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WEDNESDAY, MARCH 25, 2020

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Today's faculty features:

Michael B. Hayes, Partner, **Montgomery McCracken Walker & Rhoads**, Philadelphia

Kenneth E. McKay, Shareholder, **Baker Donelson**, Houston

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A Strafford Live CLE Webinar  
March 25, 2020

# PRIVILEGE AT RISK IN INVESTIGATIONS AND AUDITS

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# INTERNAL INVESTIGATIONS

(ATTORNEY-CLIENT PRIVILEGE)

The background is a light gray gradient. It features several realistic water droplets of various sizes, some with highlights and shadows, scattered across the frame. In the upper center, there is a faint, circular, textured pattern that resembles a fingerprint or a similar circular motif.

**WHO IS THE CLIENT?**

# THE IN-HOUSE PRIVILEGE IN THE CONTEXT OF INTERNAL INVESTIGATIONS



**Miranda  
Warning**



# RULE 1.13 OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

- (a) A LAWYER EMPLOYED OR RETAINED BY AN ORGANIZATION REPRESENTS THE ORGANIZATION ACTING THROUGH ITS DULY AUTHORIZED CONSTITUENTS...
  
- (f) IN DEALING WITH AN ORGANIZATION'S DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS OR OTHER CONSTITUENTS, A LAWYER SHALL EXPLAIN THE IDENTITY OF THE CLIENT WHEN THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE ORGANIZATION'S INTERESTS ARE ADVERSE TO THOSE OF THE CONSTITUENTS WITH WHOM THE LAWYER IS DEALING.

COMMENT 10: ....CARE MUST BE TAKEN TO ASSURE THAT THE INDIVIDUAL UNDERSTANDS THAT, WHEN THERE IS SUCH ADVERSITY OF INTEREST, THE LAWYER FOR THE ORGANIZATION CANNOT PROVIDE LEGAL REPRESENTATION FOR THAT CONSTITUENT INDIVIDUAL, AND THAT DISCUSSIONS BETWEEN THE LAWYER FOR THE ORGANIZATION AND THE INDIVIDUAL **MAY NOT BE PRIVILEGED**.

# BROADCOM OPTION BACKDATING INVESTIGATION

- BROADCOM'S BOARD HIRED LAWYERS TO CONDUCT AN INTERNAL INVESTIGATION REGARDING ITS ALLEGED PRACTICE OF BACKDATING STOCK OPTIONS. SHORTLY THEREAFTER, CIVIL SUITS WERE FILED AGAINST THE COMPANY AND SEVERAL OF ITS EXECUTIVES.
- THE LAWYERS CONDUCTED AN INTERVIEW OF THE CFO, BUT NEVER DISCLOSED TO HIM THAT THEY REPRESENTED ONLY BROADCOM AND THAT WHATEVER HE TOLD THEM COULD LATER BE DISCLOSED AT BROADCOM'S DISCRETION.
- THE SEC AND US ATTORNEY'S OFFICE THEN COMMENCED AN INVESTIGATION OF SEVERAL BROADCOM EXECUTIVES RELATING TO THE COMPANY'S OPTION GRANTING PRACTICES AND BROADCOM AGREED TO ALLOW INTERVIEWS OF ITS ATTORNEYS REGARDING THE INTERNAL INVESTIGATION, INCLUDING INFORMATION CONCERNING THE CFO'S INTERVIEW.
- THE CFO WAS INDICTED, BUT CLAIMED THAT THE INFORMATION FROM THE MEETINGS WAS PRIVILEGED. THE LAWYERS CLAIMED THAT, AT THE BEGINNING OF THE INTERVIEW, THEY HAD PROVIDED THE CFO WITH AN UPJOHN OR CORPORATE MIRANDA WARNING, BUT THE CFO DENIED RECEIVING SUCH A WARNING.

