



# Managing the Attorney-Client Privilege and Work Product Doctrine: Considerations for In-House Counsel

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## **Managing the Attorney-Client Privilege and Work Product Doctrine: Considerations for In-House Counsel**

In-house lawyers owe the same professional obligations with respect to the preservation of privileged communications as outside counsel. However, in-house counsel may confront challenges relating to the application of the attorney-client privilege and work product doctrine that differ from those faced by outside counsel. To understand the difference in the challenges faced by in-house counsel and outside counsel, one need not look much farther than how the attorney-client relationship giving rise to the privilege is formed. For example, as the resident lawyer, in-house counsel are often confronted with questions prefaced with the phrase “as my lawyer.” But does that title really fit? When is in-house counsel representing the individual as opposed to the entity? How should one draw the line between the provision of legal advice which is potentially privileged and business advice which, while possibly confidential, is not privileged? Understanding the parameters of the attorney-client privilege and the work product doctrine is essential to being able to maintain the trust that forms the basis of the attorney-client relationship and to protect the client. This paper is intended as an overview of some of the issues in-house counsel face relating to the preservation of confidentiality.

### **Attorney-Client Privilege – The Basics**

The attorney-client privilege protects communications made in confidence between a client and a client’s employees to an attorney, acting as an attorney, for the purpose of obtaining or providing legal advice. *See Upjohn Co. v. United States*, 449 U.S. 383, 394-99 (1981). An important part of the role of in-house counsel is to help educate the people with whom they interact about the limited scope of what actually constitutes an “attorney-client communication” that is “privileged.” In our experience, many non-lawyers assume that all of their communications with in-house counsel are “privileged.” Thus, the preservation of the privilege may hinge on in-house counsel’s success in educating the people who seek their counsel concerning the narrow scope of the privilege.

To determine if a communication falls within the protection of the attorney-client privilege, one must ask two questions: (1) whether legal advice of any kind was sought from a professional legal advisor in his/her capacity as such; and (2) whether the communication was related to that purpose and made in confidence by the client. The attorney-client privilege protects professional advice given to those who can act on it as well as the provision of information to counsel to enable him or her to give sound legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). However, the attorney-client privilege only shields communications that were intended to be confidential, so communications made to an attorney in the presence of a third party or made with the intent or expectation that the communications might be disclosed to a third party are not

privileged. *United States v. Evans*, 113 F.3d 1457, 1462 (7<sup>th</sup> Cir. 1997). In addition, where the client is a corporation (or an entity), the privilege is waived if the communication is disclosed to employees who did not need access to the communication. *Baxter Travenol Labs, Inc. v. Abbott Labs*, No. 84 C 5103, 1987 WL 12919, at \*5 (N.D. Ill. June 19, 1987).

The attorney-client privilege extends to factual investigations made by the attorney in order to provide legal advice to the client, and any factual statements made by an employee to the attorney pursuant to such an investigation may be privileged. *Sandra T.E. v. Berwyn Sch. Dist. 100*, 600 F.3d 612, 619-20 (7<sup>th</sup> Cir. 2009). “The attorney-client privilege prohibits the compelled disclosure of ‘confidential communications between a client and an attorney for the purpose of obtaining legal advice.’” *RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 216 (N.D.Ill. 2013) (quoting *Denius v Dunlap*, 209 F3d. 944, 952 (7<sup>th</sup> Cir. 2000)). Consequently, the identity of the person seeking advice (is she a “client”) and the purpose (for example, is this fact-finding for business advice, or legal advice) will determine whether the communication may be privileged.

The expanded role of legal counsel within organizations has blurred the line between business and legal advice. *Acosta v. Target Corp.*, 281 F.R.D. 314, 322 (N.D. Ill. 2012). Where a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, the document is not primarily legal in nature and is therefore not privileged. *Baxter Travenol Labs, Inc., v. Abbott Labs*, No. 84 C 5103, 1987 WL 12919, at \*5 (N.D. Ill. June 19, 1987). In other words, was the document prepared for the purpose of obtaining legal advice or as an adjunct to the performance of the company’s business? As will be discussed, this line is often not clear and can be especially hazy in circumstances such as where the business function integrates legal analysis.

### **Attorney-Client Privilege – Illinois v. Federal**

The scope of the attorney-client privilege is narrower under Illinois law than it is under federal law. Under Illinois law, the protections of the attorney-client privilege extend to two tiers of corporate employees. The first tier consists of the decision makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision makers rely. *Midwesco-Paschen Joint Venture v. IMO Industries, Inc.*, 265 Ill. App. 3d 654, 658 (1<sup>st</sup> Dist. 1994); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 120 (1982).

