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Business or Legal Advice?

The Great Privilege Debate

PRESENTED BY

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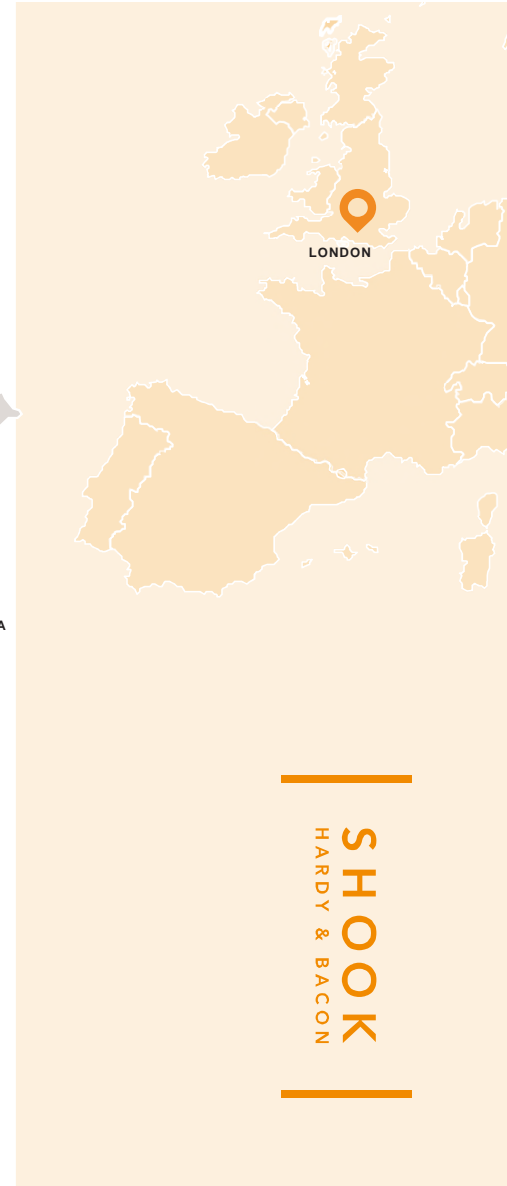
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Shook’s Investigations + Pretrial Strategies practice uses more than 30 years of experience to offer results that are creative, defensible and cost-effective. Our guiding principles include:

- To always favor a “just, speedy and inexpensive determination of every action and proceeding,” as prescribed by Fed. R. Civ. P. 1;
- To remember that the standard of discovery is not perfection, but reasonableness and good faith;
- To hold the line when the burden or expense of proposed discovery outweighs its likely benefit; and
- To resist discovery on discovery, especially in the absence of evidence of improper conduct or bad faith.



Attorney-Client
Privilege 101

Attorney-Client Privilege:

What is it?

- A client has a privilege to refuse to disclose or prevent another from disclosing a confidential communication between client and lawyer if the privilege is claimed by:
 - a) The holder of the privilege;
 - b) A person who is authorized to claim the privilege by the holder of the privilege; or
 - c) The lawyer at the time of the confidential communication.

Cal. Evid. Code § 954



Attorney-Client Privilege:

Why does the privilege exist?

- The objective of the privilege is to enhance the value which society places upon legal representation by assuring the client the **opportunity for full disclosure** to the attorney unfettered by fear that others will be informed.

Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41

- Fundamental purpose of attorney-client privilege is to **safeguard the confidential relationship** between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal. 4th 725, 219 P.3d 736

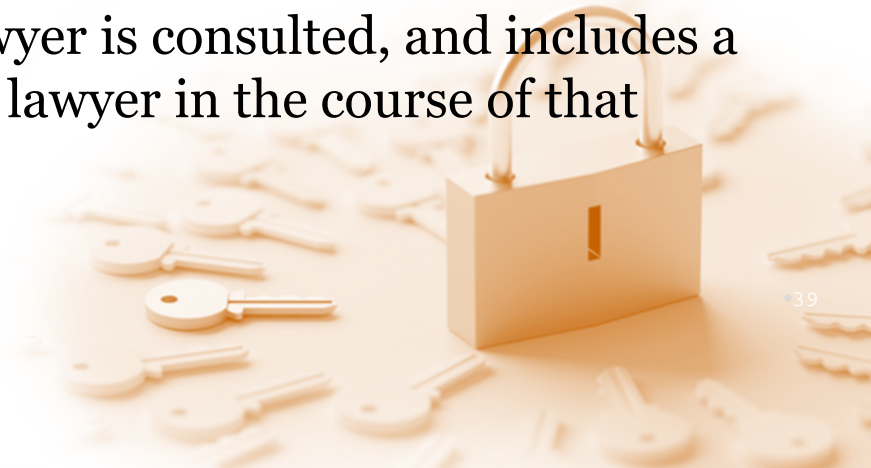


Attorney-Client Privilege:

What is covered?

