

Vinson & Elkins



THE ATTORNEY-
CLIENT PRIVILEGE:
A Practical Guide
for In-House
Counsel

THE BASICS

WHAT IS PRIVILEGED?

- ▶ The attorney-client privilege protects:
 - A communication
 - Between privileged persons (attorney, client, or in some cases, an agent)
- Made in confidence
- For the **purpose of obtaining or providing legal assistance** for the client.

HOW IS PRIVILEGE WAIVED?

- ▶ Attorney-client privilege is waived by disclosing the substance of the communication to a third party. Waiver can be voluntary or involuntary (accidental).
- ▶ Third parties may include the government, potential investors, lower level employees, or opposing parties (basically anyone other than the client, the lawyer, or in some cases, an agent of the client or lawyer).
- ▶ Common examples of privilege waivers:
 - Forwarding a privileged email communication to a third party.
 - Sharing (in writing or orally) the substance of the lawyer's advice.
 - "My lawyer says we can't do that" can be a waiver.
 - Including privileged materials in a data room.
 - Sharing privileged materials with an outside auditor, lender, or certain advisors.

IS IT BUSINESS OR LEGAL ADVICE?

- ▶ Whenever possible, separate legal and business advice (particularly where in-house counsel has a dual role and non-legal responsibilities).
 - Examples of legal functions:
 - Advising company on existing law.
 - Analyzing conduct for conformity with law or judgments regarding law.
 - Advising on imminent litigation.
 - Business functions **may** include:
 - Negotiating terms of a contract.
 - Attending business meetings.
 - Acting as a scribe.
- ▶ When serving in both legal and non-legal roles:
 - Use titles as appropriate (e.g., in email signature block).
 - Segregate legal files from non-legal files.
 - Maintain a written record of the legal aspects of a communication.

TIPS FOR PRESERVING PRIVILEGE



IN WRITTEN COMMUNICATIONS

- ▶ Mark all privileged communications as “Confidential” and “Attorney-Client Privileged” or “Attorney Work Product,” as applicable.
 - Prominent and consistent designations are critical. In any litigation, the attorney reviewing the document must be able to recognize the document as privileged.
 - Do not overuse these labels when providing business advice.
- ▶ Limit the recipients of privileged information:
 - Exclude people who are not necessary for the discussion.
 - Take care when including third parties such as investment bankers and independent auditors.
 - Start a new email chain where appropriate.



IN BOARD MEETINGS, CONFERENCE CALLS & OTHER MEETINGS

- ▶ When discussing legal matters, Board meeting minutes should indicate clearly that:
 - In-house counsel attended in his/her role as legal advisor.
 - Discussions were for the purpose of providing legal advice.
 - Discussions were confidential and intended to be privileged.
- ▶ When in meetings or on conference calls:
 - Take clear notes of who is present.
 - If only portions of discussions are privileged, label them as privileged.
- ▶ Consider excluding from privileged discussions any observer or third party whose presence may prevent a claim to privilege (investment bankers, auditors, consultants).



IN COMMUNICATIONS WITH PR & CRISIS MANAGEMENT FIRMS

- ▶ Ordinarily, communication between counsel and a public relations/crisis management firm is **not considered privileged** unless the party asserting the privilege can show that the communication was necessary for the client to obtain informed legal advice.
 - Outside counsel — rather than the company — should engage the CM/PR firm and communications should flow through outside counsel.
 - Sharing work product prepared in anticipation of litigation with CM/PR firms generally does not waive the work product privilege.



WHILE NEGOTIATING & EXECUTING TRANSACTIONS

- ▶ Drafts of Agreements/Documents are privileged if:
 - Draft was created by/for or at the direction of attorneys, AND
 - Only shared between attorney and client.
 - Once a draft is shared with a counterparty to a transaction, the attorney-client privilege is waived.
- ▶ Consider the impact of an **acquisition** on the attorney-client privilege.
 - If new management is attempting to run the pre-existing business entity and manage its affairs, new management stands in the shoes of prior management and should control the attorney-client privilege with respect to the company's operations.
 - If, for example, only a discrete set of assets has been transferred, and the acquirer is not attempting to manage or run the pre-existing business, the attorney-client privilege is unlikely to pass to the acquirer.



WHILE CONDUCTING INTERNAL & GOVERNMENT INVESTIGATIONS

- ▶ **Involve counsel** at the outset for the purpose of obtaining legal advice and document appropriately. **In-house counsel (where appropriate, with the assistance of outside counsel) should manage all investigations.**
- ▶ Communications made by and to non-attorney employees serving as **agents** of attorneys in internal investigations are protected by the attorney-client privilege.
- ▶ A communication made as part of an internal investigation must be **primarily or predominantly of a legal character** to be privileged.
 - An investigative report that is sent to an attorney *or even authored* by an attorney must still be primarily or predominantly of a legal character to be privileged.
- ▶ Under most circumstances, production of information to the Government waives privilege as to that information in subsequent civil suits.
- ▶ When an investigation is conducted by an audit committee or special committee, the committee is a client separate and apart from the company for the purposes of the attorney-client privilege.
 - Any investigative report shared with the company board or others at the company is potentially discoverable.



DURING INVESTIGATIVE INTERVIEWS

- ▶ When interviewing employees as part of formal and informal investigations (particularly with lower-level employees), memorialize that:
 - The information sought was within the scope of the employee's duties and is not available from more senior employees.
 - Communications with lower-level employees were directed by the employee's supervisor.
 - The employee understands that the purpose of the communication is for the company to obtain legal advice (*i.e.*, that an **Upjohn** warning was issued).
 - **Upjohn** warnings should include the following:
 - The attorney represents the corporation — not the employee;
 - The conversation with the attorney is covered by the attorney-client privilege; and
 - The corporation has sole discretion to waive privilege and to determine how information may be used.
- ▶ Restrict discussions with employees to matters that are within the scope of their employment.