TEACHING YOUR TEAM HOW ATTORNEY-CLIENT PRIVILEGE AND DOCUMENT DISCOVERY WORKS (AND DOESN'T) *BEFORE* THE LAWSUITS OR INVESTIGATIONS START

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Part One: What Every In-House Lawyer Should Know About the Attorney-Client Privilege

- Generally applies when: (1) a client communicates with a lawyer regarding legal advice; (2) the lawyer is acting in a professional capacity (rather than, for example, as a friend); and (3) the client intended the communications to be private and acted accordingly.[1]

    - Even preliminary conversations between a prospective client and attorney are typically protected. *In re Auclair*, 961 F.2d 65 (5th Cir. 1992). Such preliminary conversations may give rise to an implicit attorney-client relationship. *See Hacker v. Holland*, 570 N.E.2d 951 (Ind. Ct. App. 1991) ("Attorney-client relationship need not be express; it may be implied from conduct of parties."); *Jones v. U.S.*, 828 A.2d 169 (D.C. 2003) ("The issue in determining nature of relationship at issue in a claim of attorney-client privilege is what putative client believed when he was seeking advice and whether his belief about the confidentiality of the conversation was reasonable."); *Herbes v. Graham*, 536 N.E.2d 164, 168, 180 Ill. App. 3d 692, 699 (1989) ("The relationship can come into being during the initial contact between the layperson and the professional and appears to hinge on 'the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'"); *see also Bruley v. Garvin*, 48 L.R.A. 839 (Wis. 1900) ("Payment of retainer or fee is not indispensable to the formation of relation of attorney and client…and where a person consults an attorney to obtain legal advice, and the attorney accepts confidences relating to such matter, the relation of attorney and client is established, and the communication so made and the advice given thereon

[1] In addition to caselaw, most jurisdictions also have specific statutes describing the scope and application of the attorney-client privilege. This handout simply provides an overview of the law of attorney-client privilege generally, and careful review of the law as it applies in each relevant jurisdiction is recommended.

are privileged."); *Hoyas v. State*, 456 So. 2d 1225 (Fla. Dist. Ct. App. 1984) ("Attorney-client privilege applies in a case where confidential communication is made to an attorney with a view toward his employment, regardless of whether the attorney is subsequently retained, and endures even after the attorney-client relationship terminates.").

- Why it's important
    - The privilege stays in effect after the attorney-client relationship ends, and even after the client dies. The lawyer can never divulge the client's secrets without the client's permission, unless an exception or waiver applies. *United States v. White*, 970 F.2d 328 (7th Cir. 1992); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998); *see also People v. Ryan*, 197 N.E.2d 15 (Ill. 1964); *Mayberry v. State*, 670 N.E.2d 1262 (Ind. 1996); *Hoyas v. State*, 456 So. 2d 1225, 1228 (Fla. Dist. Ct. App.1984); *Adams v. Franklin*, 924 A.2d 993, 997 (D.C. 2007); *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976); H*arold Sampson Children's Tr. v. The Linda Gale Sampson 1979 Tr.*, 679 N.W.2d 794 (Wis. 2004).
- Privilege vs. Confidentiality
    - Attorney-client privilege is a rule of evidence.
    - Duty of confidentiality is a rule of legal ethics set out in each jurisdiction and in ABA Model Rule 1.6.
- Other potential avenues for protection:
    - ***Work Product***: even if they are not privileged, attorney-to-client communications often will be independently protected as attorney work product.
        - Under Fed. R. Civ. P. 26(b) (3), work product applies to documents and tangible things as well as intangible work product such as an attorney's mental impressions created "in anticipation of litigation."
        - *See State ex rel. Dudek v. Circuit Court for Milwaukee Cnty.*, 150 N.W.2d 387 (Wis. 1967) ("[A] lawyer's work product consists of the information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means."); *see also Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991); *Arizona Indep. Redistricting Com'n v. Fields*, 75 P.3d 1088 (Ariz. Ct. App. 2003); *Purdue Univ. v. Wartell*, 5 N.E.3d 797 (Ind. Ct. App. 2014); *Butler v. Harter*, 152 So. 3d 705 (Fla. Dist. Ct. App. 2014); *In re Public Defender Serv.*, 831 A.2d 890 (D.C. 2003).

- ***Consultant/Expert disclosures***: in most jurisdictions, communications with a consultant engaged by counsel in the anticipation of litigation are not discoverable, while the same communications had between client and consultant might be. Illinois Supreme Court Rule 201. When in doubt, consult your counsel before contacting your consultant.

- ***Joint Defense/Common Interest doctrine***: this is not a separate privilege, but instead "an extension of the attorney client privilege." *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n. 7 (9th Cir. 1987). The doctrine protects the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989).

