

Practical (and Ethical) Tips for Protecting the Attorney-Client and Work Product Privilege

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Quiz 1

What is the difference, if any, between ethical mandates of confidentiality and the attorney-client privilege?

- A. Confidentiality is broader than privilege.
- B. Privilege is broader than confidentiality.
- C. No difference.
- D. One applies to communications, one does not.

Quiz 2

• A federal court will apply the state's attorney-client privilege law when—

- A. When state supplemental claims included.
- B. When state's conflicts of laws rules direct.
- C. Never. Federal law applies.
- D. In diversity cases.

Quiz 3

In-house lawyer providing gov't agency with privileged memo containing CEO's admissions is—

- A. Protected by selective waiver doctrine
- B. At risk of subject matter waiver
- C. Violating CEO's attorney-client privilege
- D. Now updating resume

Quiz 4

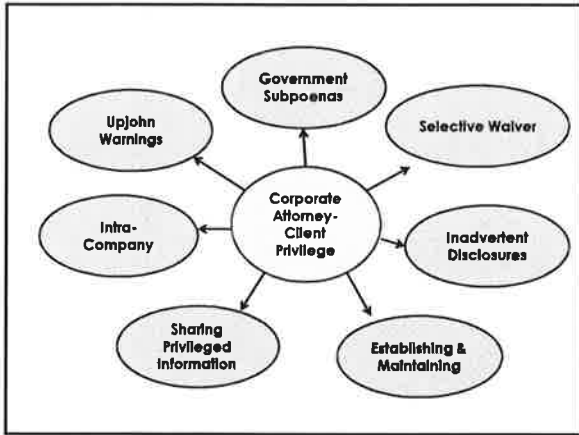
Which corporate employees' communications with in-house counsel will fall within the attorney-client privilege?

- A. Only top executives
- B. All employees
- C. Executives and managers
- D. It depends

Quiz 5

Disclosure of privileged information to auditors—

- A. Waives the privilege as to IRS and SEC
- B. Waives the privilege as to all third parties
- C. Is not waiver under the agency doctrine
- D. Protected by the federal taxpayer's privilege




Agenda

- Confidentiality
- Corporate Attorney-Client Privilege
- In-House Counsel
- Practice Tips

Ethics—Confidentiality

Rule 1.6


A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege

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Ethics—Confidentiality

Rule 1.6
Cmt 16


A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure

 BRADLEY ARANT BOULT CUMMINGS

Ethics—Confidentiality

Rule 1.6
Cmt 17

The lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients

 BRADLEY ARANT BOULT CUMMINGS

Ethics—Who is the Client

Rule 1.13

A lawyer employed or retained by an organization represents the organization acting through its constituents



Ethics—Who is the Client

Rule 1.13
Cmt 2

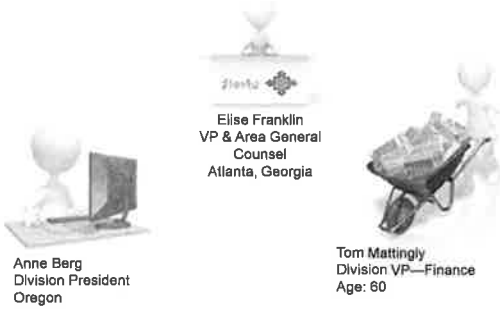
When a constituent communicates with organization's lawyer, the lawyer must keep the communication confidential as required by Rule 1.6.



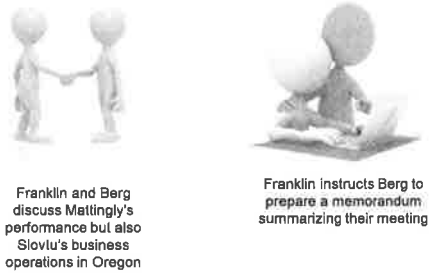
Slovту Case Study



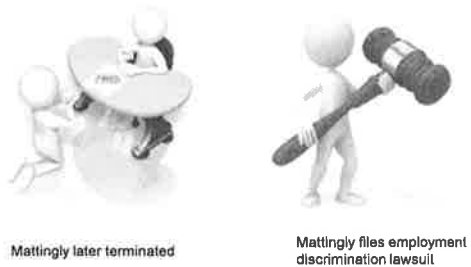
Slovту Case Study



Slovту Case Study



Slovту Case Study



Slovtu Case Study



- Mattingly's counsel deposes Berg
- Berg asked about conversation between Berg and Franklin
- Requests copy of Berg-Franklin memo