“Information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.”

Cal. Evid. Code § 952



Attorney-Client Privilege: What is covered?

Between lawyer & client
Reasonably necessary
Legal Advice
Information
Purpose of consultation
Course of relationship
No disclosure
Third parties

Cal. Evid. Code § 952



Attorney-Client Privilege: Who holds the privilege?

“**..the client is the organization itself**, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.”

Ca. Rules Prof. Conduct 3-600.



Attorney-Client Privilege:

Who bears the burden of proof?

FIRST...The party claiming the privilege

SECOND... The communication is presumed confidential. The opponent must show that it is not or that the privilege does not apply.

*NOTE: Disclosure to a third party changes the burden.



Attorney-Client Privilege:

Sometimes It Might be Work Product

- Documents prepared by attorney, agent, or possibly client.
 - Need subjective belief that litigation is a real possibility and the belief must be objectively reasonable.
 - Must be able to say document was prepared because of prospective litigation.
- Difference between opinion and ordinary work product





In-House
Privilege: 201

Attorney-Client Privilege: Includes In-House

- The attorney-client privilege also protects communications between a company and its in-house counsel **acting in a legal capacity.**

Bank of Am., N.A. v. Superior Court (2013) 212 Cal. App. 4th 1076, 1099



In-House Privilege:

What information might count?

- **Written**
- **Electronic**
- **Oral**
- **Gestures**



In-House Attorney-Client Privilege: Who counts as the “client”?

All levels of corporate employees...

as long as that employee possesses facts that the lawyer needs before
advising corporate client.



BUT...Consider giving an *Upjohn* warning.

Upjohn Warning*:

- “I represent the company and not you...”
- “Your information is not generally available elsewhere and I need it to advise the corporate client...”
- “Don’t disclose to others...”

**Could cover former employees*



Attorney-Client Privilege: Can Go Farther Than You Think

- In-house counsel and employees of corporate affiliates
- Purchaser of corporate asset



In-House Privilege: The Relationship

- A “client” is “someone who consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity.”

Cal. Evid. Code, § 951; *Wood v. Superior Ct.* 46 Cal. App. 5th 562 (2020).



In-House Privilege: In Confidence/No Disclosure

Disclosure to third parties can destroy privilege, except where:

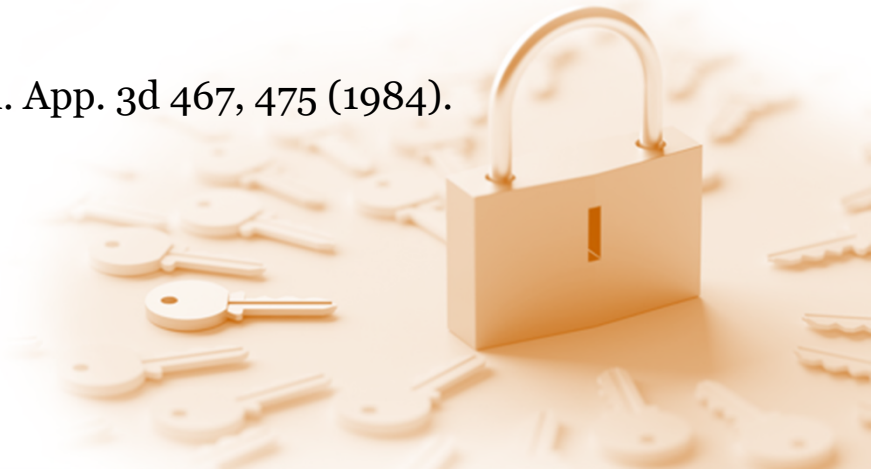
- 1) The third party is an **agent/assistant** who will help advance the litigant's interests.
- 2) The third party's **interests are aligned** with the litigant's ("common interest")



In-House Privilege: Give Legal Advice

- The privilege does not attach when the attorney is engaged in non-legal work such as rendering business or technical advice.

See, e.g., Aetna Casualty & Surety Co. v. Sup. Ct., 153 Cal. App. 3d 467, 475 (1984).



In-House Privilege: Give Legal Advice

- Primary Purpose
 - Purpose for communication vs. Purpose for lawyer's work
 - Whole document vs. Legal Portion
 - Widespread dissemination suggests it has a business purpose



Attorney-Client Privilege:

What may be excluded?