# BROADCOM OPTION BACKDATING INVESTIGATION (CONT.)

- THE DISTRICT COURT HELD THAT: “AN ORAL WARNING, AS OPPOSED TO A WRITTEN WAIVER OF THE CLEAR CONFLICT PRESENTED BY [THE LAW FIRM’S] REPRESENTATION OF BOTH BROADCOM AND [THE CFO], IS SIMPLY NOT SUFFICIENT TO SUSPEND OR DISSOLVE AN EXISTING ATTORNEY-CLIENT RELATIONSHIP AND TO WAIVE THE PRIVILEGE.”
- ULTIMATE OUTCOME:
  - NINTH CIRCUIT REVERSED BASED UPON THE CFO’S KNOWLEDGE THAT THE INVESTIGATION WAS TO BE TURNED OVER TO THE COMPANY’S AUDITORS AND PROBABLY THE GOVERNMENT.
  - THE DISTRICT COURT REFERRED THE LAW FIRM TO THE CALIFORNIA STATE BAR FOR DISCIPLINARY ACTION.

*SEE UNITED STATES V. RUEHLE, 583 F.3D 600 (9<sup>TH</sup> CIR. 2009);  
UNITED STATES V. NICHOLAS, 606 F.SUPP.2D 1109 (C.D. CAL. 2009).*

# THE PROPER *UPJOHN* OR CORPORATE MIRANDA WARNING



- DISCLOSURES (BEFORE THE INTERVIEW BEGINS):
  - THE LAWYER REPRESENTS THE COMPANY AND NOT THE INDIVIDUAL PERSONALLY
  - THE INTERVIEW IS PART OF AN INVESTIGATION BEING CONDUCTED FOR THE PURPOSE OF PROVIDING LEGAL ADVICE TO THE COMPANY
  - THE INTERVIEW IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE THAT BELONGS SOLELY TO THE COMPANY AND NOT THE INDIVIDUAL
  - THE PRIVILEGE IS SUBJECT TO WAIVER AT ANY TIME BY THE COMPANY WITHOUT THE INDIVIDUAL'S CONSENT OR KNOWLEDGE
  - THE SUBSTANCE OF THE INTERVIEW IS TO BE KEPT CONFIDENTIAL, INCLUDING AS TO OTHER EMPLOYEES
  - THE INDIVIDUAL MAY WANT TO RETAIN OUTSIDE COUNSEL TO REPRESENT HIS INTERESTS.
- MAKE A WRITTEN RECORD OF THE DISCLOSURES
  - ADDITIONALLY, *UPJOHN* WAIVERS ARE SOMETIMES UTILIZED AT THE TIME OF HIRING OR AT THE INCEPTION OF AN INVESTIGATION.

# PENN STATE/SANDUSKY PROCEEDINGS

- PENN STATE'S GC APPEARED WITH EACH UNIVERSITY ADMINISTRATOR WHEN THEY TESTIFIED BEFORE THE GRAND JURY.
- THE GC THEN TESTIFIED TO THE GRAND JURY HERSELF REGARDING ADMISSIONS THE ADMINISTRATORS MADE TO HER DISCLOSING COMMUNICATIONS WITH THEM TO THE GRAND JURY.
- THE ADMINISTRATORS CLAIMED THAT THEY THOUGHT THE GC WAS THEIR LAWYER FOR THE PURPOSE OF THE GRAND JURY TESTIMONY.



# PENN STATE/SANDUSKY PROCEEDINGS

- THE GC TESTIFIED THAT :
  - SHE TOLD THE ADMINISTRATORS “...THAT I COULD GO IN [TO THE GRAND JURY ROOM], BUT I WAS GENERAL COUNSEL FOR PENN STATE, THAT THERE WAS NO CONFIDENTIALITY...I MEAN, IF THE BOARD ASKED, I WOULD TELL THEM.”
  - SHE DID NOT ADVISE THE ADMINISTRATORS OF THEIR FIFTH AMENDMENT RIGHTS BEFORE THEY TESTIFIED BEFORE THE GRAND JURY.