Under federal law, the protections of the attorney-client privilege extend to communications made by employees to counsel at the direction of corporate superiors in order to secure legal advice, concerning matters within the scope of the employee’s corporate duties, where the employees themselves were aware they were being

questioned in order that the corporation could obtain legal advice, and the communications were kept confidential since the time they were made. *Upjohn Co. v. United States*, 449 U.S. 383, 389-390, 101 S.Ct. 677 (1981).

The distinction may be especially difficult to address when the issue arises in a federal court where a case straddles federal and state or common law claims. One way to address the issue is to be mindful to document only those things that need to be documented. Before creating a document, one should ask the purpose and value of what will be derived by making a written record of the communication. And when a record is made, it is best to avoid the bad habits of the text message world in which we find ourselves and skip shorthand.

### **Case Study – Attorney-Client Privilege**

In *Koumoulis v. Independent Financial Marketing Group, Inc.*, 295 F.R.D. 28 (E.D.N.Y. 2013), four current and former employees sued defendants complaining of various forms of discrimination. During discovery, the plaintiffs moved to compel the production of certain communications between a defendant and outside counsel concerning defendant's internal investigations of the employees' complaints. Defendant claimed that the documents were protected from disclosure on the grounds that the documents were an attorney-client privileged communication.

One of the documents at issue was a communication in which outside counsel instructed defendant's human resources personnel on what actions should be taken, when to take those actions and who should perform them; told defendant what should be documented and how it should be documented; drafted written communications from defendant to one or more plaintiffs; and drafted scripts for conversations with one of the plaintiffs about his complaints. In response, defendant reported to outside counsel the outcome of the recommended actions, asked what should be done next, and updated her on new developments.

The court found that the communications between defendant corporation and outside counsel were not protected because the predominant purpose of the communications was not to provide legal advice, but to provide human resources services and thus business advice. The court found that outside counsel was not acting as a consultant on legal issues, but was helping to supervise and direct the internal investigations primarily as an adjunct member of defendant's human resources team. The Court concluded that the "advice" at issue rarely involved the interpretation and application of legal principles to guide future conduct or assessed past conduct in the context of anticipated or potential future litigation. An explanation for the outcome may be found in the way in which the record was memorialized. To the extent that the communications were legal advice in

response to an inquiry, rather than just prescribing conduct, the communications should have made this clear.

The distinction between what qualifies for protection as a privileged communication becomes clearer when one compares the Court’s decision in *Koumoulis* to the Seventh Circuit’s decision in *Sandra T.E. v. South Berwyn School District 100*, 600 F.3d 612 (7<sup>th</sup> Cir. 2009). In *Sandra T.E.*, a music teacher employed by a school district sexually abused students in the school’s facilities over a period of many years. After the misconduct came to light, the school district faced a mass action. The plaintiffs complained against the school district and principal of their failure to prevent the sexual abuse by the teacher. The school board hired outside counsel to conduct an internal investigation and to provide legal advice to the board, including about whether there were actions that should have been taken to prevent or detect the abuse. As part of the investigation, the outside counsel interviewed many current and former school district employees and third-party witnesses. The attorneys took handwritten notes and later drafted memoranda summarizing the interviews. Outside counsel later delivered its findings and legal advice to the school board in an oral report and a written executive summary.

During discovery, plaintiff issued a subpoena to the outside counsel for all documents in its possession related to the investigation. The outside counsel refused to produce some of the documents on the basis of the protections afforded under the attorney-client privilege and work product doctrine.<sup>1</sup> The district court ordered that the documents be produced concluding that the outside counsel had been hired to provide investigative services, not legal services. The outside counsel appealed the district court’s decision to the Seventh Circuit.

The Seventh Circuit reversed and found that the requested documents were protected by the attorney-client privilege and work product doctrine. The court found that the most important piece of evidence, something overlooked by the district court, was the engagement letter between the school board and outside counsel. The engagement letter explained that outside counsel had been hired to “investigate the response to the school administration to allegations of sexual abuse of students” and “provide legal services in connection with the specific representation.” The court found that the engagement letter brought the case squarely within the *Upjohn* decision, which explained that factual investigations performed by attorneys *as attorneys* fall comfortably within the protection of the attorney-client privilege. A good engagement letter can help to set the table by outlining the purpose: seeking legal advice. Written communications providing legal

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<sup>1</sup> It bears noting that many of the documents that were gathered relating to the factual investigation were not privileged and were disclosed.

advice should, likewise, be written to communicate that they contain legal advice premised on the assumptions or findings outlined in the document.

In addition, the court found that during the interviews, outside counsel gave the school district employees the *Upjohn* warnings, advising that counsel represented the school board and not the employees and that the school board had control over whether the conversations remained privileged; the interviews were kept confidential as no third parties attended the interviews and the documents were not made public; the documents were appropriately marked as “privileged” and “confidential”; and affidavits submitted by the school board established that outside counsel had been hired to provide legal advice in the context of the facts it uncovered during the internal investigation.

