

# Placing the Attorney-Client Privilege at Risk in Employment Disputes: How to Avoid a Waiver

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## Overview

- General rules regarding privilege
- Common problems associated with the privilege
- Privilege issues in the employment context
- Questions?

**Question:** How often do you worry about the Attorney-Client Privilege?

- A. Once a day
- B. Once a week
- C. Once a month
- D. Rarely
- E. Never
- F. So often it keeps me up at night



**Question:** What is your confidence level with respect to the law governing attorney-client privilege?

- A. Very high
- B. High
- C. Moderate
- D. Low
- E. Very low



# Let's Talk . . . Attorney-Client Privilege



- The Rule: applies to communications made in confidence between a client and his or her attorney for the purpose of obtaining legal advice.
- Assume nothing is privileged, then ask:
  - Is it a communication that fits the definition?
  - Does an exception apply?
  - Have we done everything we can to prevent a waiver?
  - Are there foreign law implications?



# Common Privilege Problems

- Business v. Legal Advice
- The Zone of Secrecy
- Outside Consultants
- Inadvertent Disclosure
- Waiver Through Broad Dissemination
- Privilege Across International Boundaries

# Problem: Legal Advice vs. Business Advice (or anything else)

- Wearing two hats
- Commingled communications
- “Predominant Purpose” and “Because of” Tests
  - Common 3-part analysis:
    - Could a non-lawyer perform a given task?
    - For what purpose was the lawyer contacted?
    - Did either the client or lawyer acknowledge the nature of the lawyer’s role?
- Making the *in camera* review easy



## Solution




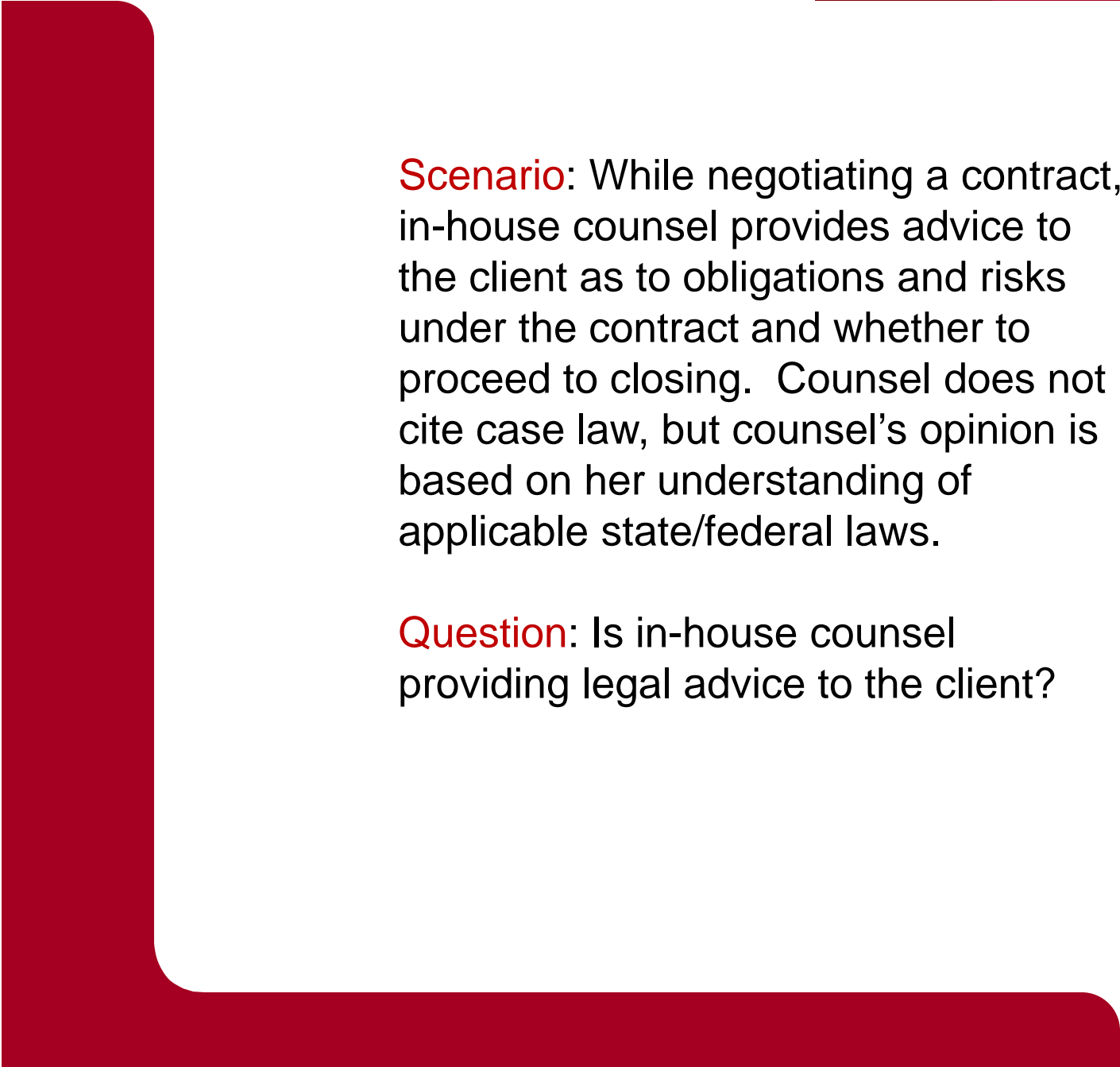
- Segregate legal and business advice to the extent practicable.
  - “You asked for my legal advice about X. Here it is: . . .”
- Recognize that acting in a business capacity may compromise the privilege
- Signal that legal advice is being given