# PENN STATE/SANDUSKY PROCEEDINGS

- PENNSYLVANIA SUPERIOR COURT DETERMINED THAT:
  - THE GC “DID NOT PROVIDE ANYTHING AKIN TO UPJOHN WARNINGS”
  - THE GC DID NOT EXPLAIN THE DIFFERENCE BETWEEN HER REPRESENTATION OF THE ADMINISTRATORS IN THEIR INDIVIDUAL CAPACITIES AND AS AGENTS OF PENN STATE
  - THE ADMINISTRATORS DID NOT KNOW THAT THE GC DID NOT REPRESENT THEM IN THEIR INDIVIDUAL CAPACITIES
  - THEREFORE, ALL COMMUNICATIONS BETWEEN THE ADMINISTRATORS AND THE GC WERE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

*COMMONWEALTH V. SCHULTZ*, NO. 280 MDA 2015, 2016 WL 285506 (PA. SUPER. CT JAN. 22, 2016)



## KBR INTERNAL INVESTIGATION: AFFIRMATION OF IN-HOUSE COUNSEL PRIVILEGE

- UPON RECEIPT OF AN EMPLOYEE TIP ABOUT POSSIBLE VIOLATION OF THE FALSE CLAIMS ACT, AN INVESTIGATION WAS UNDERTAKEN BY A DIRECTOR OF THE CODE OF BUSINESS CONDUCT PROGRAM IN CONJUNCTION WITH A TEAM OF NON-LAWYERS. AFTER THE INVESTIGATIONS WERE COMPLETED, SUMMARY REPORTS WERE PREPARED AND FORWARDED TO THE COMPANY'S LAW DEPARTMENT.
- **DISTRICT COURT:** INVESTIGATIONS WERE "UNDERTAKEN PURSUANT TO REGULATORY LAW AND CORPORATE POLICY RATHER THAN FOR THE PURPOSE OF OBTAINING LEGAL ADVICE." DEPARTMENT OF DEFENSE "REQUIRE[S] CONTRACTORS TO HAVE INTERNAL CONTROL SYSTEMS SUCH AS [DEFENDANTS'] COBC PROGRAM" SO THAT REPORTED INSTANCES OF ALLEGED MISCONDUCT CAN BE INVESTIGATED AND REPORTED. THE USE OF THESE "ROUTINE CORPORATE, AND APPARENTLY ONGOING, COMPLIANCE INVESTIGATION(S)" WAS NOTHING MORE THAN THE COMPANY'S IMPLEMENTING DOD REQUIREMENTS. ORDERED THE INTERNAL INVESTIGATION DOCUMENTS PRODUCED.





# KBR INTERNAL INVESTIGATION: AFFIRMATION OF IN-HOUSE COUNSEL PRIVILEGE

- **D.C. CIRCUIT, JUNE 27, 2014:**

- VACATED THE DISTRICT COURT'S DOCUMENT PRODUCTION ORDER AND CONFIRMED THAT *UPJOHN* IS THE STANDARD BY WHICH THE ATTORNEY-CLIENT PRIVILEGE SHOULD BE JUDGED WHEN ASSESSING WHETHER CONFIDENTIAL EMPLOYEE COMMUNICATIONS MADE DURING A COMPANY'S INTERNAL INVESTIGATION LED BY COMPANY LAWYERS WILL BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.
- THE TEST FOR APPLYING THE PRIVILEGE IS WHETHER OBTAINING OR PROVIDING LEGAL ADVICE WAS "A PRIMARY PURPOSE OF THE COMMUNICATIONS," REJECTING THE RULE THAT THE PRIVILEGE APPLIES ONLY IF THE COMMUNICATIONS WOULD NOT HAVE BEEN MADE BUT FOR THE FACT THAT LEGAL ADVICE WAS SOUGHT—ONE OF THE SIGNIFICANT PURPOSES—THE PRIVILEGE CAN APPLY EVEN IF THE COMMUNICATION ALSO HAD A BUSINESS PURPOSE.



