

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.

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

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*

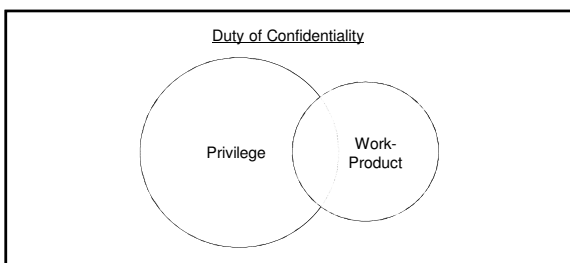
- **Common Misapplications:**
 - Facts
 - Existence of Relationship, Purpose and Foundational Issues
 - Documents / Tangibles Transmitted to Attorney
 - Fee Arrangements
 - Client Notes*
 - Attorney Notes*
 - Drafts of Documents

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The Privilege: *What it isn't*

- | <u>Privilege</u> | <u>Work-Product</u> |
|--|---|
| <ul style="list-style-type: none">• It's a privilege• The client's• Stronger• Communications | <ul style="list-style-type: none">• It's an exception• The attorney's• Weaker• Preparation for Litigation<ul style="list-style-type: none">• <i>Not all notes</i>• <i>Not all drafts</i>• <i>Not all mental impressions</i> |

The Privilege: *What it isn't*



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

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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