Slovtu Case Study

Will court rule that the attorney-client privilege protects the—


1. Berg-Franklin conversation?
2. Berg-to-Franklin memo?



Communication →




Written




Oral

Confidential →




Confidential when made



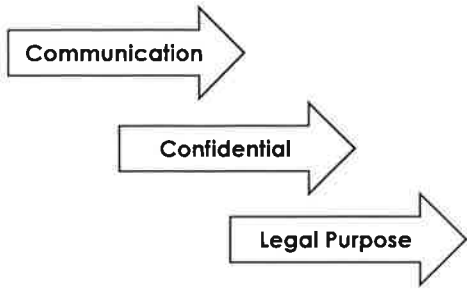
Intent to Remain Confidential

Legal Purpose →



For purposes of rendering legal advice

Corporate Attorney-Client Privilege



Corporate Attorney-Client Privilege



Employee—Outside Counsel



Employee—In-House Counsel

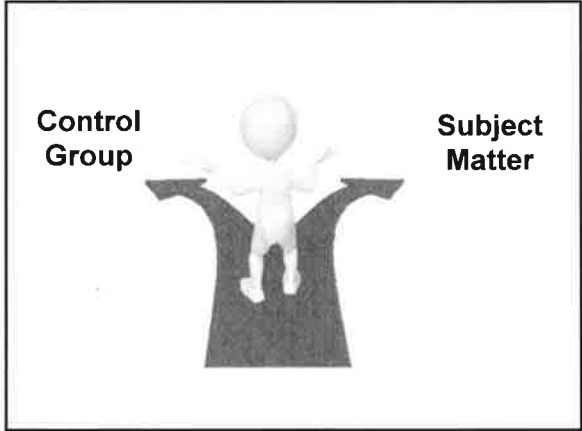
Corporate Attorney-Client Privilege



Employee—Employee



In-House Counsel—Outside Counsel



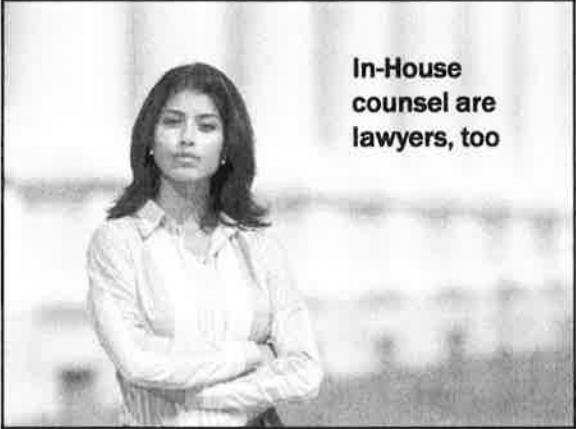
Control Test Group

Corporate employee who communicates with corporate attorney—

is in a position to take a substantial part in decision that corporation will make upon advice of counsel.

Subject Matter Test

- Communication made for purpose of rendering legal advice
- Made at direction of supervisor
- Request made to secure legal advice
- **Subject matter of communication within scope of employee's duties**
- Communication kept confidential



**In-House
counsel are
lawyers, too**



In-House Counsel

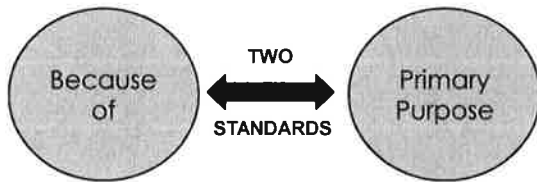
A corporation can protect material as privileged only upon a **clear showing** that in-house counsel acted in a professional legal capacity.