# KBR INTERNAL INVESTIGATION: AFFIRMATION OF IN-HOUSE COUNSEL PRIVILEGE

- **D.C. CIRCUIT, JUNE 27, 2014:**

- INVESTIGATORS ARE NOT REQUIRED TO INFORM INTERVIEWED EMPLOYEES THAT THE PURPOSE OF THE INTERVIEW IS TO ASSIST THE COMPANY IN OBTAINING LEGAL ADVICE. UPJOHN DOES NOT REQUIRE “A COMPANY TO USE MAGIC WORDS” TO GAIN THE BENEFIT OF THE PRIVILEGE FOR AN INTERNAL INVESTIGATION.
- THAT MANY OF THE INTERVIEWS IN THE INVESTIGATION WERE CONDUCTED BY NON-ATTORNEYS WAS NOT DISPOSITIVE. THE INVESTIGATION WAS CONDUCTED AT THE DIRECTION OF ATTORNEYS IN KBR’S LEGAL DEPARTMENT. THE D.C. CIRCUIT HELD THAT COMMUNICATIONS MADE BY AND TO NON-ATTORNEYS SERVING AS AGENTS OF ATTORNEYS IN INTERNAL INVESTIGATIONS ARE ROUTINELY PROTECTED BY THE PRIVILEGE.
- UPJOHN DID NOT REQUIRE OR HOLD THAT INVOLVEMENT OF OUTSIDE COUNSEL WAS A NECESSARY PREREQUISITE FOR THE PRIVILEGE TO APPLY.

*IN RE KELLOGG BROWN & ROOT, INC.*, 2014 WL 2895939,  
NO. 1:05-CV-1276 (D.C. CIR. JUNE 27, 2014)



The background of the slide is a light gray gradient with several realistic water droplets of various sizes scattered across it. The droplets have highlights and shadows, giving them a three-dimensional appearance.

# KEY FACTOR IN DETERMINING WHETHER THE PRIVILEGE ATTACHES:

WHAT WAS THE PURPOSE OF THE INTERNAL  
INVESTIGATION?

# THE INVESTIGATION MUST BE FOR THE PURPOSE OF OBTAINING OR RENDERING LEGAL ADVICE

IN THE *CICEL SCIENCE & TECHNOLOGY* CASE, THE COMPANY INVESTIGATED POSSIBLE VIOLATION OF THE FCPA BY ONE OF ITS DISTRIBUTORS.

- THE INVESTIGATION, CONDUCTED BY OUTSIDE COUNSEL, RESULTED IN THE TERMINATION OF THE DISTRIBUTOR.
- THE DISTRIBUTOR CLAIMED IN ENSUING LITIGATION THAT NON-LAWYERS COULD HAVE DONE THE SAME WORK THAT THE OUTSIDE LAWYERS PERFORMED AND, THEREFORE, THE PRIVILEGE DID NOT COVER THE INVESTIGATION
- THE COURT FOUND THAT:
  - THE LAW FIRM PROVIDED THE INTERVIEWEES WITH UPJOHN WARNINGS AND KEPT THE INTERVIEWS CONFIDENTIAL
  - SUBSEQUENT GOVERNMENT INVESTIGATIONS AND/OR CIVIL LITIGATION WERE ANTICIPATED.
  - THE FACT THAT A DIFFERENT LAW FIRM WAS HIRED TO DEFEND LITIGATION WAS NOT NECESSARILY AN INDICATION THAT THE CONDUCT WAS MERELY INVESTIGATIVE
- RELYING ON THE *KELLOGG BROWN & ROOT* CASE, THE COURT DETERMINED THAT THE “**PRIMARY PURPOSE**” OF THE INVESTIGATION WAS TO SECURE LEGAL ADVICE.

*CICEL (BEIJING) SCIENCE & TECHNOLOGY CO. LTD V. MISONIX, INC.*, 331 F.R.D. 218 (E.D.N.Y. 2019)

# BARNES & NOBLE'S INVESTIGATION OF ITS CEO



- FORMER CEO CLAIMED THAT THE PRIVILEGE SHOULD NOT APPLY TO THE INTERVIEW NOTES OF B&N'S GC WHO INTERVIEWED THE PERSON WHO MADE THE ALLEGATIONS AGAINST THE CEO
- THE COURT FOUND THAT THE PRIVILEGE DID APPLY NOTING GC RETAINED OUTSIDE COUNSEL THE SAME DAY HE CONDUCTED THE INTERVIEW.
- NOTE THE SIGNIFICANCE OF HIRING OUTSIDE COUNSEL TO THE DETERMINATION.

