instead, it used a fact-intensive analysis and found that every communication but one was made for the purpose of obtaining legal advice. For example, an email between a Bard employee and Bard's in-house counsel "concern[ed] terms of an agreement being drafted" and, therefore, was privileged.	Yes

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Case	In-house counsel communication at issue or merely an interesting case?	Court; Law Applied	Facts	Holding	Reasoning	In-Camera Review
Valenzuela v. Union Pacific Railroad Co., 2016 WL 7385037 (D. Ariz. 2016).	In-house communications at issue	District of Arizona (declining to choose law because AZ law, CA law, and FRE 502 all had same result)	Plaintiffs asserted that certain memos shared among two sister corporations and their former parent company were improperly withheld on privilege grounds. One was a memo written by a third-party agent of one of the sister corporations discussing legal advice provided by in-house counsel to the parent company. One was written by in-house counsel of the parent corporation.	Privileged	The court found that all memos were written for the purpose of obtaining legal advice. The court also pointed out that Arizona's corporate attorney-client privilege includes agents. Thus, the attorney-client privilege analysis does not change simply because the parent corporation's third-party agent was involved. And because the sister corporations were owned by a single parent that employed all attorneys involved, the memos were privileged. *Id.* at *2.	Yes

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EXAMPLES OF ATTORNEY-CLIENT PRIVILEGE CASE LAW

Case	In-house counsel communication at issue or merely an interesting case?	Court; Law Applied	Facts	Holding	Reasoning	In-Camera Review
Greyhound Lines Inc. v. Viad Corp., 2016 WL 4703340 (D. Ariz. 2016).	Communication to in-house counsel at issue	District of Arizona (applying AZ law)	Dr. Ries was a non-lawyer member of Viad's legal department. Dr. Ries prepared monthly and quarterly reports to Viad's General Counsel and the legal department, so that the lawyers could monitor the company's environmental obligations. Greyhound claimed that the reports were not privileged because they were "factual in nature" nor "labeled as privileged."	Privileged	The court noted that the reports were prepared at the direction of Viad's in-house attorneys and with the purpose of enabling those attorneys to provide legal advice. The reports addressed "a wide range of topics on which lawyers typically advise clients, including ongoing and threatened litigation, settlement discussions and offers, general legal exposure, and regulatory action." Further, a document need not be labeled "privileged" to be protected. *Id.* at *2.	Yes

EXHIBIT A
EXAMPLES OF ATTORNEY-CLIENT PRIVILEGE CASE LAW

Case	In-house counsel communication at issue or merely an interesting case?	Court; Law Applied	Facts	Holding	Reasoning	In-Camera Review
Sell v. Country Life Insurance Co., 189 F.Supp.3d 925 (D. Ariz. 2016).	Communication to in-house counsel at issue	District of Arizona (applying AZ law)	Action for wrongful denial of benefits. Senior claims analyst had emailed in-house counsel about her disagreement with the denial. Defendant asserted the privilege as to the email plus three others that simply listed in-house counsel as either a sender or recipient.	Not Privileged	The email by the senior claims analyst was not written with the purpose of seeking legal advice. *Id.* at 936. It was simply a strongly worded email describing her disagreement with the denial of benefits to plaintiff. The other emails that defendant failed to disclose merely had in-house counsel as a sender or recipient and were also not written for the purpose of seeking legal advice. *Id.* at 936 ("Defendant simply withheld such communications solely because a company attorney was named on the email. That is precisely what Arizona law prohibits."). The privilege claims of privilege were deemed frivolous and warranted sanctions.	Not Discussed
BKWSpokane, LLC v. Federal Deposit Insurance Corp., 663 Fed. Appx. 524 (9th Cir. 2016).	In-house counsel communication at issue	9th Circuit (applying federal common law)	Breach of contract claim by BKWSpokane against FDIC. BKWSpokane sought to compel certain communications made by the FDIC's in-house counsel. (The court does not describe what the communications were).	Privileged	The court held that the district court properly deemed the opinions, advice, and concurrences issued by the FDIC's in-house counsel as privileged. "The attorney-client privilege applies to communications between lawyers and their clients when the lawyers act in a counseling and planning role, as well as when lawyers represent their clients in litigation." Although the court used broad language (this is a memorandum disposition), it is likely the court would still require that the communications surrounding the "counseling and planning role" of in-house attorneys must be made for the purpose of giving legal advice. *Id.* at 527.	Not Discussed