    - In other words, although ordinarily the attorney-client privilege would be waived by disclosing documents or communications to another party, no waiver occurs as long as there is a common interest or joint defense agreement between those parties. *Waller*, 828 F.2d at 583 n. 7.

    - Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected. *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *Groth v. Pence*, 67 N.E.3d 1104, 1119 (Ind. Ct. App. 2017).

        - The mere fact "that the defendants have a common interest in the defense of this case does not automatically render every communication between them subject to the common interest privilege." *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 273–74 (N.D. Ill. 2004).

    - Only those documents or communications which are otherwise privileged are protected. "Thus, if a document is not already shielded from production by a privilege, then the common interest doctrine does not apply. And, if a privilege is waived as to certain documents before the common interest arose, then those documents cannot be shielded by the common interest doctrine." *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 273–74 (N.D. Ill. 2004).

    - "The involvement of legal counsel is often a significant factor. If the communication is between various group members who are not attorneys, then the sharing of communication directly with a non-attorney member of the community may destroy the doctrine's availability." *Del Monte Int'l GMBH v. Ticofrut, S.A.*, 2017 WL 1709784, at *8 (S.D. Fla. May 2, 2017).

- The bad news

- The scope and applicability of the attorney client privilege are uncertain and very jurisdiction-specific.

- The privilege has never been as broad as people think.

    - "Because the public generally has a right to every man's evidence, we narrowly construe constitutional, common law, and statutory privileges for they are in derogation of the search for truth." *Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1094 (Ariz. Ct. App. 2003); *see also Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991) ("[T]he privilege ought to be strictly confined within its narrowest possible limits."); *Jacobi v. Podevels*, 127 N.W.2d 73, 76 (Wis. 1964); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1381 (Fla. 1994); *Jones v. U.S.*, 828 A.2d 169, 175 (D.C. 2003); *Howard v. Dravet*, 813 N.E.2d 1217, 1222 (Ind. Ct. App. 2004); *but see Gordon v. Superior Court*, 65 Cal. Rptr. 2d 53 (Cal. Ct. App. 1997) ("The term 'confidential communication' is broadly construed, and communications between a lawyer and his client are presumed confidential, with the burden on the party seeking disclosure to show otherwise.").

    - Communications must be both confidential and made for the purpose of providing legal advice or obtaining information to provide legal advice. Ariz. Rev. Stat. § 12-2234. *See Rounds v. Jackson Park Hosp. & Med. Ctr.*, 745 N.E.2d 561 (Ill. App. Ct. 2001) ("To be entitled to the protection of the attorney-client privilege, a claimant must show that the statement originated in confidence that it would not be disclosed, was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential."); *see also Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721 (Ind. Ct. App. 1995); *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73 (Fla. Dist. Ct. App. 2010); *Neku v. U.S.*, 620 A.2d 259, 262 (D.C. 1993); *Jax v. Jax*, 243 N.W.2d 831 (Wis. 1976).

    - A communication is "confidential" only if it is "not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Wis. Stat. § 905.03(1)(d); *see also Bassett v. State*, 895 N.E.2d 1201, 1206 (Ind. 2008) ("A communication is confidential if it "occurred during an attempt to procure professional legal aid."); *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 75–76 (Fla. Dist. Ct. App. 2010) ("A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons"); *see also State v. Sucharew*, 66 P.3d 59, 65 (Ariz. Ct. App. 2003) ("The presence of a third person will usually defeat the privilege on the ground that confidentiality could not be intended with respect to communications that the speaker knowingly allowed to be overheard by others foreign to the confidential relationship"); *Adams v. Franklin*, 924 A.2d 993, 999 (D.C. 2007) ("The privilege attaches to a confidential

communication between attorney and client is waived when the substance of that communication is related to a nonprivileged party."); Cal. Evid. Code § 952 ("'[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . ."); *People v. Werhollick*, 259 N.E.2d 265, 266 (Ill. 1970) ("Courts consider several factors in determining whether a communication is confidential including "the purpose for which the statement was required, the understanding by its maker as to that purpose, [and] the extent to which its confidentiality was maintained after it was made and in the course of its transmission to counsel."").

- Courts applying a narrow construction of the privilege may hold that attorney-to-client communications fall outside the privilege more readily than client-to-attorney communications. *See Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788 (Wis. 2002) ("While the lawyer-client privilege readily protects statements from the client to the lawyer, the privilege only protects communications from the lawyer to the client if disclosure of the lawyer-to-client communications would directly or indirectly reveal the substance of the client's confidential communications to the lawyer." (internal quotation marks omitted)); *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products LLC*, 2015 WL 1120321, at *2 (E.D. Wis. Mar. 12, 2015) ("Under a narrow view of attorney-client privilege, communications made by the attorney to the client are only privileged if the communication reveals client confidences. Under a slightly broader view, attorney-to-client communications are also privileged if the communication constitutes legal advice (which must be, of course, provided in confidence).").