*PARNEROS V. BARNES & NOBLE, INC.*, 2019 WL 4891213 (S.D.N.Y. 2019)

# “ORDINARY COURSE OF BUSINESS”

- CONVERSELY, WHERE THE INVESTIGATION IS CONDUCTED IN THE ORDINARY COURSE OF BUSINESS OR TO COMPLY WITH GOVERNMENT REGULATIONS, THE PRIVILEGE WILL LIKELY NOT ATTACH.

*SEE 99 WALL DEVELOPMENT INC. V. ALLIED WORLD SPECIALTY INS. CO.,*  
2019 WL 2482356 (S.D.N.Y. 2019) (REJECTING PRIVILEGE IN CONNECTION  
WITH ROUTINE INVESTIGATION BY INSURER’S ATTORNEY REQUIRED  
UNDER THE ORDINARY COURSE OF BUSINESS);

*BEASLEY V. ROWAN COS., INC.,* 2019 WL 1676017 (E.D. LA 2019)  
(INVESTIGATION OF INCIDENT ON OFFSHORE RIG FOUND  
NOT PRIVILEGED AS PRINCIPAL PURPOSE WAS SAFETY  
AND REGULATORY COMPLIANCE)

# SIMILARLY, OSHA COMPLIANCE SELF-AUDITS

- DESPITE ITS OWN POLICY STATEMENTS, OSHA ROUTINELY SEEKS DISCLOSURE OF THE RESULTS OF SELF-AUDITS, ARGUING THAT SUCH AUDITS PROVIDE BUSINESS ADVICE RATHER THAN LEGAL ADVICE OR THAT THE AUDITS ARE SHARED WITH INDIVIDUALS NOT NECESSARY TO THE RENDERING OF LEGAL ADVICE.
- FOR EXAMPLE, IN *SOLIS V. MILK SPECIALTIES*, OSHA SUBPOENAED DOCUMENTS PREPARED AT THE REQUEST OF IN-HOUSE COUNSEL CONCERNING FIRE SAFETY COMPLIANCE EFFORTS. THE COURT FOUND NO PRIVILEGE APPLICABLE SAYING THAT THE BURDEN TO SHOW IT WAS LEGAL ADVICE IS “MORE DIFFICULT IN THE CONTEXT OF IN-HOUSE COUNSEL BECAUSE COUNSEL IS OFTEN INVOLVED IN BUSINESS MATTERS.”



854 F.SUPP.2D 629 (E.D. WIS. 2012)

# PRIVILEGE WAIVED IF THOROUGHNESS OF INVESTIGATION IS THE DEFENSE

IN *KOSS V. PALMER WATER DEPT.*, A FEDERAL MAGISTRATE JUDGE HELD THAT AN EMPLOYER WAIVED ITS PRIVILEGE—BOTH AS TO COMMUNICATIONS INVOLVING IN-HOUSE COUNSEL AND OUTSIDE COUNSEL—WHEN IT USED THE THOROUGHNESS OF ITS INVESTIGATION AS A DEFENSE IN A SEXUAL HARASSMENT LAWSUIT.

CIVIL ACTION NO. 12-30170-MAP (D. MASSACHUSETTS, OCTOBER 7, 2013)



# IN-HOUSE COUNSEL DISCUSSIONS WITH FORMER EMPLOYEES

ONE STATE'S SUPREME COURT HAS  
DECLINED TO "EXPAND THE PRIVILEGE"  
TO DISCUSSIONS BETWEEN IN-HOUSE  
COUNSEL AND FORMER EMPLOYEES  
BASED UPON UPJOHN.



*NEWMAN V. HIGHLAND SCH. DIST.*

(WASH. OCT. 20, 2016)



# AUDITS

(ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES)

