

**ATTORNEY-CLIENT PRIVILEGE**

**Confidential  
information**

## QUICK OVERVIEW - 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 support staff

## QUICK OVERVIEW - 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

## PRIVILEGE — 3-POINT ANALYSIS FOR PROBLEMS

- ❖ **Elements** required to CREATE privilege in the first place
- ❖ **Public policy exceptions** to the privilege rule
- ❖ **Waiver** of privilege

# ELEMENTS TO CREATE PRIVILEGE

- ❖ **Confidential**
- ❖ **Communication**
- ❖ To facilitate the provision of **legal services**
- ❖ To the **client**

# CREATING THE PRIVILEGE

Privilege protects communications made in confidence

The **method of communication** must be intentionally confidential

- Ensure that the communication is not overheard
- Restricted access to the communication

NOTE - Parties must treat the communication as privileged at the time of creation - privilege cannot be applied retroactively

# CONFIDENTIALITY

Communications must be made **in confidence**

- Express agreement of confidentiality
- Implied - client has reasonable expectation that communications will be understood by the attorney to be confidential

The presence of a third party may destroy confidentiality

# EAVESDROPPER

Suppose someone eavesdropped on the conversation, unknown to lawyer & client

No effect – privilege still remains

- Modern rule- APPARENT confidentiality is enough
- Note that some **older common law cases** went the other way on the eavesdropper rule, holding that it could undo privilege

Note: Parties may **prevent** an eavesdropper from testifying, even if the eavesdropper wants to testify (is working for opposing party, etc.)



# COMMUNICATIONS

Attorney-client privilege covers communications—

- From attorney to client
- From client to attorney

BUT the privilege does NOT include matters that anyone can observe (e.g., physical characteristics, mental state)

## CONFIDENTIAL COMMUNICATION - EXAMPLE

Client is speaking with Attorney about a matter involving a recent sale of stock that is under investigation by the SEC. Attorney asks Client whether she received any confidential, nonpublic information prior to the sale of her stock, and Client **silently nods** her head in the affirmative.

Although no words were exchanged, this communication is clearly **protected** by the privilege.

## ELEMENTS - PURPOSE

- Is the client seeking legal advice?
- Is the attorney rendering legal advice?

Note: If the lawyer **DECLINES** representation after the communication – privilege **MIGHT still apply** (depends)

***Upjohn Co. v. United States*, 449 U.S. 383 (1981)**

Privilege applies to communications made by a corporation's **employees** to its attorney acting at the direction of corporate superiors to secure legal advice if:

- (1) The info concerned the employee's **corporate duties**;
- (2) the employees were **aware** that information was sought from them to obtain legal advice; and
- (3) the communications were considered **confidential** when made and were thereafter kept confidential by the corporation

## CORPORATE CLIENTS - CAUTION

Indiscriminate transmission of otherwise privileged material waives the privilege. (See *F.C. Cycles, Inc. v. Fila Sport*)

For example, sending a legal memo to everyone in management positions at a large corporation, or even to a few dozen individuals - most of whom would have no connection to the matter - would almost certainly result in a waiver.

ALSO – in-house counsel performing **additional business roles** may not be covered by privilege in that role

## CORPORATE CLIENTS

Whistleblowers and disgruntled lower-level employees talking to in-house counsel about a legal issue they've observed in the workplace might NOT be privileged, because this was not done at the behest of the corporate directors.

Same applies to written complaints from lower-level employees not submitted under the purview of directives from management

## ATTORNEYS' REPRESENTATIVES

Privilege also applies to **representatives** of the client and/or attorney – but only if they facilitate the rendition of legal advice by the attorney

- Clerical/administrative employees (e.g., secretaries, receptionist, file clerks, law clerks, messengers)
- Others (e.g., accountants, translators, experts, consultants)

## COMMUNICATIONS WITH THIRD PARTIES

NOTE: The majority of courts find **NO** privilege for communications, even related to legal matters, for accountants, bankers, financial advisers, consultants, PR firms not retained by the lawyer



## PRIVILEGE FOR COMMUNICATION, NOT FACTS

Factual circumstances surrounding the communications between an attorney and a client, such as the date of the communication and the identity of persons copied on correspondence, are likewise not privileged.