- Different jurisdictions have different rules

  - In-house communications are particularly scrutinized

    - There are varying rules for how corporate clients are covered by the privilege. In federal court and most state jurisdictions, communications "made by [low-level corporate] employees to counsel for [the corporation] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel," are covered by the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); *see also Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1495 (9th Cir. 1989) (extending *Upjohn* to cover "communications between employees of a subsidiary corporation and counsel for the parent corporation," plus

"communications between former employees and corporate counsel," so long as the employee "possesses information critical to the representation of the parent company and the communications concern matters within the scope of employment"). But a minority of states depart from *Upjohn* by holding that the attorney-client privilege can extend only to those individuals in the corporation who are authorized to make legal decisions on the corporation's behalf, or at least have authority to bind the corporation in some way. *See AU Elec., Inc. v. Harleysville Grp., Inc.*, 2014 WL 2429104, at *2 (N.D. Ill. May 28, 2014) (holding that under Illinois law, "privileged communications lose their privileged status if disseminated to persons not in [the corporation's] control group"); *see also Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982) (defining the "control group" to include "top management who have the ability to make a final decision," as well as "employee[s] whose advisory role to top management in a particular area is such that a decision would not normally be made without [their] advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority"); *compare Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993) (adopting a narrow version of the *Upjohn* doctrine under which, "[w]here someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege [only] if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client").

- In-house privilege claims are more highly scrutinized. *See Solis v. Milk Specialties Co.*, 854 F. Supp. 2d 629, 632 (E.D. Wis. 2012) (demonstrating privilege "is more difficult in the context of in-house counsel because counsel is often involved in business matters as well as legal"); *Am. Nat. Bank and Trust Co. of Chicago v. Equitable Life Assur. Soc. of U.S.*, 406 F.3d 867, 879 (7th Cir. 2005) (mentioning privilege is "especially difficult" because of the need to "distinguish[] in-house counsels' legal advice from their business advice"); *Salvation Army v. Bryson*, 273 P.3d 656, 661 (Ariz. Ct. App. 2012) (stating ""things become complex" when the attorney's client is a corporation because "[t]he corporation is a fictional entity" that "can only act through its agents," giving rise to the question: "[W]hich communications made by the corporation's agents are those of the corporate client and not merely those of the individual speaker?""); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) ("[T]o minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the

privilege in the corporate context will be subjected to a heightened level of scrutiny."); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) (requiring a "clear showing" that communications with in-house counsel were made for the purpose of obtaining legal advice, because "the presumption [of privilege] that attaches to communications with outside counsel does not extend to communications with in-house counsel"); *see also Casey v. Unitek Global Servs., Inc.*, 2015 WL 539623 (E.D. Penn. Feb. 9, 2015) (holding that the defendant lacked an attorney-client relationship with a lawyer it hired to run its risk management and safety departments). Such privilege claims are more highly scrutinized because in-house counsel must be acting in their capacity as legal professionals providing legal advice, not business advice. *See Hartford Fin. Serv. Grp., Inc. v. Lake County Park and Recreation Bd.*, 717 N.E.2d 1232, 1236 (Ind. Ct. App. 1999); *In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984).

- If the jurisdiction is foreign, there may be no privilege.
    - The European Union's "legal professional privilege" protects only communications with an "independent" lawyer—*i.e.*, not in-house counsel. *See Akzo Nobel Chemicals Ltd. v. Akcros Chemicals Ltd.*, Case C-550/07 P (Sept. 14, 2010).
    - Volkswagen retained Jones Day to oversee an internal investigation into Volkswagen's use of secretive software to cheat emissions tests. This September, Jones Day's offices were raided by German Prosecutors who reported took more than 150 lever arch folders and USB sticks of files relating to the investigation. Prosecutors said they had court approval for the raid and argued that Jones Day had been operating as merely a "third party," not legal counsel.
        - Worse, legal recourse for Volkswagen is very limited – complaints are filed at the lowest level court (equivalent to magistrate courts), and the sole permitted appeal is heard by a district court, whose decision is final and binding.
        - Volkswagen lost at both stages, and now can only file a constitutional complaint with Germany's top court, which (as a legal entity outside the European Union), it may not have the right to do. *See Not So Privileged*, THE AMERICAN LAWYER, September 2017, p. 15.
    - The courts of some E.U. countries, however, extend the privilege to communications with in-house counsel. For example, in 2013 the Brussels Court of Appeal held that the *Akzo Nobel Chemicals* rule did

not apply in a Belgian national case and ordered the Belgian Competition Authority to return materials seized from a company's in-house counsel.