# POTENTIALLY PRIVILEGED INFORMATION FREQUENTLY REQUESTED

- INDEPENDENT AUDITORS FREQUENTLY REQUEST DOCUMENTS PREPARED FOR OR ASSOCIATE WITH PENDING OR ANTICIPATED LITIGATION. IN FACT, “SHADOW INVESTIGATIONS” BY AUDITORS ARE BECOMING INCREASINGLY COMMON RELATING TO MATTERS SUBJECT TO LITIGATION OR ARBITRATION.
- AUDITORS MAY SEEK INFORMATION BEYOND MATTERS PUBLICLY FILED IN PLEADINGS OR AVAILABLE IN DEPOSITION TRANSCRIPTS, INCLUDING INTERNAL DOCUMENTS SUCH AS:
  - PRESENTATIONS MADE TO THE BOARD OF DIRECTORS OR SPECIAL COMMITTEES
  - REPORTS FROM INTERNAL INVESTIGATIONS
  - LEGAL OPINIONS FROM OUTSIDE COUNSEL REGARDING VIABILITY OF CLAIMS/DEFENSES
  - KEY DOCUMENTS RELATING TO THE LITIGATION ASSEMBLED BY LITIGATION COUNSEL
  - OPINIONS FROM CONSULTING OR UNDISCLOSED EXPERTS RELATING TO DAMAGES MODELS OR CALCULATIONS
  - RESULTS OF MOCK TRIALS OR JURY RESEARCH

## POTENTIALLY PRIVILEGED INFORMATION FREQUENTLY REQUESTED

- ALL OF THESE TYPES OF INFORMATION CONTAIN CLOSELY-GUARDED SECRETS OF A COMPANY, MUCH OF WHICH WILL BE PROTECTED FROM DISCOVERY IN A LAWSUIT OR EXTERNAL INVESTIGATION BY THE ATTORNEY-CLIENT PRIVILEGE

# LIMITATIONS TO THE ATTORNEY-CLIENT PRIVILEGE INVOLVING COMMUNICATIONS WITH IN-HOUSE COUNSEL

1. OFFICER TITLES: COURTS ROUTINELY APPLY A HIGHER STANDARD TO IN-HOUSE COUNSEL COMMUNICATIONS REGARDING THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE ESPECIALLY WHEN IN-HOUSE COUNSEL SERVE IN DUAL CAPACITIES, INCLUDING PERFORMING NON-LEGAL BUSINESS FUNCTIONS WITHIN THE ORGANIZATION, INCLUDING SUCH THINGS AS CONDUCTING INVESTIGATIONS, REGULATORY COMPLIANCE WORK, CORPORATE GOVERNANCE AND NEGOTIATING BUSINESS TERMS OF A TRANSACTION. THERE IS A PARTICULARLY HEIGHTENED SCRUTINY WHERE DUAL TITLES SUCH AS CORPORATE SECRETARY, VICE PRESIDENT, ETC. ARE PRESENT.
2. INTERNATIONAL COMMUNICATIONS: SOME COUNTRIES DO NOT RECOGNIZE ANY ATTORNEY-CLIENT PRIVILEGE (FRANCE, ITALY, SWEDEN) WHILE OTHERS HAVE SIGNIFICANT LIMITATIONS AS IT APPLIES TO IN-HOUSE COUNSEL. *AKZO NOBEL* CASE IN 2010 FROM THE EUROPEAN COURT OF JUSTICE EXCLUDED FROM THE SCOPE OF THE PRIVILEGE COMMUNICATIONS BETWEEN IN-HOUSE COUNSEL AND THE ENTITY'S EMPLOYEES CITING A LACK OF INDEPENDENCE AND THE "DUAL-PURPOSE" OF THEIR EMPLOYMENT. BUT SEE THE *BELGACOM* CASE (BELGIUM 2013).

## DISCLOSURE OF PRIVILEGED INFORMATION TO INDEPENDENT AUDITORS

- IN MOST JURISDICTIONS, DISCLOSURE TO AN INDEPENDENT AUDITOR WOULD CONSTITUTE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE, IN WHOLE OR IN PART.
- THUS, THE DILEMMA. A COMPANY WANTS TO PROVIDE ALL THE NECESSARY INFORMATION FOR AN AUDITOR TO PREPARE A THOROUGH AND INFORMED OPINION, BUT AT THE GREAT RISK OF WAIVING THE PRIVILEGE OVER INFORMATION THAT COULD BE DEVASTATING IN THE HANDS OF AN ADVERSE PARTY.

