Attorney-Client Privilege in the Corporate Setting

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January 2022

Outline of Presentation

- Determining Attorney-Client Privilege in Corporations
- Challenges Unique to In-house Counsel
- Work Product Doctrine
- Best Practices

Attorney-Client Privilege

Introduction to Attorney-Client Privilege

- Basic Elements
  - Confidential communication
  - Between lawyer and a client
  - For the purpose of obtaining or rendering legal advice

- Every American court recognizes that in-house counsel qualify for the assertion of attorney-client privilege. In these cases, the client is the corporation.
- However, the nature of in-house work poses unique challenges and greater potential to abuse the privilege. As a result, many courts seem to scrutinize attorney-client privilege more closely in the in-house context.

Tests for Attorney-Client Privilege

- Two major tests for determining who can assert attorney-client privilege in the corporate context.
  - **The Control Group Test**: This is by far the minority rule. It is a restrictive approach to attorney-client privilege and it has been explicitly rejected by the Supreme Court. Nevertheless, it remains in some jurisdictions, including Illinois.
  - **The Subject Matter Test**: This more liberal and realistic test has been adopted by the Supreme Court and a plurality of states. Furthermore, although many states have not explicitly adopted it, this test is still the overwhelming rule in those jurisdictions, including Missouri.

Control Group Test

- The essence of the control group test is that the "client" is the corporation, and the only people who can "personify" the corporation when communicating with counsel are the corporate employees who actually have authority to act on counsel's legal advice. *See City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).
- Therefore, only high-level employees can participate in an attorney-client relationship.
- In pure control group states, only top management can assert the privilege at all.
- Some states, including Illinois, have relaxed the control group test to also include individuals who regularly advise management in decision-making and whose opinions would normally be relied on in such decision-making. *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. App. 1982).

Subject Matter Test

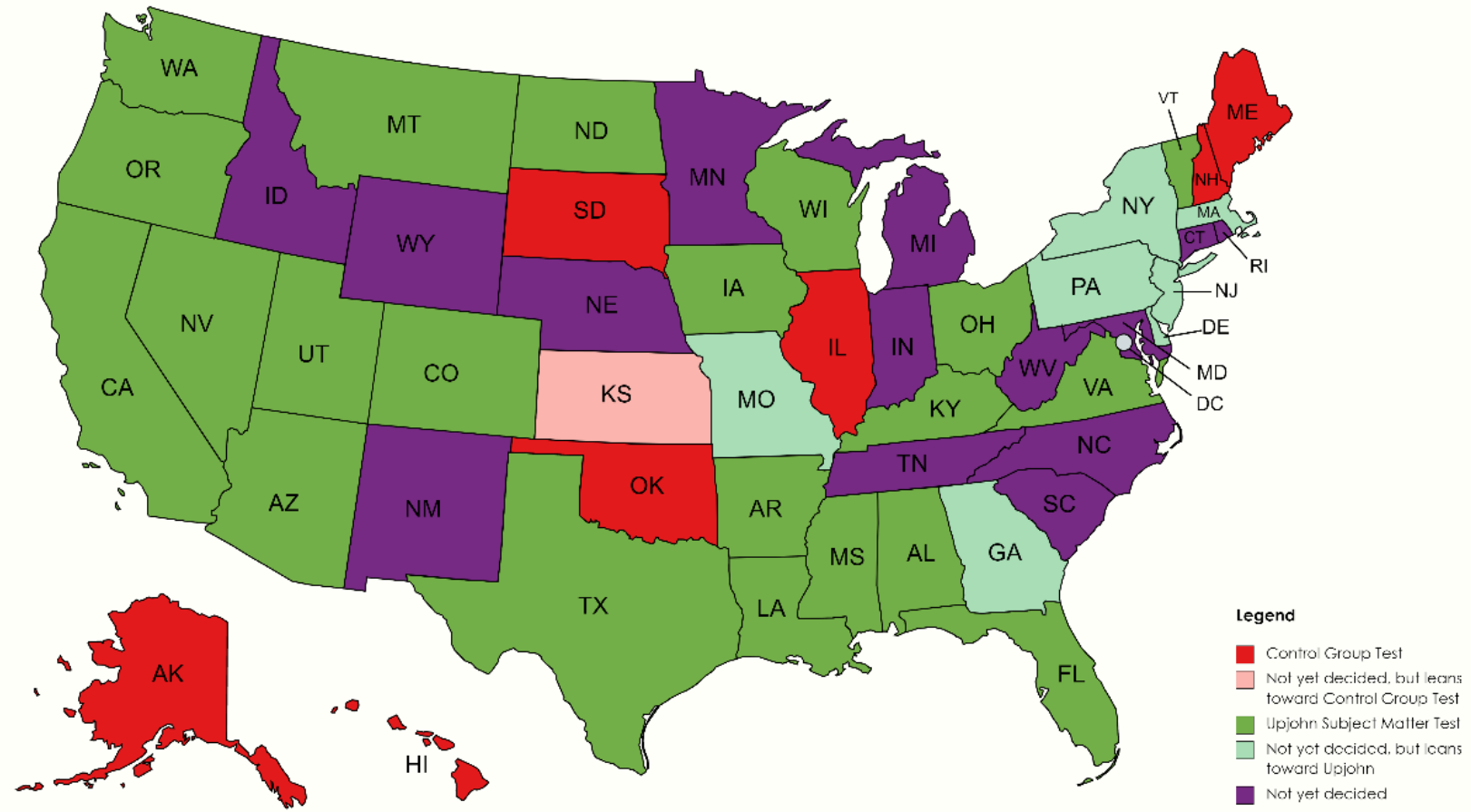
- The subject matter test acknowledges that low and mid-level employees often possess the most relevant information when a legal issue arises.
- This test extends the attorney-client relationship beyond corporate management, so that it can potentially apply to communications with any corporate employee.
- The attorney-client privilege is applicable to an employee's communication if
  1) the communication was made for the purpose of securing legal advice;
  2) the employee making the communication did so at the direction of his corporate superior;
  3) the superior made the request so that the corporation could secure legal advice;
  4) the subject matter of the communication is within the scope of the employee's corporate duties; and
  5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977).