- There are many other trap doors where you can lose protection:
  - ***Crime/fraud.*** The attorney-client privilege does not exist where the "crime-fraud exception applies." *See Lahr v. State*, 731 N.E.2d 479 (Ind. App. Ct. 2000); *see also RMS of Wisconsin, Inc. v. Shea-Kiewit Joint Venture*, 2014 WL 4748844, at *2 (E.D. Wis. Sept. 24, 2014) (no attorney-client privilege upon a showing of "reasonable cause to believe that the attorney's services were utilized in furtherance of [an] ongoing unlawful scheme"); *People v. Radojcic*, 998 N.E.2d 1212, 1223 (Ill. 2013) (no privilege upon "evidence from which a prudent person would have reasonable basis to suspect (1) the perpetration or attempted perpetration of a crime or fraud, and (2) that the communications were in furtherance thereof" (internal quotation marks omitted)); *State v. Fodor*, 880 P.2d 662 (Ariz. Ct. App. 1994) (no privilege upon "a *prima facie* showing . . . the attorney was retained by the client for the express purpose of promoting intended or continuing criminal or fraudulent activity"); Fla. Stat. § 90.502(4)(a) (no privilege where "[t]he services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud"); *Swortwood v. Tenedora de Empresas, S.A. de C.V.*, 2014 WL 895456, at *12 (S.D. Cal. Mar. 6, 2014) (no privilege upon a showing "that the (1) client was engaged in or planning a criminal or fraudulent scheme when he or she sought the advice of counsel to further the scheme; and (2) attorney-client communications for which production is sought are sufficiently related to, and were made in furtherance of, the scheme—*i.e.*, the attorney was consulted not with respect to prior wrongdoing but, rather, to facilitate or conceal a continuing or contemplated crime or fraud." (internal quotation marks omitted)); *In re Public Defender Serv.*, 831 A.2d 890 (D.C. 2003) (such exception "assures that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.").
  - ***Sharing information with insurer.*** *See In re Imperial Corp. of Am.*, 167 F.R.D. 447, 451–53 (S.D. Cal. 1995) (privilege waived by disclosure of communications to representatives of a directors' and officers' liability insurer that had no duty to defend the directors and officers, only a potential duty of indemnification); *Longs Drug Stores v. Howe*, 657 P. 2d 412 (Ariz. 1983) (employee statements to the defendant's insurer, who took the statements at the request of in-house counsel and provided them to in-house counsel to use as part of his case evaluation, were not subject to attorney-client privilege, although they still had limited work-product protection); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Tr. Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993) ("[I]f what is sought is not legal advice,

but insurance, no privilege can or should exist."); *State ex rel. Dudek v. Circuit Court for Milwaukee Cnty.*, 150 N.W.2d 387, 400 (Wis. 1967) ("Where important issues pertinent to action by insured [], the attorney-client privilege attached only to communications between insurer's attorney and insurer which were in some way relevant to those issues."); *Staton v. Allied Chain Link Fence Co.*, 418 So.2d 404 (Fla. Dist. Ct. App. 1982) ("Communications between an insured and its insurer made for information and benefit of attorney defending insured fall within attorney-client privilege and are not subject to discovery."); *compare with People v. Ryan*, 30 Ill.2d 456 (Ill. 1964) and *Richey v. Chappell*, 594 N.E.2d 443 (Ind. 1992) (recognizing an insurer-insured privilege in Illinois and Indiana).

- ***Other selective disclosures.*** *See Burden-Meeks v. Welch*, 319 F.3d 897, 899 (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."); *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (rejecting the theory of selective waiver and citing similar decisions of the First, Second, Third, Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits); *but see Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 368–69 (Ill. 2012) (holding "that subject matter waiver does not apply to disclosures made in an extrajudicial context when those disclosures are not thereafter used by the client to gain a tactical advantage in litigation").

- ***Mistaken/inadvertent disclosure.*** *See Constr. Sys. of Am., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 118 So. 3d 942, 943–44 (Fla. Dist. Ct. App. 2013) (using "a five-factor relevant circumstances test to determine whether a party waived privilege through inadvertent disclosure"); *but see Harold Sampson Children's Tr. v. The Linda Gale Sampson 1979 Tr.*, 679 N.W.2d 794 (Wis. 2004) ("[A] lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents (which the attorney does not recognize as privileged) to an opposing attorney in response to a discovery request."); *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999) ("'[W]aiver" does not include accidental, inadvertent disclosure of privileged information by the attorney."); *Dalen v. Ozite Corp.*, 594 N.E.2d 1365, 1371 (Ill. App. Ct. 1992) ("Mere inadvertent production does not waive the privilege."); *P.T. Buntin, M.D., P.C. v. Becker*, 727 N.E.2d 734 (Ind. Ct. App. 2000) ("Court balances several factors, including reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, and an overreaching issue of fairness and the protection of an appropriate privilege, which must be judged with respect to whether the privilege is guarded with care and diligence, or negligence and indifference."); *Burch & Cracchiolo, P.A. v. Myer*s, 351 P.3d 376, 384 (Ariz. Ct. App. 2015).