### **Work Product Doctrine – The Basics**

The work product doctrine protects material prepared by an attorney or at the direction of an attorney in anticipation of litigation. *RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 217 (N.D. Ill. 2013). To identify work product, courts are directed to determine “whether in light of the factual context the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation.” *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7<sup>th</sup> Cir. 1996). The determination of whether materials are prepared in anticipation of litigation or the prospect of litigation eludes precision. *Allendale Mut. Ins. Co. v. Bull Data Syst., Inc.*, 145 F.R.D. 84, 86 (N.D. Ill. 1992).

Materials created in the ordinary course of business, which may have the incidental effect of being helpful in litigation, are not privileged under the work product doctrine. *Heriot v. Byrne*, 257 F.R.D. 645, 663 (N.D. Ill. 2009). The work product doctrine does not apply if the prospect of future litigation is remote at the time the document was created. *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1118 (7<sup>th</sup> Cir. 1983). “The mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney....” *Id.* In sum, in order for the work product doctrine to apply, the document must have been created when some articulable claim existed that was likely to lead to litigation, when the probability of litigation was substantial and imminent or when objective facts exist that establish an identifiable resolve to litigate.

### **Case Study – Work Product Doctrine**

A case that suggests the subjective nature of what may qualify as “in anticipation of litigation” is *Binks Manufacturing Company v. National Presto Industries, Inc.*, 709 F.2d 1109 (7<sup>th</sup> Cir. 1983). In this case, National Presto Industries (“Presto”) purchased a baking system from Binks Manufacturing Company (“Binks”). After the baking system was installed, Presto encountered numerous problems attempting to operate the system and refused to pay Binks the purchase price of the system.

Binks and Presto had an exchange of letters concerning their dispute. Binks sent a letter to Presto demanding payment of the purchase price. Binks concluded its letter stating:

*[I]f you persist in the unwarranted view that the equipment supplied under the quotation does not meet specifications and is not acceptable, please inform us immediately as we have no other recourse but to make arrangements to dismantle and remove the equipment.*

Presto responded demanding the Binks take the necessary steps to fix the problems with the system. Presto concluded its letter stating:

*If you persist in your choice not to make the necessary corrections, we shall have to proceed on our own and continue to hold you fully responsible for any damages and expenses incurred.*

After the letters were exchanged, one of Presto's in-house attorneys travelled to interview Presto plant personnel about the problems with the system. After his interviews, he prepared several documents. One document was an "inter-office letter" to Presto's General Counsel entitled "Evaluation of Binks Situation" in which he described a conversation that he had with three corporate officers of Presto and recited in detail the problems that Presto had experienced with the operation of the System. The other document was a memo to Presto's Production Manager that had a more detailed list of each of the systems malfunctions and the duration of each breakdown, along with his opinion as to the allocation of responsibility between Presto and Binks for each of the respective system breakdowns.

A complaint and counterclaim were eventually filed, and in the course of discovery, Binks sought the two documents prepared by Presto's in-house counsel. Presto asserted that the documents were attorney work product and protected from disclosure. However, the court rejected the privilege claim and ordered the production of both documents.

The court's analysis was focused on the events leading up to the visit by Presto's in-house counsel to the plant and the preparation of the documents. The court found that while there may have been "the remote prospect of litigation" when the documents were prepared, Presto failed to establish that the documents were prepared because of the prospect of litigation or that some articulable claim existed that was likely to lead to litigation. The court found that Binks' letter did not threaten Presto with litigation, but only said that if payment was not made that it would dismantle and remove the equipment. Likewise, the court found that while Presto's response had a more threatening tone, it fell short of stating that Presto intended to institute litigation against Binks.

Monday morning quarterbacking is easier than having to make tough calls in the moment. However, *Binks* illustrates the importance of framing advice or strategy in context. For example, in *Sandra T.E.*, the party seeking the documents contended that the investigation was undertaken for the purpose of quelling outrage and the prevention of future disputes as opposed to addressing a pending dispute. The Seventh Circuit highlighted that “[t]here is a distinction between precautionary documents ‘developed in the ordinary course of business’ for the ‘remote prospect of litigation’ and documents prepared because ‘some articulable claim, likely to lead to litigation, [has] arisen’ “ *Sandra T.E. v South Berwyn School Dist. 100*, 600 F.3d at 622 (quoting *Binks Mfg. Co. v Nat’l Presto Indus. Inc.*, 709 F.2d at 1120).

The Seventh Circuit noted that the engagement letter executed by the school board explained that the investigation was being undertaken in the context of the pending litigation and to provide legal services in connection with that specific representation. The exchange between Presto and Binks suggested not just the existence of a dispute relating to performance, but that action would be taken to hold an entity accountable for the non-performance. Consequently, *Sandra T.E.* suggests that had counsel been clear in the communication of his legal analysis and findings that his work was undertaken in anticipation and preparation for reasonably expected litigation, it would have made it far easier to defend the claim of privilege.