Upjohn v. US

- Control group vs. subject matter reaches Supreme Court
- "The control group test … frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).
- Where corporate employees communicate with corporate counsel at the direction of superiors in order to secure legal advice from counsel, and where employees are aware that they are being questioned so that the corporation could obtain legal advice, such communications are protected by attorney–client privilege.
- Most jurisdictions drop the control group test after this decision.

States Retaining Control Group Test

- Illinois
- Maine
- New Hampshire
- South Dakota
- Oklahoma
- Alaska
- Hawaii
- Potentially Kansas



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Types of Attorney-Client Communication

- There are four basic types of communication within the attorney-client relationship:
  - Corporation/employee seeks legal advice from counsel
  - Counsel seeks information from corporation/employee
  - Corporation/employee provides information to counsel
  - Counsel renders legal advice to corporation
- Whether the jurisdiction uses the control group test or the subject matter test affects the protection of these communications.

Other Challenges for In-House Counsel

- Regardless of which test is utilized, there are a few other major areas where in-house counsel often lose (or never acquire) protection of attorney-client privilege.
  - Legal advice vs. Business advice
  - Counsel's involvement in a matter is illusory (e.g., cc'd on an email)
  - Disclosure to employees who don't need to know
  - Disclosure to third parties

Business Advice vs. Legal Advice – Predominant Purpose

- "In light of the two hats often worn by in-house lawyers, communications between a corporation's employees and its in-house counsel… must be scrutinized carefully to determine whether the **predominant purpose** of the communication was to convey business advice and information or, alternatively, to obtain or provide legal advice." *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 648 (S.D.N.Y. 2019).
- Legal advice does not have to be entirely limited to legal opinions and research, but it does need to be relevant to rendering a legal opinion.
- Some courts have suggested that if a given piece of advice could be equally rendered by an individual without a law degree, then there is a good chance it is not legal advice.
- If feasible, courts often require the legal advice to be redacted from a communication with both business and legal advice.