- Putting documents on file-sharing site with no password protection waived attorney-client privilege. *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, 2017 WL 1041600 (W.D. Va. Feb. 9, 2017).

- ***Unauthorized use of employer e-mail system.*** *See In re High-Tech Emp. Antitrust Litig.*, 2013 WL 772668, at *6–8 (N.D. Cal. Feb. 28, 2013) (finding no waiver of privilege attaching to emails that a part-time Google employee sent from his @intuit.com address, but only because Intuit did not impose "an all-out ban on personal use" of @intuit.com email addresses and did not monitor employee emails, despite having reserved the right to do so); *see also In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (employing a widely-cited, four-factor test "to measure [an] employee's expectation of privacy in his computer files and e-mail" for purposes of determining if emails sent from the employee's work account are covered by attorney-client privilege); *Goldstein v. Colborne Acquisition Co., LLC*, 873 F.Supp. 2d 932, 937 (N.D. Ill. 2012) (recognizing that if there were restrictions on use of company e-mail "an employee's belief that his communications were confidential is less reasonable"); *Convertino v. U.S. Dept. of Justice*, 674 F.Supp.2d 97 (D.D.C. 2009) ("[F]or documents sent through e-mail to be protected by the attorney-client privilege there must be a subjective expectation of confidentiality that is found to be objectively reasonable."); *Leor Exp. & Prod. LLC v. Aguiar*, 2009 WL 3097207, at *4 (S.D. Fla. 2009) (finding that employee "had no reasonable expectation of privacy in emails transmitted" through his employer's server).

- ***Internal investigation.*** *See Bickler v. Senior Lifestyle Corp.*, 266 F.R.D. 379 (D. Ariz. 2010) (holding that when a nursing center's in-house counsel directed the human resources department to interview employees about alleged negligence at the center, the employees' responses were not privileged under Arizona law because they were not made directly to a lawyer, although the responses still qualified for limited work-product protection); *but compare In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (holding that because providing legal advice was "one of the significant purposes of the internal investigation," the attorney-client privilege applies).

- The practical realities of litigation:

  - Challenges to claims of attorney client privilege/work product doctrine and confidentiality designations are more frequently being made for strategic reasons.

  - Courts often review in camera and see it anyway; the bell cannot be unrung. *But see Costco Wholesale Corp. v. Superior Court*, 219 P.3d 736 (Cal. 2009) ("[A] court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege . . . ."); *In re Marriage of Decker*, 606 N.E.2d 1094 (Ill. 1992) ("Because of the inherent problem involved in a trial court's viewing

information that may in fact be privileged, and then later ruling on an issue which the privileged information may affect, it would be prudent, where possible, to have another trial judge conduct the *in camera* inspection once the initial threshold has been met and the court has determined that an *in camera* inspection is proper.").

- Privilege—let alone claims of confidentiality—does not survive real explosions (Enron, suits against law firms, shifting or new constituencies, government investigation).
- Disclosure is often not surprising to other attorneys but can be to juries, judges and newspapers.
- Document retention/production is being put on trial; privilege/ethics are next.

- Best practices
  - Everything doesn't have to be in writing (but some things do).
  - Run your business, but observe formalities: If it is a secret, treat it as such.
  - Edit communications as if a judge might see them some day or as if someone with great incentive to take things out of context will distort them.
  - The transaction costs of the fight to compel production may not be worth the likely result.
  - Consultants' work may be protected, but only if proper procedures are in place.
  - Recent Cases (see Appendix).

Part Two: Teaching Your Employees about How the Privilege Works (and Doesn't Work) and Why They Should Care

- Educating your Team: Why it is Important
    - It is important they understand the rules before and after the game starts.
    - Many of the rules are consistent with good business practice as well as risk management.
    - Not knowing the rules in advance can lead to unfortunate consequences later.
    - Many executives and other employees have wild misconceptions about the rules.
    - It is our obligation as attorneys to teach them.
    - *"Document the Right Way"* Power Point Presentation for Employees
        - Quarles is happy to tailor and present information to your employees.
- Big picture messages for your employees:
    - You could become the face of the Company in a lawsuit
    - Your document could become "Exhibit A" in litigation
    - Your documents could help win a big case or, alternatively, it could cost the Company money.
    - Should you even be writing? Sometimes talking is better:
    - Permits greater informality
    - Allows brainstorming
    - Confines circulation
    - You should write:
        - When it is dictated by business needs.
        - When it is necessary to create an essential record of what occurred.
        - After you have all necessary facts/information – or after you acknowledge you still need additional information.
- The Basics for your employees:

- Why documents matter
    - Circumstantial evidence is often the only evidence.
    - Conversations exist only in memory.
    - By contrast, documents are real, permanent, and can be seen and touched.
    - Documents can be used to question or contradict after-the-fact oral explanations.
    - In regulatory proceedings and litigation, the outcome often depends on the quality of the parties' documents
- Discovery
    - Voluminous discovery requests exchanged
    - Courts and agencies require production if a document is "relevant" or "reasonably calculated"
    - Documents reviewed for privilege before production
    - For discovery purposes, it does not matter where documents are stored: discovery can reach many places, including: "Personal" or Shadow file in office; cell phone (company or personal); home files, home computer, CDs, and thumb drives; car; the cloud
- Can't we pick and choose what to produce?
    - Ask Arthur Andersen's former employees.
    - In the absence of any lawsuits or claims, follow your normal record retention requirements.
    - If a lawsuit, notice of claim or government investigation is filed, started, or reasonably likely, **do not destroy anything**!
    - Consult with counsel assigned to the case.
    - With the discovery tort (spoliation), a party may win a case based on discovery, even if they couldn't win on the merits.
- Easy test for all documents:
    - If your communication were reprinted on the first page of the newspaper, what would your reaction be?

- Note: this "easy test" applies to *all* written communications
    - Traditional: memos, letters, e-mails, calendars, diaries, billing records
    - Nontraditional: notes on napkins, post-its, receipts
    - *Anything* electronic: texts, instant messaging, Facebook, Snapchat, Instagram, Twitter, message boards, etc.

- Why electronic communications can be so dangerous
    - They combine the immediacy of speech with the permanency of writing.
        - People are not as careful with electronic communications as they are with more formal documents.
        - Before hitting send, do the "letterhead" test.
    - No control over forwarding
    - Inadvertent reply to "all"
    - Wrong e-mail address (autofill e-mail)
    - Mixing business with personal matters
- Top 10 reasons not to send an email:
    - Venting.
    - Criticizing or avoiding tough conversations.
    - Covering yourself: *"I told you so."*
    - Shifting responsibility.
    - Looking for an easy or quick way out.
    - Feeling lazy.
    - Feeling rushed (it's 5:03 p.m.)
    - Irritated with a customer, co-worker, or the world.
    - Unsure you fully understand the facts (or contract/issue)
    - Don't know your audience.

- How your employees can create good documents
    - The goal is to make all of your writing more:
        - Accurate
        - Thorough
        - Factual
        - Specific
        - Boring
- Ten Rules for Good Documents
    - These rules apply to “personal” documents
    - (Because there are no personal documents
- Rule 1: Good Documents Are Honest And Don’t Gloss Over Ugly Details
    - Be accurate and truthful – enhances credibility
    - Stick to the facts
    - The facts are what they are: never change or “doctor” documents after the fact.
    - Attach supporting documents (photos, lab tests, etc.) to your documents
- Rule 2: Good Documents Are Thorough
    - Think like a news reporter, and dig into the details.
    - Search for corroborating evidence (photos, lab tests, etc.), and attach it to your documents.
    - Use full names of people involved.
    - Include dates of events.
    - Include your name and the date.
    - Include the other side of the story (the customer’s, counter-party’s) – it may change and you want to capture the first version.
- Rule 3: Good Documents Are Contemporaneous

- Write it down ASAP, not ASAConvenient.
- Write it when facts and impressions are fresh and when details can easily be verified.

- Rule 4: Good Documents Don't Include Hyperbole
  - Avoid conclusory statements
    - "The Company never/always does this ...."
  - Avoid unnecessary personal opinions and judgments
    - "Customer called our customer service representative, whining about…"
    - "Customer is crazy…."
- Rule 5: Good Documents Don't Leap To Conclusions
  - Where conclusions are appropriate, they should be supported by the facts.
  - Where conclusions are appropriate, they should logically flow from the facts.
  - Describe both the facts supportive of your conclusion and the facts competing for a different conclusion.
  - Important to show that we are not "cherry picking" the facts.
- Rule 6: Good Documents Are Not Cute
  - Don't "talk" in writing.
  - Don't include personal asides or emote.
  - Don't use sarcasm. It's too easy to misconstrue later.
  - Don't mix business and personal.
  - Don't use humor inappropriately.
  - Don't use profanity.
- Rule 7: Good Documents Don't Use Phrases That Can Be Misconstrued Or Misunderstood
  - Writing simply and clearly is always a good idea.
  - If possible, avoid Company acronyms and jargon when communicating with the outside world.