Participants in a meeting with an attorney, the length of a consultation and scheduling documents (calendars, appointment books) are **not** necessarily protected from compelled disclosure.

Fee arrangements between an attorney and a client are typically discoverable, except where such discovery would produce confidential communications with the client.

## SUMMARY - NO PRIVILEGE

- ❖ Privilege does not protect **facts** communicated to counsel
- ❖ Privilege does **not cover everyone** in the corporation or everyone working with the corporation
- ❖ **Generally, no privilege:**
  - If the communication had primarily a non-legal objective
  - If the communication was personal musing rather than request for advice
- ❖ **Copying (cc:) your attorney or general counsel does not** automatically make a communication privileged
- ❖ Information that is generally available to the public

## EXCEPTIONS (NO PRIVILEGE)

There are some public policy exceptions to the application of the attorney-client privilege, which include:

**Death of a Client** - The privilege may be breached upon the death of a testator-client if litigation ensues between the decedent's heirs, legatees or other parties claiming under the deceased client.

**Fiduciary Duty** - An exception has been carved out when the corporation's **shareholders** wish to pierce the corporation's attorney-client privilege (against the directors).

## EXCEPTIONS – CRIME OR FRAUD

**Crime or Fraud** - If a client seeks advice from an attorney to assist with the furtherance of a crime or fraud or the post-commission concealment of the crime or fraud, then the communication is not privileged.

If, however, the client has completed a crime or fraud and then seeks the advice of legal counsel, such communications **are** privileged **unless** the client considers covering up the crime or fraud.

# EXCEPTIONS – COMMON INTEREST

## JOINT REPRESENTATION PROBLEM

If two parties are represented by the same attorney in a single legal matter, neither client may assert the attorney-client privilege **against the other** in **subsequent litigation** if the subsequent litigation pertains to the subject matter of the previous joint representation

## WAIVER AT TIME OF COMMUNICATION

Waiver typically arises when a communication is witnessed by a third party or where the client does not intend the communication to be confidential.

**The mere presence of a third party will likely prevent the creation of attorney-client privilege.**

## WAIVER AT TIME OF COMMUNICATION

**EXAMPLE** – Client and her stockbroker meet with Attorney to discuss the suspect sale of stock. Attorney represents Client in connection with the sale, but not the stockbroker. During the course of the meeting, Client discloses sensitive information.

Under this scenario, privilege is likely **waived** and the information conveyed does not have protection from disclosure.

# SUBSEQUENT WAIVER

**Waiver by failure to assert the privilege at trial**

**Waiver by voluntary disclosure**

**Waiver by putting the protected information at issue**

**Rule 502 waiver (federal proceeding or to a federal office or agency)**



# WAIVER BY CONDUCT: THE “HALF-OPEN DOOR” RULE

- Revealing parts of the communication in testimony
- Revealing one opinion but asserting privilege on others related to the same topic