In-House Counsel

**Legal Hat
or
Business Hat**

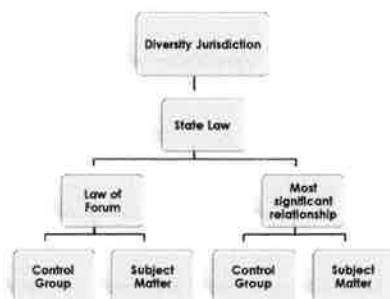
Dual-Purpose Communications



Conflict of Laws in Federal Court



Conflict of Laws in Federal Court



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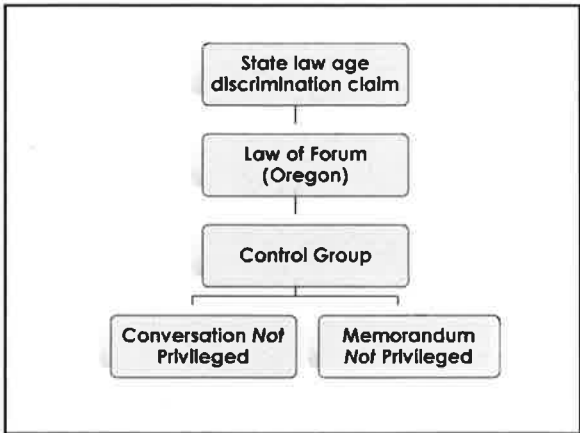
ADEA in Federal Court

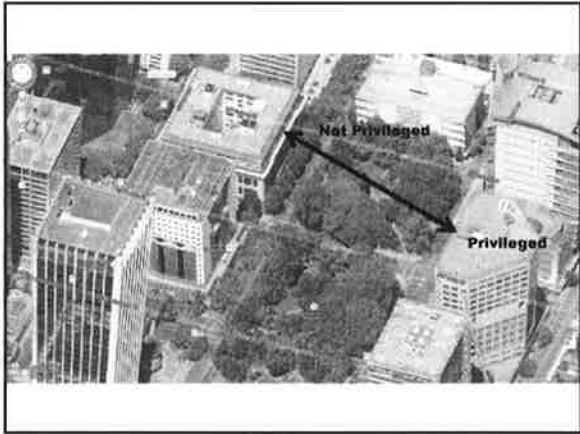
Supplemental State Law Claim?
Same result.

Subject Matter Test

Conversation Privileged

Memorandum Privileged







Copying In-House Lawyer

Merely copying or “cc-ing” legal counsel, in and of itself, is not enough to trigger the attorney–client privilege.

Phillips v. C.R. Bard, Inc., 290 F.R.D. 615 (D. Nev. 2013).

Email Attachments

Although the email to which the memorandum is attached is marked “private” the memorandum itself contains no similar designation.

In re Mentor Corp., 632 F. Supp. 2d 1380 (M.D. Ga. 2009)

Notice/Warning

- While it is true that a mere stamp is insufficient to cloak an otherwise unprivileged document, court will not overlook absence of such a designation
- The lack of any stamp indicating that the documents were confidential or privileged when created makes the potential for waiver even greater, and the absence of evidence on this issue more pertinent.
 - *Freiermuth v. PPG*, 218 FRD 694

Notice/Warning

- Most law firms and corporate and government legal departments include this warning on all of their emails as a matter of course. That does not mean, however that all of the information contained in those emails is confidential, or has continued to remain confidential.
 - *Penn. Dep't Public Welfare v. U.S.*, 2006 WL 3792628

Notice



Warnings

- In a situation where the author or recipient of allegedly privileged documents functions as a corporate manager as well as an attorney, **efforts must include clear designation** of those communications sent or received in his capacity as a legal advisor.

New York Federal Court

Kept Confidential?

- Although the Defendant claims that these documents were treated as confidential and kept in locked cabinets, none of these documents is marked "confidential" or "privileged." The documents were not segregated, but were intermingled with all other personnel documents.

New York Federal Court

Stamps—Documents

- Just because a document is designated "CONFIDENTIAL-ATTORNEY/CLIENT PRIVILEGED" does not mean that the Court can assume that the information was continually maintained as such.

Penn. Dep't of Public Welfare v. United States, 2006 WL 3792628 (W.D. Pa. 2006).



Practice Tips

- ❖ Predict jurisdiction when reasonably anticipate litigation.
 - ❖ Federal Claim—Subject Matter Test.
 - ❖ State-law Claim—Which State? Which Test?
 - ❖ Govern yourself accordingly.

Practice Tips

- ❖ When cannot easily predict jurisdiction, focus on commonality.
 - ❖ Confidential when made
 - ❖ Kept confidential
 - ❖ Legal purpose.

Practice Tips

- ❖ Maintain confidentiality
- ❖ "Privileged & Confidential" in all email subject lines
- ❖ Begin communications with privilege instruction
- ❖ Instruct employees not to forward emails or reply with copy to non-lawyers

Slovtu Case Study





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