- Looks do matter.
    - Proper grammar and spelling connote the proper impression regarding the careful and professional way in which we perform our job duties.
    - Labeling ("not for file"; "destroy after reading"; "do not forward"; "delete as soon as you read") is useful . . . for the other side

- Rule 8: Good Documents Should Be Shared Only On A Need-To-Know Basis
    - Documents concerning trade secrets and related matters should always be treated with confidentiality.
    - Don't use written communications for sensitive information unless protected by the privilege.
    - Be careful even with documents you think are Attorney-Client Privileged.
        - They may not be privileged
        - The privilege can be easy to lose
- Rule 9: All Relevant Documents Must Be Preserved
    - Whether good or bad.
    - Don't destroy documents during or in anticipation of litigation.
    - Never destroy evidence, no matter how bad.
    - Documents must be preserved in original form, with any attachments.
    - Documents must be preserved even when there is no pending litigation, but litigation is "reasonably foreseeable."
    - Penalties include monetary sanctions and/or entry of judgment.
- Rule 10: Label A Draft "Draft"
    - Creating work product is a dynamic process
    - Lawsuits occur years later when it is difficult to create a timeline of events and expectations
    - Legal duties and jury expectations will be lower when everyone recognizes that work is still a draft
    - Remember: drafts are discoverable

- Remember: never use a “draft” as the final document

- . . . And One More Word To The Wise
  - Careless email practices can result in “accidental contracts.”
  - Offer, acceptance and consideration.
  - Many contracts need not be signed to be enforceable.

Appendix
Recent Examples of Treatment of Attorney-Client Privilege

Case	In-house counsel communication at issue or merely an interesting case?	Court; Law Applied	Facts	Holding	Reasoning	In-Camera Review
In re: Bard IVC Filters Products Liability Litigation, 2016 WL 3970338 (D. Ariz. 2016).	In-house counsel communications at issue	District of Arizona (applying AZ law)	Motion to compel production of 133 disputed documents. The documents fell into different categories, some involving emails between a Bard employee and Bard's in-house counsel, some involving communications between Bard's in-house counsel and the in-house counsel's assistant, others involving communications between Bard's in-house counsel and an outside consultant.	Privileged	The court cited Arizona's privilege statute providing that communications between corporate attorneys and employees of the corporations are privileged if made for the purpose of providing legal advice. *Id.* at *5; A.R.S. § 12-2234. The court analyzed whether each communication was made for the purpose of seeking legal or business advice. The court recognized that some jurisdictions use a "primary purpose" standard to distinguish between business and legal advice, and others use a "because of" test. The court didn't expressly apply either; instead, it used a fact-intensive analysis and found that every communication but one was made for the purpose of obtaining legal advice. For example, an email between a Bard employee and Bard's in-house counsel "concern[ed] terms of an agreement being drafted" and, therefore, was privileged.	Yes

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Valenzuela v. Union Pacific Railroad Co., 2016 WL 7385037 (D. Ariz. 2016).	In-house communications at issue	District of Arizona (declining to choose law because AZ law, CA law, and FRE 502 all had same result)	Plaintiffs asserted that certain memos shared among two sister corporations and their former parent company were improperly withheld on privilege grounds. One was a memo written by a third-party agent of one of the sister corporations discussing legal advice provided by in-house counsel to the parent company. One was written by in-house counsel of the parent corporation.	Privileged	The court found that all memos were written for the purpose of obtaining legal advice. The court also pointed out that Arizona's corporate attorney-client privilege includes agents. Thus, the attorney-client privilege analysis does not change simply because the parent corporation's third-party agent was involved. And because the sister corporations were owned by a single parent that employed all attorneys involved, the memos were privileged. *Id.* at *2.	Yes

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Case	In-house counsel communication at issue or merely an interesting case?	Court; Law Applied	Facts	Holding	Reasoning	In-Camera Review
Greyhound Lines Inc. v. Viad Corp., 2016 WL 4703340 (D. Ariz. 2016).	Communication to in-house counsel at issue	District of Arizona (applying AZ law)	Dr. Ries was a non-lawyer member of Viad's legal department. Dr. Ries prepared monthly and quarterly reports to Viad's General Counsel and the legal department, so that the lawyers could monitor the company's environmental obligations. Greyhound claimed that the reports were not privileged because they were "factual in nature" nor "labeled as privileged."	Privileged	The court noted that the reports were prepared at the direction of Viad's in-house attorneys and with the purpose of enabling those attorneys to provide legal advice. The reports addressed "a wide range of topics on which lawyers typically advise clients, including ongoing and threatened litigation, settlement discussions and offers, general legal exposure, and regulatory action." Further, a document need not be labeled "privileged" to be protected. *Id.* at *2.	Yes

