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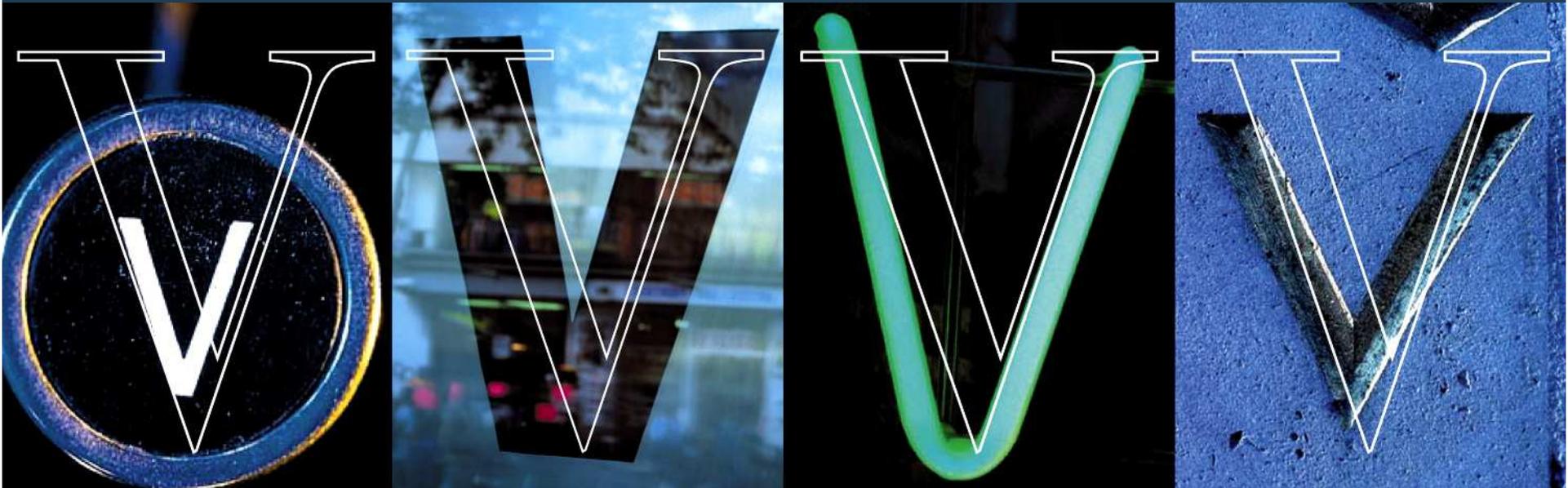
ACC Association of
Corporate Counsel

Legal Quick Hit: Privilege Considerations for Nonprofit In-House Counsel

MODERATOR: JEFF TENNENBAUM

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VICTORIA DANTA

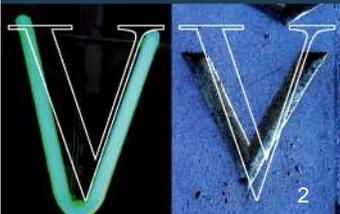
TUESDAY, SEPTEMBER 11, 2012



Agenda

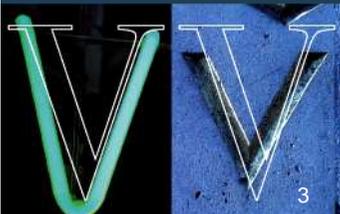


- The Basics
 - What is the attorney-client privilege?
 - What is the attorney work-product doctrine?
 - How do they differ?
- Special Considerations for Nonprofit In-House Counsel
 - The impact of affiliate/subsidiary relationships
 - Who is the “client?”
 - Examples and explanations



The Basics

- Proposed Rule of Evidence 503(b) (1972): A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of facilitating the rendition of professional legal services to the client
- Two kinds of protection:
 - *Attorney-client privilege*: In general, protects confidential communications between a client or an agent of the client and an attorney made for the purpose of seeking or obtaining legal advice
 - *Attorney work-product doctrine*: Protects work product created by the attorney or by the client in anticipation of litigation