In *Binks*, assuming that counsel perceived a reasonable threat of litigation, and we assume from the circumstances that this was the case, the documents should have memorialized that concern. It would have made it much easier to protect the documents as work-product had this been undertaken at the time of the communications.

### **Common Interest Doctrine/Joint Defense Privilege**

The “common interest” doctrine, which, depending on the circumstances in which it is asserted may be referred to as the joint defense privilege, offers a narrow exception to the rule that sharing a communication with a person other than a person or entity’s own counsel waives the attorney-client privilege or attorney work product privilege. To fall within the ambit of this, the communication has to otherwise qualify for protection under the attorney-client privilege or the work product doctrine. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 139-140 (N.D. Ill. 1993). The common interest doctrine/joint defense privilege applies to circumstances in which two or more people or entities consult an attorney for legal advice or in pursuit of a common goal concerning a matter of mutual concern. “The purpose of the common interest doctrine is to protect the confidentiality of communications ... where a joint ... effort or strategy has been decided upon or undertaken by the parties and their respective counsel.” *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997).



The interests of the parties do not need to be completely overlapping, but the scope of the privilege is limited to the areas in which there is an overlap. *See Strougo v. BEA Assoc.*, 199 F.R.D. 515, 520 (S.D.N.Y. 2001). However, critically, the common interest must relate to a litigation interest and not merely a common business interest. *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212, 216 (N.D. Ill. 2001).

*Dexia Credit Local v. Rogan*, 231 F.R.D. 268 (N.D. Ill. 2004) illustrates the common interest doctrine in practice. In *Dexia*, an individual who was the owner and chief executive officer of a hospital allegedly conspired with a vendor of the hospital and others to defraud the hospital. The hospital's board, at the urging of one of the hospital's principle lenders, caused the board to terminate the CEO after various entities and individuals were indicted in connection with fraudulent actions undertaken by them related to the hospital. The board replaced the CEO with a management company. Shortly thereafter, Medicare and Medicaid ceased payments to the hospital, and it was dissolved. A custodian was appointed to manage the hospital's affairs, and he filed a voluntary bankruptcy on behalf of the hospital. The custodian entered into an agreement with the lender pursuant to which the lender would fund certain litigation against the former CEO and others who had allegedly defrauded the entity and its creditors.

The lender asserted that it had a common legal and litigation interest with the entity against the former CEO. The bankruptcy court found that the individual appointed as custodian of the hospital had the authority to control, exercise, or waive the attorney-client privilege on behalf of the hospital. The former CEO sought production of certain documents that the hospital had shared with its lender as well as certain documents to which he had access when he had been the hospital's CEO. He contended that there was no common interest privilege protecting communications that the entity had shared with the lender. And he contended that he was entitled to see the documents to which he had access during the time that he was CEO because he had previously been a member of the entity's control group.

The court noted that “[t]he purpose of the common interest doctrine is to ‘foster communication’ between parties that share a common interest and to ‘protect the confidentiality of communications ...where a joint ... effort or strategy has been decided upon or undertaken by the parties and their respective counsel.” *Id.* at 273. The court held that the common interest doctrine, the same thing as the joint defense privilege, arises when two or more people/entities consult an attorney about a mutual concern. The common interest privilege only applies to documents that fall within the common interest. *Id.* at 273. And the privilege applies to the outside world and not to disputes that arise between the parties that shared the privilege. *Id.* at 273.

The court upheld the assertion of privilege concerning the documents shared by the entity with the lender under the common interest doctrine. Further, despite the fact that the CEO had access to the documents prior to his termination, the Court held that the privilege was not his to waive. Even though it was undisputed that the CEO had previously had access to the documents at issue and had even authored some of the communications with counsel on behalf of the corporation prior to his termination, he was not entitled access to the documents. Specifically, the Court found that the CEO lost access to the documents once he ceased to be a member of the corporation’s control group, notwithstanding the fact that he created some of the documents. The Court explained that “the privilege does not belong to the individual agents of the corporation seeking the advice; the privilege belongs to the corporation, because the corporation is the client.” *Id.* at 277.

### **Upjohn Warnings**

The situation where a corporate employee is being interviewed by the attorney representing the corporation raises special attorney-client issues. Such interviews are common place in most internal investigations carried out for the purpose of providing legal advice to a corporation. In *Upjohn v. United States*, the Supreme Court provided important guidance to all attorneys who find themselves interviewing corporate employees. The purpose of the “Upjohn Warnings”, as they have come to be known, is to make sure that the individual employee being interviewed understands that the attorney-client privilege, as commonly understood, does *not* apply to their interview with an attorney representing the corporation. Making sure that the employee being interviewed is aware of this fact is a necessity that establishes the ethical character of the attorney’s actions while also preserving the corporation’s legal ability to control and use the statements by the employee in the manner best suited to its legitimate interests.