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Sell v. Country Life Insurance Co., 189 F.Supp.3d 925 (D. Ariz. 2016).	Communication to in-house counsel at issue	District of Arizona (applying AZ law)	Action for wrongful denial of benefits. Senior claims analyst had emailed in-house counsel about her disagreement with the denial. Defendant asserted the privilege as to the email plus three others that simply listed in-house counsel as either a sender or recipient.	Not Privileged	The email by the senior claims analyst was not written with the purpose of seeking legal advice. *Id.* at 936. It was simply a strongly worded email describing her disagreement with the denial of benefits to plaintiff. The other emails that defendant failed to disclose merely had in-house counsel as a sender or recipient and were also not written for the purpose of seeking legal advice. *Id.* at 936 ("Defendant simply withheld such communications solely because a company attorney was named on the email. That is precisely what Arizona law prohibits."). The privilege claims of privilege were deemed frivolous and warranted sanctions.	Not Discussed
BKWSpokane, LLC v. Federal Deposit Insurance Corp., 663 Fed. Appx. 524 (9th Cir. 2016).	In-house counsel communication at issue	9th Circuit (applying federal common law)	Breach of contract claim by BKWSpokane against FDIC. BKWSpokane sought to compel certain communications made by the FDIC's in-house counsel. (The court does not describe what the communications were).	Privileged	The court held that the district court properly deemed the opinions, advice, and concurrences issued by the FDIC's in-house counsel as privileged. "The attorney-client privilege applies to communications between lawyers and their clients when the lawyers act in a counseling and planning role, as well as when lawyers represent their clients in litigation." Although the court used broad language (this is a memorandum disposition), it is likely the court would still require that the communications surrounding the "counseling and planning role" of in-house attorneys must be made for the purpose of giving legal advice. *Id.* at 527.	Not Discussed

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Recent Examples of Treatment of Attorney-Client Privilege

Case	In-house counsel communication at issue or merely an interesting case?	Court; Law Applied	Facts	Holding	Reasoning	In-Camera Review
Hamdan v. Indiana University Health North, LLC, 2014 U.S. Dist. LEXIS 86097 (S.D. Ind. June 24, 2014)	In-house counsel communication at issue	Southern District of Indiana (applying federal common law)	Plaintiff requested email communications between personnel of defendant corporation. *Id.* at *2. Defendant corporation's in-house counsel was also included within the email chains. *Id.* at *3. Defendant corporation redacted emails that included in-house counsel and claimed attorney-client privilege. *Id.*	Not Privileged	The court found that the email chain, which copied defendant corporation's in-house counsel, was not protected by the attorney-client privilege. Although in-house counsel was copied on the email, the court reasoned that the email was not sent directly to in-house counsel and the sender of the email was not seeking legal advice. *Id.* at *9. Instead, the email merely communicated facts about the situation surrounding a former employee's behavior. *Id.* at *10.	Yes
Solis v. Milk Specialties Co., 854 F. Supp. 2d 629, 632 (E.D. Wis. 2012)	In-house counsel communication at issue	District Court for the Eastern District of Wisconsin (applying federal common law)	Plaintiff sought an order requiring defendant corporation to produce two-documents that contained communications made by in-house counsel.	Not privileged	The court held that the documents did not fall under the attorney-client privilege. *Id.* at 633. "Carrying the burden is more difficult in the context of in-house counsel because counsel is often involved with business matters as well as legal." *Id.* at 632. The first document ("The Dust Report") was a collection of technical process diagrams, cost estimates, and equipment that could be installed in each facility; the second document ("The Five Year Strat Plan") was essentially an extension of the first document. *Id.* at 633. The court reasoned that the documents that contained communications with in-house counsel were both aimed at business advice (not legal advice). *Id.*	Yes

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In re Seroquel Prods. Liab. Litig., 2008 WL 1995058, at * 4, 8-9 (M.D. Fla. May 7, 2008)	In-house counsel communication at issue	District Court for the Middle District of Florida (applying federal common law)	Plaintiffs sought a motion to compel defendant corporation to produce documents "improperly designated as privileged and documents for which privilege should be deemed waived." *Id.* at *1. Defendant corporation invoked the attorney-client privilege for several documents between in-house counsel and company personnel.	Not Privileged	The court held that a majority of the documents were not privileged. *Id.* at *9. The court reasoned that defendant corporation did not meet the burden of showing that the documents, which contained communications with in-house counsel, related mainly to legal matters. "[Plaintiff] chose, as part of its business organization, to mix legal consultation with many other sources for creating final documents. This choice makes it difficult to determine the primary purpose in creating the communication and to determine whether the attorney's roles were primarily providing legal (rather than business) advice." *Id.* at *7.	Yes