Lawyer's Involvement is Illusory

- Courts are wary of the fact that corporations may try to take advantage of attorney-client privilege to shield communications that are not actually protected.
- Across the board, courts have held:
  - Copying a lawyer on an email, unrelated to legal services, will never serve to make that email privileged.
  - Similarly, bringing a lawyer into a meeting where he or she does not need to be will not automatically make that meeting privileged.
- Consider "Would this email still make sense if it was sent without the lawyer copied on it?"
  - If the answer is yes, then the lawyer's involvement may be illusory.

Disclosure within Corporation

- A key element of attorney-client privilege is that the communication must be "confidential."
- Courts have held that a communication can lose its confidentiality if it is shared with too many people.
- **Subject Matter Standard**: Only disclose to those who "**need to know**"
- **Control Group Standard**: Only disclose to those **within the control group**
- The confidentiality requirement remains, even after the communication is made.
- Generally, to avoid waiver of the privilege, employees should ask permission from in-house counsel before they reveal to anyone—including their co-workers—any communications they may have had with in-house counsel.

Disclosure outside Corporation

- Generally, a voluntary disclosure to a third party of the privileged material, being inconsistent with the confidential relationship, waives the privilege. *Kirsch v. Brightstar Corp.*, 68 F. Supp. 3d 846 (N.D. Ill. 2014).
  - It is hard to argue that a communication was truly confidential if the corporation shares it with a third party.
- This standard seems to be the same in Missouri and Illinois.
- Corporations should be careful not to include a third party, such as a vendor, independent accountant or business consultant, in confidential communications.

Work Product Doctrine

Work Product Doctrine

- Applies to materials prepared by an attorney, or an agent of the attorney, **in anticipation of litigation**. *United States v. Nobles*, 422 U.S. 225, 237–39 (1975).
  - Similar to attorney-client privilege, but closer to "qualified immunity" as opposed to a privilege
- Protects documents and material items that are an attorney's "work product" for litigation
  - Attorney involvement not required (as compared to privilege)
  - Broader forms of documents are covered (not just legal memos)
- Threat of litigation must be "substantial and significant"
  - Possibility of litigation is NOT sufficient to invoke work product doctrine
- Termination – some (but not all courts) hold that work product protection ends with the termination of the litigation for which it was created

Work Product Doctrine: Waiver

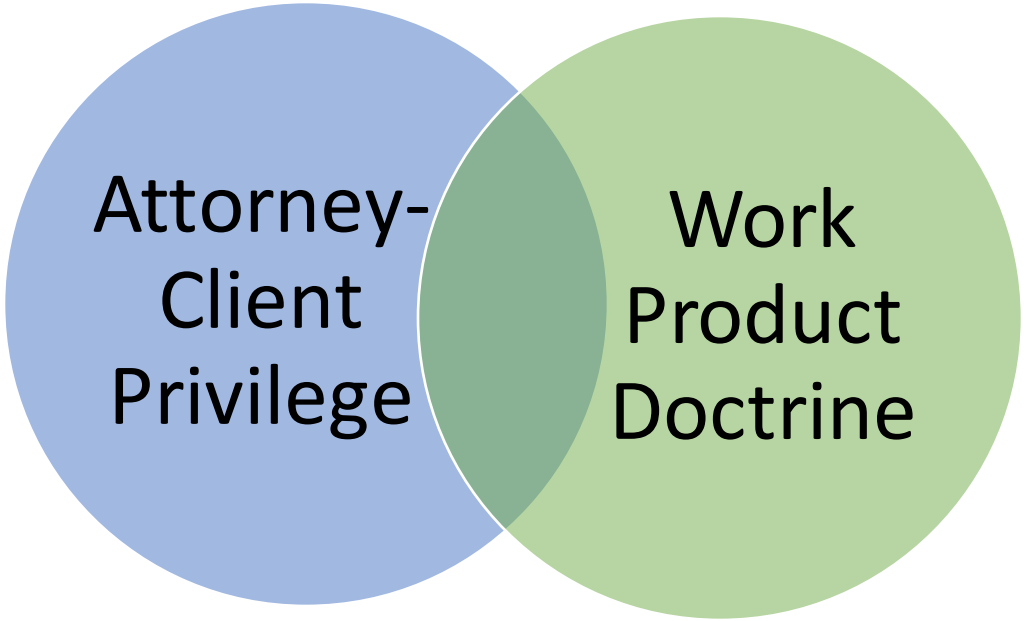
- Waiver – disclosure to "friendly" third parties (even those who do not qualify as agents of the attorney or client) does not usually waive protection
- However, work product protection can be overcome if there is a substantial need for the product in question and the equivalent cannot be obtained without "undue hardship"
- *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1314-15 (7th Cir. 1984)
  - If a report is used in an adjudicative procedure to advance corporate interest, there is a strong presumption confidentiality must be surrendered
- *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846-47 (8th Cir. 1988)
  - Disclosure to adversary waives work product protection, even if parties "shared a common interest in settling claims"

