

## ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE SETTING

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**ATTORNEY-CLIENT PRIVILEGE – AN OLD, DRY TOPIC AT THE END OF A LONG DAY OF CONTINUING LEGAL EDUCATION...**

- The oldest of common law privileges for confidential communications – dating to the 16<sup>th</sup> Century reign of Queen Elizabeth I.
- Professor John H. Wigmore on Evidence (early 20<sup>th</sup> Century):  
 “Where legal advice of any kind is sought, from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence, by the client, are at his insistence permanently protected, from disclosure by himself or by the legal advisor, except the protection be waived.”
- Translated another way:  
 “A practicing attorney... or the stenographer or confidential clerk of any such person, who obtains information by reason of the person’s employment... shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity, and necessary and proper to enable the person to discharge the functions of the person’s office according to the usual course of practice or discipline.”  
Iowa Code Annotated §622.10(1)
- It is also one of the most misunderstood legal propositions that Hollywood and popular culture has ever dealt with – We will explore some of those examples today to lighten things up!

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### WHAT DOES IT REALLY MEAN?

- In order that the attorney-client privilege may exist, the "5 Cs" must exist:
  - (1) There must be a client;
  - (2) There must be a communication;
  - (3) There must be confidentially;
  - (4) There must be counsel (an attorney); and
  - (5) There must be counsel – the giving of legal advice by an attorney.
- All 5 ingredients must exist in order that Attorney-Client Privilege Exist .
- PURPOSE – To encourage the free flow of information between an attorney and his or her client. Without privilege, "the legal system will suffer, as clients will have to determine whether confidential disclosures to their attorney could be revealed to a party with opposing legal interests. Undoubtedly, this risk could "chill" full disclosure, causing a client to withhold important facts...As a result, the attorney runs the risk of rendering incomplete and, perhaps, incorrect legal advice." ;
- Often asserted in conjunction with the Work Product Doctrine.

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### WELL, ARE CORPORATIONS PEOPLE OR NOT?




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### WHAT IS THE DIFFERENCE BETWEEN APPLYING THE PRIVILEGE TO AN INDIVIDUAL VERSUS A CORPORATION?

- The Corporation "is an artificial creature of the law, and not an individual."
- Why, then, is Attorney-Client Privilege applicable or even pertinent to an "artificial creature" of the law?
  - The Corporation has no 5<sup>th</sup> Amendment right against self incrimination;
  - In order to establish and maintain robust internal compliance processes and protocols, the Corporation needs counsel to have open access;
  - Privilege allows the attorney for the corporation to act in the capacity of a "gatekeeper".
- Two contexts for Privilege within the corporation:
  - (1) Corporate/Inside Counsel; and
  - (2) Outside Counsel representing the Corporation.

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As the corporation is the "client," there are two critical questions:

- (1) Who are the individual employees actively representing the legal interests of the Corporation for purposes of invoking the privilege?
- (2) What are the means in which a Corporation can best preserve Attorney-Client Confidentiality?

There are competing answers...

- Control Group Test: The privilege is held only by those employees communicating with counsel and in a position of control – having a substantial role in the determination of charting a course of action in response to the legal advice received from counsel.
- Subject Matter Test: The Privilege will only attach when (1) the communication is purposed to give or receive legal advice; (2) the employee communicating with counsel has been directed to do so by a superior; (3) the superior intended that the communication would facilitate legal advice for the benefit of the corporation; (4) the subject matter of the communication is within the scope of the employee's duties; and (5) the communication is not shared beyond those persons who need to know.
- Upjohn Test: The authoritative case on the scope of the Attorney-Client privilege in the corporation.

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### UPJOHN CO. V. UNITED STATES 449 U.S. 383, 101 S. CT. 677, 66 L. ED 2D 584 (1981)

- The pharmaceutical corporation, Upjohn, had conducted an internal corporate investigation relying upon questionnaires developed by counsel and answered by management employees to determine whether or not the company's foreign office managers were engaged in making illegal or questionable payments to foreign officials.
- The Court determined that just as an individual is entitled to the protection of Attorney-Client Privilege, so too is the Corporation.
- In essence, the Upjohn Court adopted a version of the Subject Matter Test.
- The communications at issue in Upjohn were protected because (1) They were made to in-house counsel at the direction of corporate superiors; (2) The statements concerned duties within the scope of the employees' corporate duties; (3) The information was not available from upper level management; and (4) The employees were aware that they were being questioned in order for the corporation to receive legal advice.

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### UPJOHN CONTINUED...

- The Court rejected the Control Theory of Attorney-Client Privilege
- A recognition that "lower level employees can expose a company to legal liability, and often have the need for direction from legal counsel."
- Adoption of the Subject Matter Test to determine whether or not the Attorney-Client Privilege applies in a particular situation.
- The focus of inquiry in determining whether or not the Privilege applies is upon *why* the communication occurred, not necessarily the level of authority or status of the employee being questioned or communicating with counsel.
- "The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel... The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."

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TAKEN TO EXTREMES ON CABLE...



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The Net Effect of Upjohn

- Upjohn remains good federal precedent – but state jurisdictions are not always in agreement.
- Control Group Test is the minority perspective, but our neighbor to the East-Illinois, remains the most staunch supporter of this proposition. Consolidated Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982).
- As recently as 2009, Iowa had not adopted a position on this matter until the Supreme Court's holding in Keefe v. Bernard, 774 N.W.2d 663 (Iowa 2009). This decision follows the majority subject matter test as articulated by Upjohn.
- Several states have not adopted a position one way or another (e.g.: Kansas, Maryland). "An uncertain privilege... is little better than no privilege at all." Upjohn at 393.



