### Attorney-Client Privilege

#### Elements
- Legal advice of any kind is sought
- From a professional legal advisor in that capacity
- Communications made for that purpose
- In confidence
- By the client
- At the client’s instance permanently protected
- Unless privilege is waived

#### Purpose
- Encourage full & frank discussions between attorneys & clients
- Enable attorneys to give sound legal advice

#### Key Questions
- Is the client seeking legal advice?
- Is the attorney rendering legal advice?

#### What is Privileged?
- Oral or written communications with your client
- Memorializations of oral communications with your client
- Communications for the purpose of retaining counsel
- Communications with attorney’s paralegals & support staff

#### What is Not Privileged?
- Underlying facts
- Communications where client is not seeking legal advice
- Communications with third parties
- Advice that aids in commission of illegal activity
- Protected information that client intentionally or inadvertently waives
Attorney-Client Privilege
Defining the Corporate Client

- Attorney-client privilege extends to all employees having relevant information

Attorney-Client Privilege
Upjohn Test

- Whether communications were made by corporate employees to corporate counsel at direction of superiors for purposes of obtaining legal advice
- Whether communications contained information needed by corporate counsel
- Whether information concerned matters within scope of employee’s duties
- Whether employee was aware that reason for communication was to obtain legal advice for corporation
- Whether communications were ordered to be & remained confidential

Attorney-Client Privilege
Tips for Preserving

- Determine what privilege applies to communications & conduct communications to maximize protection
- Limit distribution of legal advice to people who need to know
- Establish policy on copying & distributing documents containing legal advice & opinions
- Identify documents that are privileged

Work Product Doctrine
Definition

Protects from discovery documents or material things prepared:

- In anticipation of litigation or for trial; and
- By or for a party or by or for a party's representative

Work Product Doctrine
What Does it Protect?

- Written statements, private memoranda, fact chronologies, mental impressions, personal beliefs & any information assembled by attorneys in anticipation of litigation
- In anticipation of litigation = “because of” the prospect of litigation or primarily to assist in litigation

Work Product Doctrine
What Does it Cover?

Materials prepared by anyone at the direction of attorney where future litigation was distinct possibility:

- Attorney’s paralegals and support staff
- Consultants/investigators/experts engaged by attorney
- Client acting at attorney’s direction
- Jury research consultants
Work Product Doctrine
Qualified
• May be overcome by showing substantial need & showing there is no other access to information without undue hardship
• Yet, mental impressions, conclusions, opinions & legal theories of attorney remain protected
FRCP 26(b)(3)

Work Product Doctrine
Tips for Preserving
• Identify work product & create privilege log
• Include mental impressions & opinions in documents that summarize interview & evidence
• Allow outside counsel, rather than company or its in-house counsel, to retain consultants, investigators & experts

Waiver of Privileges
Types & Scope
• Types
  – Intentional Disclosure
  – Inadvertent Disclosure
• Scope
  – Waiver of privilege regarding some communications generally waives the privilege as to all communications related to the same subject matter

Waiver of Privileges
Tips to Avoid Waiver
• Include agreement for asserting claims of privilege in pretrial scheduling order
• Obtain protective order or confidentiality agreement
• FRCP 26(b)(5)(B): inadvertent waiver procedure

Attorney-Client Privilege and
Work Product Doctrine

Questions for Panel Members
Magistrate Judge Piester
Professor Kirst