The Basics

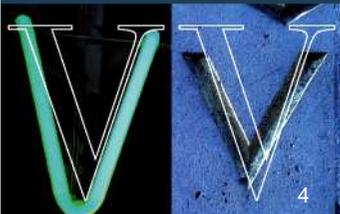
The Attorney-Client Privilege

- Key Policy: To encourage full and frank disclosure by a client to an attorney so the attorney can provide sound and informed legal advice
- *The privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him [or her] to give sound and informed advice.*

- Upjohn Co. v. U.S., 449 U.S. 383, 389-91 (1981)

- *The attorney-client privilege is designed “to facilitate the administration of justice,” in order to “promote freedom of consultation of legal advisors by clients.”*

- Natta v. Hogan, 392 F.2d 686, 691 (10th Cir. 1968)



The Basics

The Attorney-Client Privilege (Cont.)

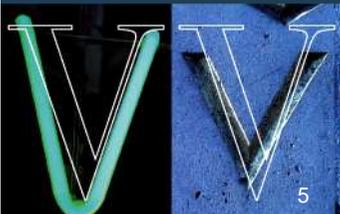
- Four Key Elements:

1 A communication

2 Among privileged persons

3 Made in confidence

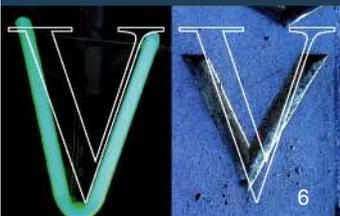
4 For the purpose of seeking or obtaining legal assistance



The Basics

The Attorney-Client Privilege (Cont.)

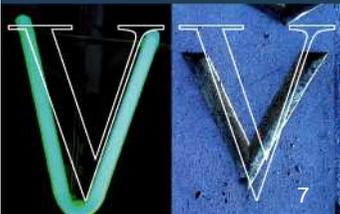
- What is a “Communication?”
 - Any expression through which a privileged person undertakes to convey information to another privileged person OR any document or record conveying such an expression
 - Communications can be in ANY FORM
- Who are “Privileged Persons?”
 - For example,
 - The client
 - The client’s agents for communication
 - The lawyer
 - The lawyer’s agents for communication



The Basics

The Attorney-Client Privilege (Cont.)

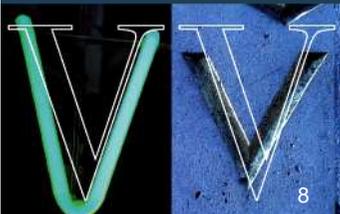
- Is the communication made “in confidence?”
 - The communicating party must reasonably believe that no one other than a privileged person will learn its contents
 - Intent = relevant, but ≠ determinative
 - A “practical” requirement
- “For the purposes of seeking or obtaining legal advice?”
 - Business or other non-legal advice is not protected
 - Consider:
 - The relationship between the privileged parties
 - Whether a lawyer is drawing on his or her expertise in advising the client
 - Whether the lawyer’s training adds value



The Basics

Legal Advice v. Business Advice

- Does the nature of the task change the privilege?
 - “Can we execute on business strategy?”
 - “What is the likelihood of litigation or an enforcement action?”
- Internal investigations
- Responses to whistleblower allegations



The Basics

The Attorney Work-Product Doctrine

- Provides qualified protection from discovery in a civil action when materials are:
 - Documents and tangible things that are otherwise discoverable
 - Prepared in anticipation of litigation or for trial
 - By or for another party, or by or for that other party's representative
- To overcome the doctrine, the party seeking discovery must show:
 - A substantial need for the materials; and
 - That there is no other way to obtain the information or its equivalent without substantial hardship

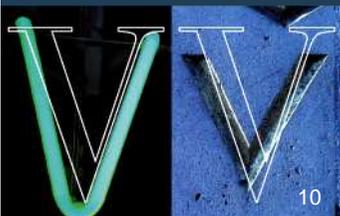
- Fed. R. Civ. P. 26(b)(3)



The Basics

The Attorney Work-Product Doctrine (Cont.)