## *The “Privileged” Life of In-House Counsel*



- Meet Jane Doe:
  - Senior Vice President/Deputy General Counsel at a financial institution
  - Experienced lawyer, highly placed in law department
- One day her phone rings. She is asked: should her company honor an existing Letter of Credit?
  - So what does Jane do?
    - Gathers facts
    - E-mails client
    - Prepares documents
    - Alludes to no legal principle and conducts no legal analysis
    - Makes recommendation
    - Jane’s company declines to honor the LOC
  - Are Jane’s recommendations privileged?



**Scenario:** While negotiating a contract, in-house counsel provides advice to the client as to obligations and risks under the contract and whether to proceed to closing. Counsel does not cite case law, but counsel's opinion is based on her understanding of applicable state/federal laws.

**Question:** Is in-house counsel providing legal advice to the client?



## **Problem: The “Zone of Secrecy”**

- There is a persistent belief among non-lawyer employees that copying in-house counsel on communications will result in privilege protection
- Results in a dilution of the privilege that can have significant adverse consequences



## Solution

- Do not assume that the presence of counsel (by cc or in person) will provide protection
- Meeting agendas and/or summaries should show discrete entries for legal issues
- Be selective about “use” of the law department
- Be particularly careful about confidentiality claims for routine internal audits
- Carefully designate information as privileged, especially with regard to e-mail



## Hypothetical

- CFO sends an e-mail to the company CEO expressing concern about an accounting issue and states “I hope this doesn’t get us sued.” CFO copies in-house counsel on the e-mail.
- Is the communication privileged?



## Hypothetical (Part 2)

- Same scenario as before
- CEO responds to CFO and says “Who cares if we get sued? We’re hiring Reed Smith. They win all of their cases! I for one am going to sleep soundly tonight. Want to go golfing tomorrow?”
- CEO copies in-house counsel
- Privileged?

# Problem: Outside Consultants



- Sharing privileged information with outside consultants may result in waiver of privilege
  - The “interpreter” standard: communications with a financial advisor are covered by the attorney-client privilege if the financial advisor’s role is limited to helping a lawyer give effective advice by explaining financial concepts to the lawyer. *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961).
  - The “functional equivalent” doctrine: extends the attorney-client privilege to communications between a corporation’s counsel and corporate consultants who are *de facto* employees. *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002).
- Disclosures to outside auditors:
  - Work product protection can extend to auditor-created documents prepared in course of determining appropriate litigation reserves
  - Consistent with “agency” approach in Rule 26. Focus is on content and the purpose behind creating the document.



## Solution

- Establish relationships with outsiders through law department or outside counsel
- Satisfy “translator” standard
- Require confidentiality agreements
- Make outsiders part of the “team”
- Think twice if outsider’s skills are duplicative of internal assets





# Hypothetical

- Borrower shares privileged communications with outside financial advisor
- Claims “functional equivalence”
- Intense restructuring negotiations – consultant spends 90% of time on negotiations with bank/creditors
- At the table with legal advisors
- Communications captured by the privilege?



## Hypothetical 2

- There is a large explosion at a company factory and three workers are severely injured. The event generates lots of media attention and there is likely going to be follow-on litigation against the company. In-house counsel wants to get ahead of any negative publicity and retains a PR firm to consult the company on its response. In-house counsel wants to discuss the litigation risks with the PR firm but is concerned that she may waive any privilege by doing so.
- What should in-house counsel do?

