

## Attorney-Client Privilege and Work Product Doctrine

- ### 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

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

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

- ### Attorney-Client Privilege 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

- ### Attorney-Client Privilege 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

- Corporate client analyzed under test set forth in *Upjohn v. United States*, 449 U.S. 390 (1980)
- 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