Work Product Doctrine: State and Federal

- In federal court, Federal Rule of Civil Procedure 26(b)(3) governs work product determinations regardless of whether the underlying claims are state or federal in nature
- Illinois work product is narrower and only covers "opinion work product" that discloses the opinions or theories of the attorney. *Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr.*, 572 N.E.2d 1025, 1029 (Ill. Ct. App. 1991).
- Missouri work product is in line with federal work product, covering:
  - "Tangible" work product (documents and tangible items like statements and interviews), which may be discoverable upon the adversary's showing of a "substantial need."
  - "Intangible" work product ("opinion work product" including an attorney's opinions, thoughts, or impressions), which is never discoverable. *State ex rel. Rogers v. Cohen*, 262 S.W.3d 648, 653-54 (Mo. 2008).

Attorney-Client Privilege vs. Work Product

- Attorney-client privilege applies to communications between attorneys and clients, not to any underlying facts or ideas.
- Work product doctrine applies to most material prepared by an attorney or the attorney's agent in anticipation of litigation.
- ACP, once established, is generally a stronger protection than WPD.
- Once litigation is anticipated, WPD can cover a wider range of materials; however, "anticipation of litigation" is a high standard.
- WPD is subject to exceptions when the other side has a "substantial need"



When can an In-House Lawyer "Anticipate" Litigation?

- Company receives a phone call from an angry customer who alludes to the threat of litigation.
  - Possibly.
- Company receives a demand letter from the customer that explicitly threatens litigation.
  - Probably yes.
- Company receives a demand letter from an attorney whom the customer has retained.
  - Most likely yes.
- There is no perfect test for when you can anticipate litigation; it is very contextual. The company should document any communications to prove it had a good-faith belief litigation was anticipated before creating work product.

Recap – Best Practices

Best Practices

- Follow the company's values – be thoughtful with written communications (including IMs).
- Pick up the phone when warranted – especially for very sensitive legal advice and when the facts are unclear.
- Always limit recipients of legal advice to those who "need to know."
- Be wary of providing legal advice in open team forums – particularly when the session is being recorded.

Best Practices (Continued)

- Mark privileged documents as “privileged” and confidential.
- Keep business advice separate from legal advice.
  - think about separating the legal advice into a separate communication.
- Make sure employees know not to share their communications with coworkers without permission from in-house counsel.
- Make it clear that employee is seeking legal advice on behalf of corporation, and counsel is giving legal advice.

Best Practices (Continued)

- Directive Email
  - Prominently label as a privileged communication.
  - Make clear that the Office of General Counsel is directing that certain action be taken so that OGC may provide legal advice to the company.
  - Clearly set forth the requested actions.
  - Make clear that any communications, information, documents, or analysis generated is at the request of OGC and should be prominently labeled as privileged.
  - Direct that the work be kept confidential and not shared with others, without first consulting OGC.

Thank You

January 2022