## Problem: Inadvertent Disclosure



- Turning over documents by mistake may result in a subject matter waiver of the privilege
- Changes to Fed. R. Evid. 502 – the middle-ground approach



## Solution

- Instituting protocols to avoid inadvertent disclosure, e.g., a separate server and/or different e-mail address for the in-house group, and a policy on document review
- Identify all in-house staff connected with issue
- Make clear your intent to maintain confidentiality on documents and e-mail



## Problem: Waiver Through Broad Dissemination

- Losing the privilege by publishing a privileged communication beyond those who have a “need to know”
- Some state law (e.g. Illinois) maintains control group test

## Solution



- When highly sensitive legal advice is at issue, maintain strict control over the distribution group
- Ask “need to know” question
- Sensitive documents should be published with an “eyes only” or similar warning
- Educate clients re: risk of overly broad dissemination



## True Story: *EXXON*, Ala. Sup. Ct.

- In-house lawyer writes a memo to management providing legal advice re: the royalty provisions under a mineral lease agreement
- The letter clearly reflects legal advice
- Lawyer sends to three people, all of whom were within management at Exxon, were often provided with legal advice, and considered it to be a confidential communication
- Document was stamped showing scores of intended recipients
- Trouble at trial court
- Saved by appeal

# Problem: Privilege Outside of U.S.



- UK corollaries: (i) legal advice privilege, and (ii) litigation privilege.
- Other Member States:
  - Of 27 Member States of the EU, the national law of 14 Member States does *not* recognize legal professional privilege for internal communications with in-house counsel (including Germany, France and Italy)
  - The position is unclear in 7 Member States: Belgium, Denmark, Latvia, Lithuania, Malta, Romania and Spain
- The ECJ – historic and recent rejection of in-house counsel/client claims of privilege





## Solution

- Recognize that communications across borders may not be privileged
- Try to limit communications with counsel outside of the United States

# Privilege in the Employment Context



- Employment matters raise novel privilege issues
- Internal investigations
- Employment disputes



## Internal Investigations

- Corporation is the client, not the employee
- Employee wrongdoing and the “Upjohn” warning – avoiding a potential conflict:
  1. You represent the company
  2. Your communications are privileged
  3. Privilege belongs to the company
  4. Only the company may waive



## Internal Investigations (Cont.)

- Preserving the privilege is particularly tricky in the context of internal investigations
- Attorney as investigator? Beware of waiver.
- Investigation as a defense to a claim of harassment. Preserving the defense without waiving the privilege.
- Avoid attorney as decision-maker



## Hypothetical

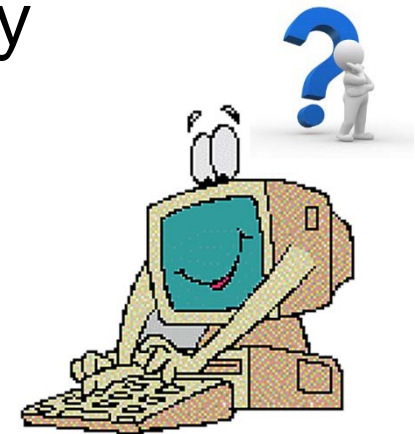
- In-house counsel is asked to investigate employee claims of discrimination
- In-house counsel interviews several employees to obtain information pertinent to the investigation
- In-house counsel is later asked in a deposition about her conversations with the employees
- Should she answer?

## Hypothetical (Cont.)

- Same scenario
- During the investigation, in-house counsel takes notes of witness interviews. She does not share the notes with anyone but refers to the witness interviews in a memo to the client discussing counsel's conclusions about the investigation.
- Litigation follows and opposing counsel demands in-house counsel's notes from the interviews
- Are the notes privileged?

## Employee Communications w/ Personal Counsel (Not You) – What's Protected?

- Employee communications with personal counsel may be protected by the privilege, unless the employee does not have a reasonable expectation of privacy
- Factors:
  - Use of company computer?
  - Company policy?





## Hypothetical

- Disgruntled employee plans to quit and sue the company for discrimination
- Retains personal counsel and communicates with counsel while at work using company computer
- Does not use company e-mail address but accesses internet to use gmail account for attorney communications
- Communications privileged?





## Hypothetical 2

- Employee is privy to privileged communications
- Employee leaves company and files suit
- Can employee use the privileged communications in the suit against the company?



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