The *Upjohn* decision, and professional commentary regarding it (*See generally*, ABA White Collar Crime Comm., “Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees” (2009), available at [HTTP://meetings.abanet.org/wedupload/commupload/CR301000/newsletterpubs/abaupjohn\\_taskforcereport.pdf](http://meetings.abanet.org/wedupload/commupload/CR301000/newsletterpubs/abaupjohn_taskforcereport.pdf)) advise that in any situation when an attorney; either in-house or outside counsel representing a corporation; determines that a conflict, or even a *potential* conflict, may exist between the interests of the individual employee being interviewed and the corporate client, the lawyer should advise the employee witness of the following:

1. The lawyer represents the corporation, *not* the employee being interviewed;
2. The purpose of the interview is an attempt to obtain truthful information to assist the lawyer in his representation of the corporation;

3. The employee being interviewed may wish to obtain independent legal advice; and
4. Any attorney-client privilege that may exist in connection with the interview belongs exclusively to the corporation, not to the employee being interviewed, and the corporation may, at its sole discretion, waive the attorney-client privilege and disclose the content of the interview if it should so determine.

Some lawyers have added additional warnings to their version of the “Upjohn Warnings.” Common additions include: explicitly informing the employee that the attorney conducting the interview may not provide any legal advice to the employee because he represents the employer organization; and, a statement to the employee that while the employee has the right to decide whether to answer the interviewer’s questions, the terms of the employee’s employment and the continuation of that employment require the employee to cooperate in all reasonable internal investigations carried out by the corporation. These “additions” are not required by the *Upjohn* ruling itself but may well provide a stronger basis upon which to allow the corporation to later use interview statements made by an employee because the additional statements provide relevant and important information to the employee which makes all the clearer the employee’s understanding of the terms under which the interview is conducted. These additions highlight that the interviews are undertaken solely for the benefit of the corporation so that it can obtain the benefit and protection of the advice of its legal counsel.

Because it is the rare situation where before interviewing a particular employee the lawyer representing the corporation in an internal investigation can rule out the possibility that the employee’s interests “may differ” from the corporation’s, the provision of the Upjohn Warnings is strongly recommended in all instances where employees are being interviewed. The risks that flow from not providing adequate Upjohn Warnings can be serious, and include, suppression of witness statements, counsel disqualification, witness confusion, malpractice claims and even referrals for bar disciplinary action. It is, therefore, highly recommended, as well as widely accepted practice, to administer Upjohn Warnings before virtually every employee interview, even if it seems clear at the time that the employee to be interviewed is most likely a mere witness, as opposed to a potentially culpable participant in, the conduct under investigation.

#### **Provision of Counsel to Employees.**

As discussed, the accepted practice is to, at a minimum, let employees to be interviewed as part of an internal investigation know that they have a right to seek individual legal counsel. The separate and more subtle issue is whether and under what circumstances a corporation should consider providing legal counsel to such employees.

It has been our experience that, particularly in connection with large internal investigations and internal investigations conducted with a reasonable expectation of subsequent government regulatory and/or law enforcement inquiries, it will often, if not always, be appropriate for corporations to seriously consider providing legal counsel to their employees. Such situations generally arise where a corporation has experienced some significant incident which has the potential to directly impact their regulatory position and/or bring them under the scrutiny of governmental law enforcement agencies (e.g., fuel or chemical spill, a serious injury on a job site, large financial improprieties). In these circumstances, it is common for employees to, quite logically, have individual concerns of a very specific legal nature. Experience has shown that corporations finding themselves in such circumstances are well advised to offer to provide to employees who are subject to interviews as part of the internal investigation, or at least the key employees in such an investigation, separate legal counsel.

Counsel carrying out the investigation for the corporation should identify competent outside counsel who can be offered, at corporate expense, to provide independent legal advice to the employees involved. While employees should never be pressured to accept such free legal assistance, experience strongly suggests that almost all employees given the option of free legal assistance will choose it over having to either go without or pay for an attorney themselves. The advantages to a corporation of such a provision of legal advice to employees are multiple. First, the independent counsel, will work with the witness to better prepare them to respond to the questions of the attorney carrying out the internal investigation. The independent counsel will also review with the employee witness the facts of the case, refresh their memories, review any relevant documents and air any concerns about their own past conduct, all in a manner that will almost always allow for a more accurate, complete and smooth internal investigation. Additionally the employee witnesses most often will feel reassured and grateful to the corporate employer for providing such legal services, making them more likely to cooperate in the internal investigation.