Note – new Fed Rule 502 (see below) codified the half-open door rule

# WAIVER

The CLIENT holds the privilege

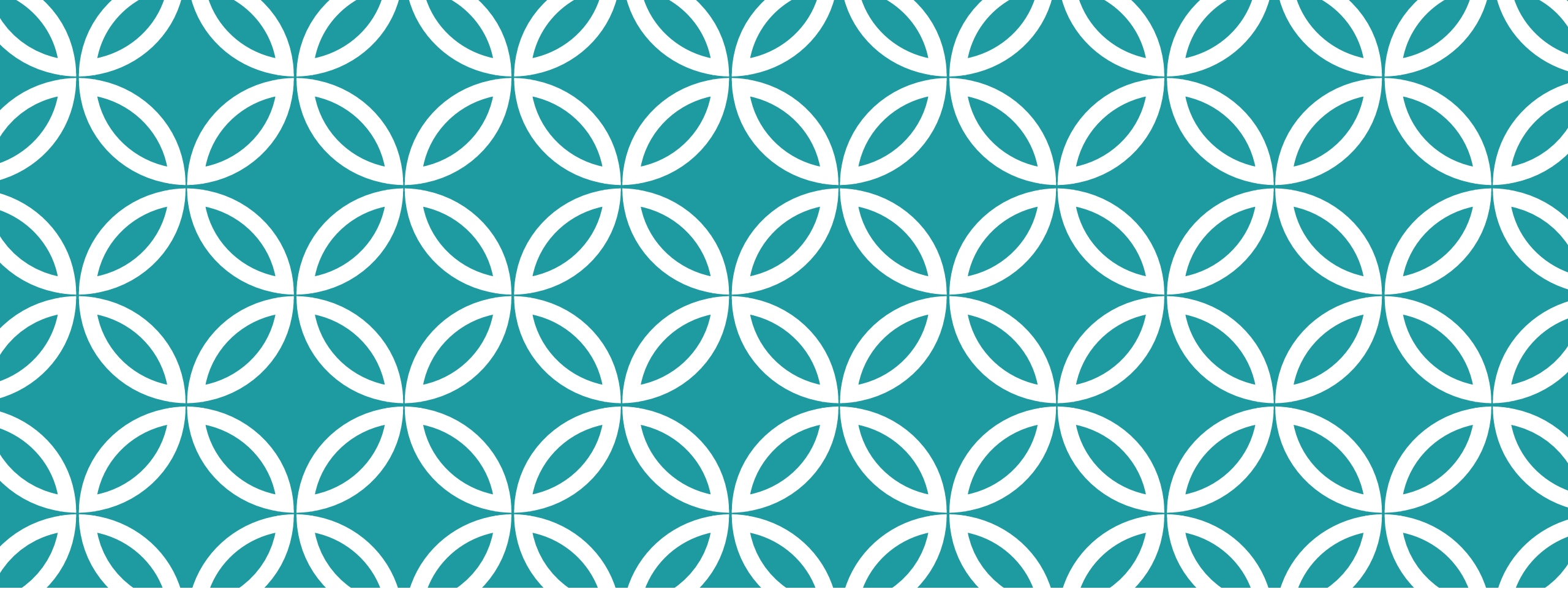
- Client's attorney may expressly waive it with permission OR inadvertently without permission
- For corporations, the decision to waive belongs to the corporation's **officers and directors**

## THIS DOESN'T WORK

All of your outgoing emails contain the following:

**“The information contained in this email is privileged. It has been sent for the sole use of the intended recipient(s). If the reader of this message is not an intended recipient, you are hereby notified that any unauthorized review, use, disclosure, dissemination, distribution or copying of this communication, or any of its contents, is strictly prohibited.”**

**Not automatically privileged.** Blanket privilege inscriptions do not help in the privilege analysis; courts are increasingly wary of indiscriminate marking of all communications as privileged.



# PRIVILEGE - FEDERAL RULES

# FED. R. EVID. 501 — STATE LAW OFTEN CONTROLS

## **Rule 501. Privilege in General**

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, **state law governs privilege** regarding a claim or defense for which state law supplies the rule of decision.

# FED. R. EVID. 502 — LIMITS ON WAIVER

## **Rule 502. Attorney-client Privilege and Work Product; Limitations on Waiver**

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

\* \* \*

## FED. R. EVID. 502(A) — HALF-OPEN DOOR

**(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

## FED. R. EVID. 502(B)

**(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).



## FED. R. CIV. P. 26(B)(5)(B)

**(B) *Information Produced.*** If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.