# WORK PRODUCT PRIVILEGE

- A POSSIBLE ALTERNATIVE TO ACHIEVE BOTH GOALS IS TO INVOKE THE WORK PRODUCT PRIVILEGE WHICH TYPICALLY PROTECTS INFORMATION PREPARED BY A PARTY AND ITS COUNSEL IN ANTICIPATION OF LITIGATION
- FEDERAL RULE OF CIVIL PROCEDURE 26(B)(3)\*

WORK PRODUCT: “DOCUMENTS AND TANGIBLE THINGS THAT ARE PREPARED IN ANTICIPATION OF LITIGATION OR FOR TRIAL BY OR FOR ANOTHER PARTY OR ITS REPRESENTATIVE (INCLUDING THE OTHER PARTY’S ATTORNEY, CONSULTANT, SURETY, INDEMNITOR, INSURER, OR AGENT”

\*THE DEFINITION AND EXCEPTIONS TO THE WORK PRODUCT PRIVILEGE VARIES TO SOME DEGREE IN COURTS OPERATING UNDER STATE PROCEDURAL LAW AND RULES

# ADVANTAGE OF INVOKING THE WORK PRODUCT PRIVILEGE

- IMPORTANTLY, THE WORK PRODUCT PRIVILEGE IS NOT AUTOMATICALLY WAIVED BY DISCLOSURE TO AN AUDITOR. FOR A WAIVER TO OCCUR, THE INFORMATION MUST BE DISCLOSED TO AN ADVERSARY OR CREATE A RISK THAT THE INFORMATION WILL BE DISCLOSED TO AN ADVERSARY.



# SPLIT OF AUTHORITY ON WAIVER

- MAJORITY RULE: DISCLOSURE OF WORK PRODUCT TO AN AUDITOR DOES NOT WAIVE THE WORK PRODUCT PRIVILEGE. THE POWER TO ISSUE AN ADVERSE OPINION OR THE NEED TO SCRUTINIZE AND INVESTIGATE A COMPANY'S BOOKS AND RECORDS DOES NOT RISE TO THE LEVEL OF AN "ADVERSARY".
- MINORITY RULE: DISCLOSURE OF WORK PRODUCT TO AN AUDITOR WAIVES THE WORK PRODUCT PRIVILEGE. INDEPENDENT AUDITORS ARE INHERENTLY ADVERSARIAL TO THE COMPANIES THEY AUDIT AS AN AUDITOR MUST NOT SHARE A COMMON LEGAL INTEREST WITH THE COMPANY BEING AUDITED PUTTING THEM IN A POSITION OF AN "ADVERSARY".
- RESULT: MAJORITY "NO WAIVER" JURISDICTIONS ENCOURAGE FULL DISCLOSURE FACILITATING THE MOST INFORMED AUDIT OPINION.

## PROTECTING PRIVILEGED INFORMATION DURING AN AUDIT

1. CONFIRM THAT THE WORK PRODUCT PRIVILEGE ACTUALLY APPLIES TO THE LITIGATION OR CLAIM-RELATED INFORMATION TO BE DISCLOSED
2. ENSURE THAT THE AUDITOR ENGAGEMENT LETTER IS CLEAR ABOUT THE AUDITOR'S DUTY OF CONFIDENTIALITY GENERALLY AND ENUNCIATE THAT THE AUDITOR WILL CONFORM DISCLOSURES IN THE AUDIT REPORT TO THE TERMS OF THE ABA STATEMENT OF POLICY
3. PROVIDE ONLY THOSE MATERIALS ESSENTIAL TO THE AUDIT AND NOT AN ENTIRE LAWYER CASE FILE
4. CONSIDER VERBAL DISCLOSURE OF SUCH INFORMATION TO THE AUDIT TEAM
5. IDENTIFY ANY AUDIT WORKPAPERS THAT MAY CONTAIN OR REFERENCE PRIVILEGED INFORMATION
6. RESPOND AND REQUIRE OUTSIDE COUNSEL TO RESPOND BASED UPON THE TERMS OF THE ABA STATEMENT OF POLICY
  - IF AN UNFAVORABLE OUTCOME IS NEITHER "PROBABLE" OR "REMOTE", THE ATTORNEY SHOULD EXPRESS NO OPINION REGARDING THE OUTCOME OF THE MATTER

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