Concerns that employees who have been given a chance to speak with a lawyer of their own will become reluctant to cooperate in the internal investigation in our experience are generally unfounded. The vast majority of employee witnesses are already highly incentivized to cooperate fully with an internal investigation out of concern for their continued employment should they fail to do so. And there is nothing unfair in this. The employee may possess information gained in the course of employment material to the protection of the employer's interests. Also, most employee witnesses, after speaking with independent counsel, will correctly conclude that they personally have no real legal concerns which should prevent their cooperation with the internal investigation. An employee witness' own counsel can walk the witness through the pros and cons of

cooperating with the employer's internal investigation, which more often than not will promote both the employee's piece of mind the corporation's fact finding.

There is, of course, a financial cost to providing such independent counsel to employee witnesses. While this is not to be ignored, it should be balanced against the advantages and benefits to the corporation in enhancing the quality of their internal investigation. An additional point of importance is that when counsel carrying out the internal investigation on behalf of the corporation recommends independent counsel for the employee witnesses, among the qualifications for such counsel should be not only experience in representing employees in similar circumstances but also a willingness to communicate with counsel conducting the internal investigation all information which independent counsel is ethically allowed to share with regard to the investigation. This becomes particularly valuable and important should subsequent related investigations occur regarding government regulatory and/or law enforcement entities. Having a counsel representing employee witnesses who is willing to share with corporate counsel the actions and statements of the investigating government entities, so long as doing so is not contrary to the interests of their employee witness clients, can be very valuable.

Some of the costs of providing independent legal representation to employee witnesses in internal investigations can be minimized by the appropriate use of what are sometimes termed "Pool Counsel." Pool Counsel are independent legal counsel which represent more than one employee witness in connection with an internal investigation. Such Pool Counsel are appropriate for employee witnesses who, while identified as potential interviewees as part of the internal investigation, do not appear to have any significant individualized legal interests in conflict with the employer or with the other employee witnesses being represented by the Pool Counsel. In other words, employee witnesses who are merely part of a group of employees who may have some information about an internal investigation but are not identified as particularly "key" or "crucial" figures in the investigation may well be able to be represented by Pool Counsel. Pool Counsel can provide these employees with the same basic general legal information about their status in the internal investigation and the potential consequences of their interviews in a wholly ethical way as long as no conflicts amongst his or her employee clients become apparent. Should the attorney carrying out the internal investigation for the corporation identify any particularized individual and distinct legal issues for a particular employee witness, or if Pool Counsel identifies a particular employee client with a meaningful independent legal concern, the legal representation can be changed and that employee can be given individual legal counsel.

Some corporations have raised concerns about how potential government regulatory or law enforcement entities would view the provision of counsel to employees as part of an internal investigation. While in the past there have been some indications from

governmental entities like the Department of Justice (DOJ), that they had concerns about employer organizations providing legal counsel to employees who the DOJ may have viewed as having some personal legal culpability, the tone at DOJ has shifted on this issue over time. In general, it has been our experience over the last several years that where corporations have provided truly independent, qualified and experienced legal counsel to their employees, the government generally recognizes that the ability of both the corporation and the government to carry out an efficient investigation is enhanced.

In summary, the goal of any corporation carrying out an internal investigation is to acquire the most accurate information about the situation in the most efficient manner. Provision of Upjohn Warnings insures that the results of the internal investigation will be both more reliable and more useful for the corporation. The possible provision of independent legal counsel to employee witnesses in an internal investigation will also generally serve the interest of the corporation in obtaining a fully accurate and efficient internal investigation. The provision of independent legal counsel for employees may also serve to enhance the accuracy of any subsequent government investigation into the same situation. As always, counsel for the corporation should chose a strategy that best serves the client's interest while also always dealing fairly and forthrightly with the corporation's employees.

### **Multiple Client Representation**

The joint defense privilege only applies as long as the attorney-client privilege is applicable. *Janousek v. Slotky*, 980 N.E.2d 641 (1st Dist. 2012), illustrates the analysis that should be undertaken to assure the preservation of "confidentiality" in circumstances in which counsel undertakes to represent multiple clients. *Janousek* involved a dispute between a minority member of a limited liability company and the majority members. Counsel represented the company and the majority members at the company's expense. The minority member sought access to the communications between the company's counsel and the majority members.

The Court found that the circumstances presented a "dual representation." As a consequence, to evaluate whether there was a waiver of privilege, the Court needed to evaluate the expectation that each of the clients would have that the confidentiality of its communications with counsel would be maintained in the context of the case. The Court held that the minority member was entitled to access the communications between the attorney representing both the limited liability company and the majority members on the basis that there could not have been a reasonable expectation that the communications would be confidential from the minority member. *Id.* at 651. Citing Section 10-15 of the Illinois Limited Liability Company Act, the Court found that a limited liability company is obligated to provide its members and the members agents with access to its records, and that those records include communications with the entity's counsel. *Id.* at 651. The

Court noted that it was incumbent on counsel to warn its clients of consequences of the dual representation and the waiver of the privilege associated with such a representation.