- Foundational facts for attorney-client relationship
- Independent facts related to the communication
- Underlying facts
- Facts known before the attorney-client relationship



Attorney-Client Privilege: Potential Pitfalls

- Waiver (Dissemination)
- Adding the lawyer to everything
- Dual purpose communications
- Exceptions (Crime, joint representation, breach by client or lawyer)

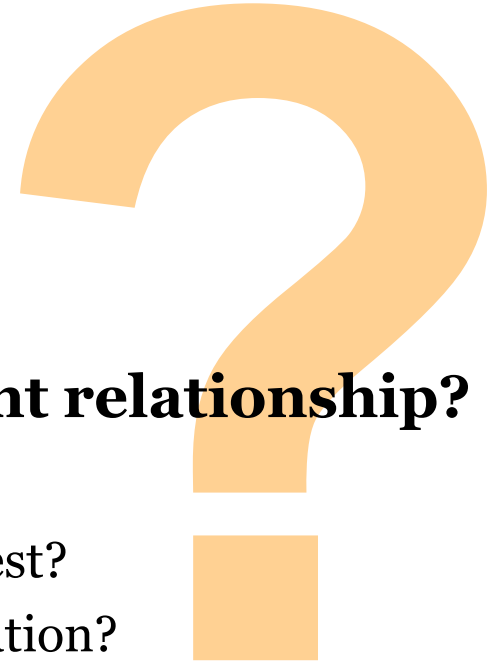




Pop Quiz
Review

Questions to Consider

- **Was there information transmitted?**
- **Between a lawyer and client?**
- **Was it in the course of their attorney-client relationship?**
- **Was the information disclosed to others?**
 - Was disclosure necessary to further the client's interest?
 - Or to accomplish the purpose of the lawyer's consultation?
- **Was legal advice requested or given?**
 - If other information was requested/given, was the legal advice the primary content?



In-House Privilege:

Scenario 1: Adverse Event

FACTS

- In-house counsel receives an email from sales rep that a patient using the company's product has died. In-house counsel emails outside counsel asking for advice on how to investigate the incident and write up the complaint file. **Is the email privileged?**

ANALYSIS

- Between client and lawyer in the course of the legal relationship
- Single purpose: Email seeks legal advice on complaint processing.
- Note underlying facts not privileged.

In-House Privilege:

Scenario 2: Tax Advice

FACTS

- In-house counsel has multiple email communications with their corporation's accountants to get tax advice. **Are the emails privileged?**

ANALYSIS

- Privilege may cover agents of attorney or client representative.
- Attorney may seek translation of tax information in order to provide legal advice to the client.
- Mixed purpose depending on specific purpose for tax advice.

In-House Privilege:

Scenario 3: Internal Complaint

FACTS

An anonymous employee submits a complaint about his boss. In-house counsel interviews various employees about the allegations. **Is the substance of the interview privileged?**

ANALYSIS

- All employees can be covered by privilege.
- If *Upjohn* warning provided, client employees know lawyers are representing company.
- Make sure the interview is done in order to give legal advice.

In-House Privilege:

Scenario 4: Negotiations

FACTS

- In-house counsel negotiates the terms of a vendor contract supplying travel services for the company, and discusses the terms with the CFO. **Are internal communications related to the contract privileged?**

ANALYSIS

- Attorney-client privilege not applicable when the attorney acts merely as a negotiator, or is providing only business advice.

In-House Privilege:

Scenario 5: Marketing Materials

FACTS

- In-house counsel is present at a meeting where marketing pieces with advertising claims for a new product are being discussed. **Is the discussion privileged?**

ANALYSIS

- The mere presence of the attorney does not subject the meeting to privilege.
- There must be some showing that the discussion contained legal, as opposed to business advice from counsel.

In-House Privilege:

Scenario 6: PR Team

FACTS

- In-house counsel hires a PR team to help with media messaging associated with employee fraud.
Are strategy communications between in-house counsel and the PR team privileged?
-

ANALYSIS

- Unless the PR team “furthers the interest of the client” or is “reasonably necessary for the accomplishment of the purpose for which the lawyer is consulted, not likely privileged. There is no common interest in the outcome of the litigation and the PR team doesn’t help advance the legal strategy.

In-House Privilege:

Scenario 7: Insurance

FACTS

- CEO e-mails in-house counsel about whether the company has insurance coverage for employee's injury. **Is the email privileged?**

ANALYSIS

- Between attorney and corporate officer
- Asking about coverage for potential lawsuit is legal opinion.

In-House Privilege:

Scenario 8: Investigation

FACTS

- In-house counsel asks outside counsel to do some due diligence on a company before it considers acquiring it. **Are the documents privileged?**

ANALYSIS

- Primary purpose of due diligence research is to provide business advice, not legal advice

Helpful Tips

- Educate
- Explain what advice is legal, not business-related
- Limit recipients
- Use outside counsel
- Select privileged documents strategically
- Use technology to avoid inadvertent disclosure

Thank you.

