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Can We Keep a Secret? Protecting the Privilege in Fraud Investigations



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Overview

- **The Contours of the Privilege**
 - What it is
 - What it isn't
 - Confidentiality and Work-Product Distinguished

- **Potential Pitfalls**
 - In-House Counsel
 - Internal Investigations
 - Government Investigations

- **Practical Takeaways**

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The Privilege: *What it is*

- **The Privilege Protects only:**
 - A **communication**;
 - Between a **client** and **attorney**;
 - For the purpose of securing or providing **legal advice** or opinion

- **Constant Tension for Courts:**
 - Privilege is an obstacle to the truth and forces courts :
To make difficult tradeoff[s] between the broad institutional goal of preserving the vitality of the adversary system and the sometimes incompatible goal of achieving justice in the matter before it.

KW Muth Co. v. Bing-Lear Mfg., 219 FRD 554, 566 (E.D. Mich 2003)

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The Privilege: *What it is*

- **Corporations as Clients**
 - Majority: *Subject-Matter Test*
 - Minority: *Control Group Test*

- **Subject-Matter Test:**
 - Communication is privileged if made:
 - **To secure legal advice;**
 - **By an employee at the direction of a superior;**
 - **The superior requested the communication to secure legal advice for the corporation;**
 - **Subject matter is within the scope of the employee's duties; and**
 - **Communication not disseminated beyond need-to-know individuals.**

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The Privilege: *What it isn't*

- **Common Misapplications:**
 - Facts
 - Existence of Relationship, Purpose and Foundational Issues
 - Documents / Tangibles Transmitted to Attorney
 - Fee Arrangements
 - Client Notes*
 - Attorney Notes*
 - Drafts of Documents

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The Privilege: *What it isn't*

Privilege

- It's a privilege
- The client's
- Stronger
- **Communications**

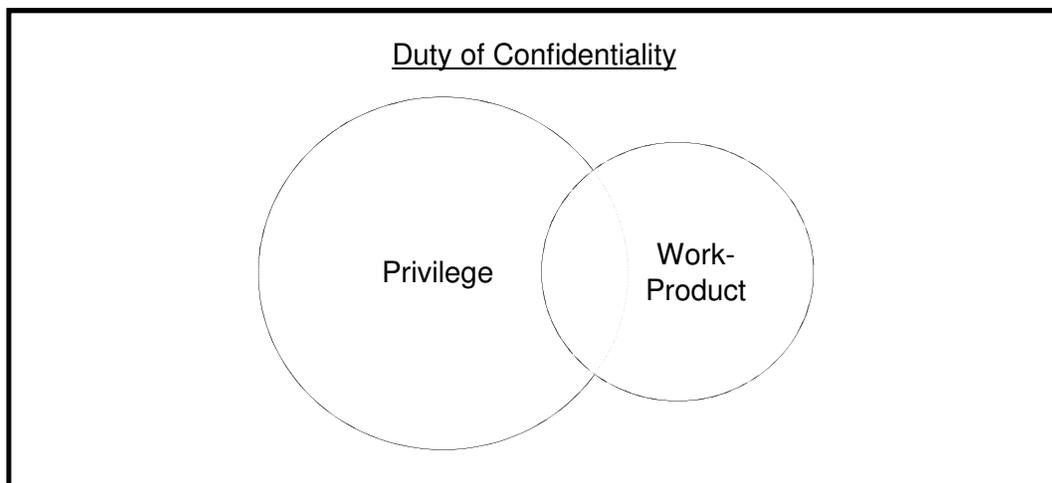
Work-Product

- It's an exception
- The attorney's
- Weaker
- **Preparation for Litigation**
 - *Not all notes*
 - *Not all drafts*
 - *Not all mental impressions*

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The Privilege: *What it isn't*

Duty of Confidentiality



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Pitfalls: *Internal Investigations*

- **Peril of Two Hats**
 - Business vs. Legal Dichotomy (and its erosion)
 - In-House Counsel
 - Outside Counsel as Investigators

- **Increased Scrutiny by Courts**
 - Tax Returns
 - Patent viability reports
 - Investigative reports for internal use

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Scenario 1: *Privileged or Not?*

- Company conducts internal investigation and audit re: allegations of kickbacks to “determine how to proceed.”
 - Utilizes internal auditor rather than outside counsel
 - Communicates audit report to outside counsel for consultation on allegations

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Scenario 2: *Privileged or Not?*

- Company's in house counsel conducts internal investigation to analyze employee allegations of illegal kickbacks.
 - Key interviews conducted by non-attorneys
 - *Upjohn* warnings were not provided to interviewed employees
 - Outside Counsel not involved.

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Scenario 3: *Privileged or Not?*

- School engages outside counsel to conduct internal investigation re: sexual abuse.
 - Interviewees given *Upjohn* warnings
 - Attorneys conducted interviews
 - Results of investigation privately disclosed to School Board

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Pitfalls: *Government Investigations*

- **Waiver**
 - Involuntary: The ball is in your court
 - Voluntary: The ball is in the your client's court
- **Transfer to New Organization**
 - Mergers and Acquisitions can transfer the privilege to new organization
- **The Yates Effect?**
 - Need to position organization relative to individuals
 - Pressure on clients to waive the privilege
 - Increased chance for invocation (intended or unintended) of Advice of Counsel
 - So what?

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Pitfalls: *Advice of Counsel*

- **The Client-Attorney Privilege**
 - The privilege is the client's privilege
 - Clients view our advice as legal authority to act
 - What happens when the Government increases pressure?
- **Advice-of-Counsel Defense**
 - Client can invoke justification for its actions: reliance upon legal advice from counsel
 - Privilege is **automatically waived**
 - Advice is scrutinized by Government and the Court

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Takeaways: *Practical Protections*

- ***Upjohn, Upjohn, Upjohn***
 - Never forgo an ***Upjohn*** warning
 - Isolate legal communications only to **need-to-know individuals**
 - Avoid **CC: and BCC: traps**
 - Integrate *Upjohn* into communications:
 - “response to your request for legal advice”

- **Precise Marking**
 - Casting too wide a net creates problems with clutter
 - Clutter creates risk

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