### **Conflicts Arising From Dual Representation May Result In Malpractice Claims**

A challenge inherent in representing multiple clients in a matter is keeping a sharp lookout for conflicts between the clients and addressing those conflicts as they arise. Counsel sometimes attempt to address those conflicts by obtaining prospective conflict waivers from their clients. In some instances, Courts have found prospective conflicts waivers to be enforceable. *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F.Supp.2d 579, 582-583 (D.Del. 2001). There, the Court found that to be enforceable, “[a] prospective waiver should identify the potential opposing party, the nature of the likely subject matter in dispute, and permit the client to appreciate the potential effect of the waiver.” *Id.* at 583. And in other cases, Courts have declined to enforce prospective waivers. *Concat L P v Unilever, PLC*, 350 F.Supp.2d 796, 820 (N.D.Cal. 2004). There, the Court identified a variety of considerations ancillary to whether the prospective waivers was effective including: (1) the breath of the waiver; (2) temporal scope; (3) the quality of the discussion between attorney and client concerning the waiver; (4) the specificity of the waiver; (5) the nature of the conflict and the relationship between the matters in which the waiver was obtained and the dispute at hand; (6) the sophistication of the client; and (7) the interests of justice. Defective conflict waivers can result in privilege waivers and, as will be discussed, malpractice claims.

*Yanez v. Plummer*, 221 Cal.App.4th 180, 164 Cal.Rptr.3d 309, (2013), highlights the risks associated with dual representation and should be of particular interest to in-house counsel. *Yanez* arose from a personal injury brought by an employee of Union Pacific Railroad. The railroad obtained a statement from Yanez, a person employed by Union Pacific at the time of the accident and who had been present but had not actually witnessed the occurrence. Yanez’s supervisor asked that he prepare a written report concerning the accident. The statement he prepared described the physical conditions in the area in which the accident took place, including an area within the employer’s facility which was soaked in grease and oil. The supervisor requested that Yanez prepare a second statement because the first statement lacked sufficient details. The first statement did not indicate whether Yanez had witnessed the accident. The second statement indicated that Yanez had actually witnessed the accident.

Yanez was subpoenaed for deposition and, pursuant to directions from his employer, Yanez met with the employer’s in-house counsel on the morning of his deposition. In-house counsel was in possession of both of Yanez’s statements. Yanez advised in-house counsel that he had not actually seen the injured worker fall down notwithstanding the indication in the second statement that he had. Yanez told in-house counsel that he was concerned that his job would be in jeopardy because he believed that his testimony would

be unfavorable to the railroad in light of his description of the physical conditions in the area of the accident. He asked counsel who would “protect” him in the course of the deposition, and in-house counsel advised that he was Yanez’ counsel for the deposition and that Yanez’ job would not be affected as long as he testified truthfully at his deposition.

In-house counsel failed to advise Yanez of the potential conflict presented by the representation. The injured employee’s attorney elicited Yanez’ admission that he had not witnessed the accident. In-house counsel followed-up eliciting testimony about Union Pacific’s “total safety culture” and trying to distance Union Pacific’s management from responsibility for the conditions in the area of the accident. He then highlighted the discrepancies between the two statements that Yanez had written at the direction of his supervisor. Yanez testified that the suggestion that he had seen the accident in the second statement was a mistake and confirmed that he did not actually see the injured employee fall.

The director of the facility was present at the deposition as the company’s representative. He obtained a copy of the transcript to confirm Yanez’ testimony – truthful testimony – that he had not witnessed the accident. Yanez was subsequently fired based on the discrepancy between the two statements on the basis of his dishonesty in the drafting of the second statement. The testimony concerning the discrepancy in the statements was elicited by in-house counsel, the individual who had told Yanez that he was representing him at the deposition and that there was nothing to be concerned about as long as he told the truth. Yanez sued in-house counsel. The Court found that counsel’s conduct, including his failure to advise Yanez of the conflict in advance of the deposition, was at least potentially a contributing factor in Yanez’ termination. The Court found that counsel’s conduct breached professional obligations owed by him, presented a genuine issue of material fact with respect to the causation, and thus reversed summary judgment. The court noted that in the circumstances presented where counsel purported to represent the employer and the employee simultaneously (to the employee’s detriment) without obtaining the employee’s written waiver to the conflict. *Id.* at 190.

Although it is not discussed in the case, counsel could have avoided the issue by advising Yanez of the conflict and acting solely as counsel for the employer at the deposition. The company could have offered Yanez separate counsel but, at a minimum, had a professional obligation to advise Yanez of the potential conflict, especially in light of counsel’s decision to underscore the inconsistency in the two statements prepared by Yanez.