"We agree with the United States Supreme Court that the corporate attorney client privilege should not be limited to those in the 'control group.' Instead, the test must focus on the substance and purpose of the communication."

Keefe v. Bernard at 672.

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THE PRIVILEGE CAN BE WAIVED – PURPOSEFULLY, OR CONSTRUCTIVELY

- Constructive Waivers include:
  - Disclosure of the privileged communication to a third party – even employees of the corporation without a legitimate need to know, outside auditors, underwriters, etc.
  - Production of privileged documents;
  - Deposition testimony; or
  - When the legal advice is combined with or otherwise provided for a specific business purpose.
- Even privileged communications will not be protected if they relate to communications in furtherance of contemplated or ongoing criminal or fraudulent conduct – The Crime Fraud Exception.
- May be specifically mandated by legislation – I.E.: Sarbanes Oxley.
- Confidential information, available for the purview of others on a shared, public network – I.E.: The lobby of opposing counsel's law firm.
- Unsolicited legal advice of a proactive nature.

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WHAT ABOUT WAIVING THE PRIVILEGE TO SECURE MORE FAVORABLE TREATMENT?

- Many governmental agencies, such as the Department of Justice and the SEC have encouraged corporations to cooperate in investigations by waiving the attorney-client privilege.
- Once waived to curry favor in an investigation, is the privilege no longer applicable in another matter?
  - *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) allowed a "Selective Waiver" of the privilege – Even though privileged information was shared with the SEC, it remained privileged as to other parties in subsequent litigation.
- Selective Waiver is NOT recognized in all jurisdictions. Once waived, the privilege is extinguished in future discovery and litigation. See, *Burden-Meeks v. Welch*, 319 F.3d 897 (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." *Burden-Meeks* at 899.

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AND, THEN, THERE WERE THE MEMOS...

"PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS"

- Thompson Memorandum (2003) – Instructed federal prosecutors to consider, among other factors, whether or not the corporation was willing to waive the attorney-client privilege and work-product doctrine protection in exchange for a favorable plea agreement if asked to do so by the Department of Justice. Other Federal Agencies followed suit...
- McNulty Memorandum (2006) – Superseded Thompson and acknowledged that the prior Memorandum had the unintended result of "discouraging full and candid communications between corporate employees and legal counsel." It created a series of procedures for prosecutors to complete before approaching a Corporation with the request to waive Attorney-Client Privilege.
- Filip Memorandum (2008) – Superseded McNulty and emphasized that "waiving the attorney-client privilege and work-product protections has never been a prerequisite... for a corporation to be viewed as cooperative" in determining whether or not it would be offered a more favorable plea deal. Prosecutors are no longer allowed to ask for waivers

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### PRACTICAL PRACTICE POINTERS

- Make sure all the elements of Attorney-Client Privilege actually exists – The Basics;
- Counsel – whether outside or corporate, must act in the capacity of an Attorney;
- Remember “who” the client is – The Corporation;
- Watch for conflicts of interests among the various employees, even at the Board and Executive level, when individual interests might deviate from those of the Corporation;
- Take reasonable and prudent steps to ensure that communications are kept confidential;
- Know your jurisdictional rules in both state (control vs. subject matter) and federal (selective waiver vs. one and done) courts;
- Provide the “corporate Miranda” articulated in Upjohn at the beginning of any employee interview;
- Avoid labeling each and every communication as “Attorney-Client Privileged,” as it dilutes the meaning of the protection;
- Begin correspondence with words indicating that legal advice has specifically been requested by the Corporation.

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### DON'T TAKE THE PRIVILEGE LIGHTLY...

Don't be “flip” in asserting Attorney Client Privilege! The below is not a movie clip, it is real...

- Putting the label of “Attorney Client Privileged” on every email tends to dilute.
- If you assert the Attorney Client Privilege in response to discovery, make sure you have adequate justification.
- Recent Show Cause Order by Judge Bennett in Liguria Foods, Inc., vs. Griffith Laboratories, Inc.,
- **“NO MORE WARNINGS. IN THE FUTURE, USING “BOILERPLATE” OBJECTIONS TO DISCOVERY IN ANY CASE BEFORE ME PLACES COUNSEL AND THEIR CLIENTS AT RISK FOR SUBSTANTIAL SANCTIONS.”**

Emphasis in Original.  
Case No. C 14-3041-MWB

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### FOR FURTHER & MORE COMPLETE GUIDANCE...

- Preserving the Attorney-Client Privilege in Corporate Communications: Common Errors
  - [https://www.nyemaster.com/media/cms/FBHarty\\_Preserving\\_Atty\\_Client\\_Priv\\_204714493FBD8.pdf](https://www.nyemaster.com/media/cms/FBHarty_Preserving_Atty_Client_Priv_204714493FBD8.pdf)
- Preserving Attorney-Client Privilege and Work Product Immunity During Internal Corporate Investigations
  - [http://www.iowadefensecounsel.org/IDCAPdfs/Presentations/Michael\\_Mock.pdf](http://www.iowadefensecounsel.org/IDCAPdfs/Presentations/Michael_Mock.pdf)
- Managing the Attorney-Client Privilege and Work Product Doctrine: Considerations for In-House Counsel
  - [http://www.greenstelder.com/media/publication/63\\_Attorney%20Client%20Priv%20In%20House%20WhitePaper%202-2015.pdf](http://www.greenstelder.com/media/publication/63_Attorney%20Client%20Priv%20In%20House%20WhitePaper%202-2015.pdf)

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