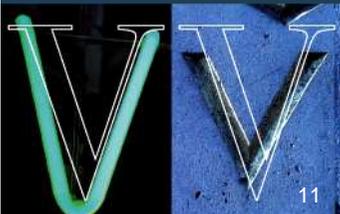
- “Opinion” work product is protected, e.g.,
 - Theories
 - Analyses
 - Thoughts
 - Mental impressions
 - Conclusions
 - Options for consideration
- Examples:
 - Witness outlines
 - Witness memoranda
 - Compilations of otherwise non-privileged documents or records



Special Considerations for Nonprofit In-House Counsel

Who Is the “Client” for Purposes of Privilege Considerations?

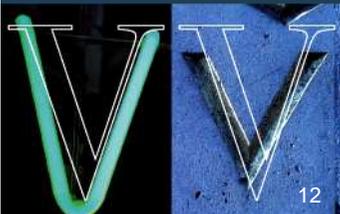
- Often said that the “entity” is the “client,” but this can obscure rather than clarify which individuals (or groups of individuals) are, in effect, the client for purposes of advice, counsel, and privilege.
- Consider:
 - Officers
 - Board Members
 - Audit Committee
 - Employees
 - Independent Contractors
 - Consultants



Special Considerations for Nonprofit In-House Counsel

Who Is the “Client” for Purposes of Privilege Considerations?
(Cont.)

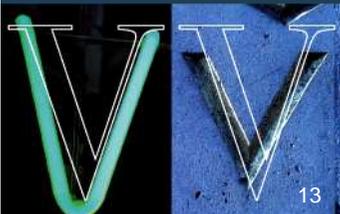
- Ask:
 - What is the role of the individual seeking advice? Giving advice?
 - What kinds of information are being communicated?
 - What is the subject matter of the advice sought? The advice given?
 - Is the person within the “control group?”
 - Will disclosure constitute a “waiver” of the privilege?
- Special considerations for organizational employees
 - Upjohn / “Corporate Miranda” warnings
 - “Do I need a lawyer?”
 - Always be on the look-out for actual or potential conflicts of interest!



Special Considerations for Nonprofit In-House Counsel

Protecting Your Organization and Protecting Yourself

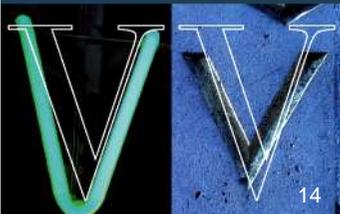
- When asked for advice, always have a clear understanding of the requestor's objectives, as well as his or her role *vis-à-vis* your organization
- Is the request for advice made on behalf of the organization, or does it implicate the requestor's individual interests? Both? Are there actual or potential conflicts of interest?
- Is there a potential to “waive” or weaken your organization's assertion of the attorney-client privilege or attorney work-product protection?



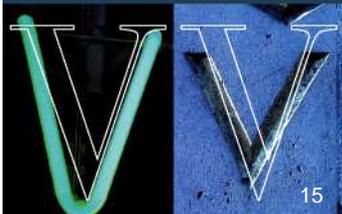
Special Considerations for Nonprofit In-House Counsel

Impact of Parent/Subsidiary Relationships

- Nonprofit organizations that demonstrate sufficient interrelatedness can be treated as one entity for purposes of the attorney-client privilege. The organizations must be closely affiliated or under common ownership and share a common legal interest
- Ask:
 - Do the nonprofit organizations operate, in effect, as a single entity?
 - What is the basis for the assertion of privilege?
 - Who is seeking discovery and for what purpose?



Questions?



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