### **Insured-Insurer Privilege**

An insurer providing a defense to its insured will generally require its insured to supply it with a variety of information concerning the litigation and failure to provide that information may result in an exclusion from coverage. Consequently, in some states, including Illinois, when an insurer has a duty to defend its insured, the attorney-client privilege extends to communications between an insurer and its insured. *People v. Ryan*, 30 Ill.2d 456 (1964). The idea behind the extension of the privilege in this manner is that the insurer is essentially acting as an agent to transmit information between the insured and the attorney employed to defend the insured. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill. App. 3d 541 (1<sup>st</sup> Dist. 2004). Communications between an insured and the attorney retained to represent the insured, as well as communications between the insurer and the attorney retained to represent the insured, fall within the scope of the attorney-client privilege. *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 194 (1991).

However, not all states recognize the extension of the attorney-client privilege to communications between an insured and its insurer in circumstances in which the insurer is providing a defense for its insured. For example, under Michigan law, “[n]o attorney-client relationship exists between an insurance company and the attorney representing the insurance company’s insured. The attorney’s sole loyalty and duty is owed to the client, not the insurer.” *Kirschner v. Process Design Associates, Inc.*, 459 Mich. 587, 598 (1998) quoting *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.*, 197 Mich. App. 482, 492 (1992). Under Michigan law, the attorney-client privilege only applies to communications between an insured and the attorney retained to represent the insured. The attorney-client privilege does not apply to communications between the attorney retained to represent the insured and the insurer or to communications between the insured and the insurer. *Koster v. June’s Trucking, Inc.*, 244 Mich. App. 162, 167 (2000).

The privilege issues ancillary to communications between an insured and an insurer become even more murky when the claims at issue arise in multiple jurisdictions. Moreover, the scope of what an insured is required to provide to its insurer to avoid breaching obligations owed under the policy may vary depending on whether the insurer contests its duty to defend, the language of the insurance policy, and the consequences for privilege of sharing the information with the insurer. In our experience, insureds and their insurers can usually work out protocols for the exchange of information that protect the needs of both without waiver of privilege (at least as to third-parties).

### **Self-Critical Analysis Privilege**

A purpose of the attorney-client “rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking the representation if the

professional mission is to be carried out.” *Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d at 619. Similarly, courts have developed a “self-critical analysis privilege” to encourage businesses to voluntarily evaluate their safety procedures. *See Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970). The self-critical analysis privilege may be implicated in the context of an internal investigation. And in some places, this type of privilege has been established by statute to promote safety such as the Medical Studies Act, 735 ILCS 5/8-2101.

The “self-critical analysis privilege” is predicated on the recognition that the production of documents generated as a part of such a process would “tend to hamper honest, candid self-evaluation geared toward the prevention of future accidents” and have a chilling effect on self-evaluation. *See Resnick v. American Dental Association*, 95 F.R.D. 372, 374-375 (N.D. Ill. 1982); *Morgan v. Union Pacific R. Co.*, 182 F.R.D. 261, 265 (N.D. Ill. 1998). For the reports to be privileged, it is necessary that they be generated with the expectation that they would be kept confidential and that they were in fact kept confidential. *Id.* at 266. And critically, the courts that have discussed this privilege have recognized that there is a “vast array of inconsistent decisions on this issue, [and] it would be understatement to say that it is unclear whether a federal self-critical analysis privilege exists.” *Id.* at 264.

## **Conclusion**

This paper is intended to underscore some issues that are commonly presented to in-house counsel. The line between what is privileged and what is not is often gray. And this “grayness” is illustrated by the inconsistency in the cases that address the issues presented in this paper. There is no fail safe, but a best practice is to approach every communication with a sensitivity to whether the purpose of the communication is to seek “legal advice” with the expectation of confidentiality and to approach the preparation of every document with the thought as to whether it is being prepared in “anticipation of litigation.” To that end, we offer the following “takeaways”:

### **Suggested Best Practices for Presentation of Privilege**

1. Be aware of the who, what, where, when, how and why of your conversation.
2. Make sure that your client understands the role that you are playing, i.e. is the conversation privileged and or is the document that you are going to create work product.
3. Evaluate whether the information being sought by your client or given to your client is “legal” advice as opposed to “business” advice. And in that regard, to the

extent a document is generated, frame the advice to reflect the intent (if legal advice is sought or given, make the case for why this is “legal” advice).

4. Evaluate whether the document was prepared in anticipation of litigation and if so, put it into context reflecting why there is a reasonable anticipation of litigation.
5. If a document contains both legal and business advice, consider separating the content into two different documents.
6. If you are using outside counsel, make sure that there is an engagement letter in place that accurately describes what it is that outside has been engaged to do.

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