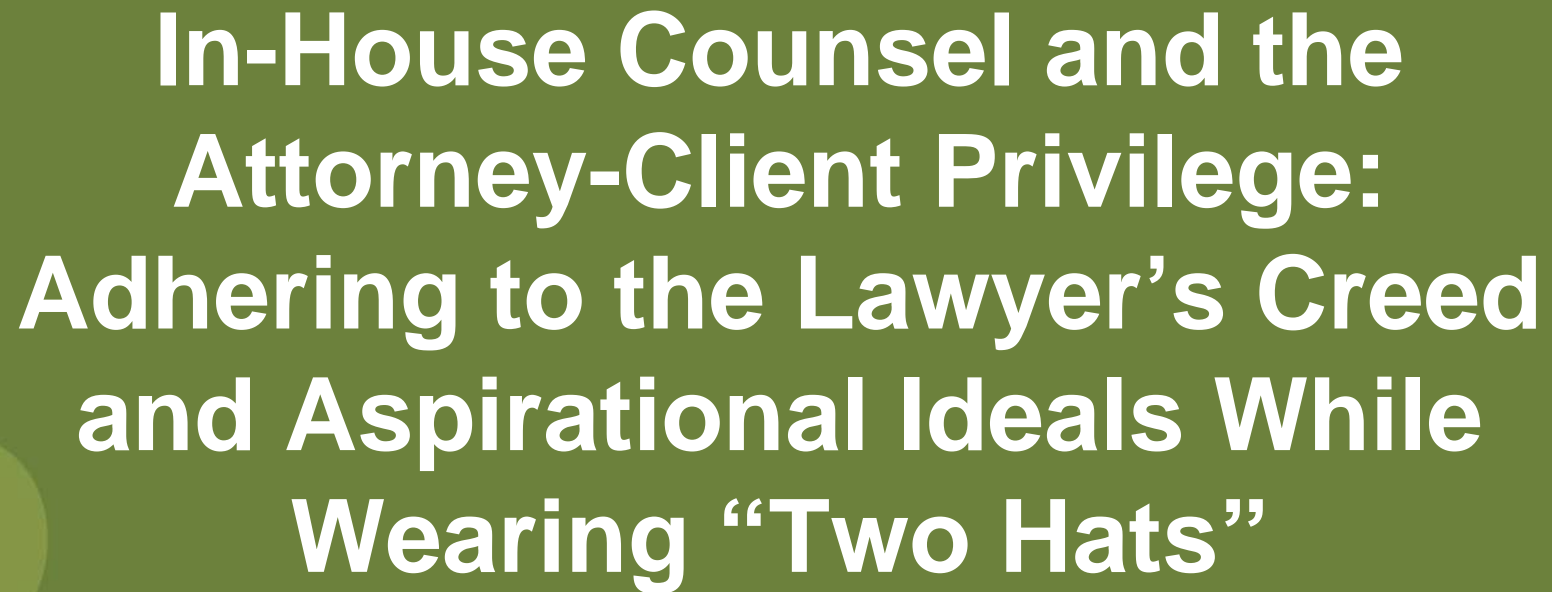

In-House Counsel and the Attorney-Client Privilege: Adhering to the Lawyer's Creed and Aspirational Ideals While Wearing "Two Hats"

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Professional Ideals and the Attorney-Client Privilege

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Professional Ideals and the Attorney-Client Privilege — Let Them Be Your Guide

- For in-house attorneys, the attorney-client privilege can be murky because they often wear two hats: Lawyer and Business Advisor.
- The Ohio Supreme Court's *A Lawyer's Creed* and *A Lawyer's Aspirational Ideals* both offer guidance on how to straddle the sometimes murky line between legal advice and business advice.
- *A Lawyer's Creed* begins with a promise to offer clients "loyalty, confidentiality, competence, diligence, and …best judgment."

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Professional Ideals and the Attorney-Client Privilege — Let Them Be Your Guide *(Cont.)*

- Among other things, *A Lawyer's Aspirational Ideals* provides:
  - "AS TO CLIENTS, I shall aspire:

    ***

    (b) To fully informed client-decision making. I should:

    (4) Communicate promptly and clearly with clients, and

    (5) Reach clear agreements with clients concerning the nature of the representation.

    ***

    (d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve fidelity to clients."
    A Lawyer's Aspirational Ideals, paragraphs (b)(4)(5), (d).

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Professional Ideals and the Attorney-Client Privilege — Let Them Be Your Guide *(Cont.)*

- As an in-house attorney, the *Creed* and the *Ideals* guide you to:
  - Distinguish your legal clients from your business clients to ensure fully informed decision making;
  - Define the attorney client relationship and make clear that your clients understand the difference between legal representation and/or a business relationship;
  - Comply with the obligations of confidentiality while avoiding conflicting loyalties; and
  - Explain the attorney-client privilege to your clients. Determine where the business client ends (No Privilege) and the legal client begins (Privilege).
- See The Supreme Court of Ohio Professional Ideals for Ohio Lawyers and Judges; *A Lawyer's Creed* and *A Lawyer's Aspirational Ideals*, paragraphs (b),(d) (provided in your supplemental materials).

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The Basics: What Does the Attorney-Client Privilege Protect?

- Generally, attorney-client privilege protects communications if:
  - They are made by a client to an attorney or the attorney's agent;
  - For the purpose of making or seeking legal (not business) advice;
  - They are made in confidence; and
  - They are kept confidential by the client.

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The Basics: What Does the Attorney-Client Privilege Protect? *(Cont.)*

- "In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law." *State ex. rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261 (2005).
- O.R.C. 2317.02 provides that:

  "The following persons shall not testify in certain respects:

  (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client…"

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The Basics: What Does the Attorney-Client Privilege Protect? *(Cont.)*

- The federal and state rules of civil procedure and of evidence also reinforce the attorney-client privilege.
  - Ohio R. Civ. P. 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…"
  - Ohio R. Evid. 501 provides that "[t]he privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience."

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The Basics: What Does the Attorney-Client Privilege Protect? *(Cont.)*

- However, there are no hard and fast rules. Err on the side of caution.
  - Privilege issues are determined on a case-by-case basis.
  - Keep current on privilege case law in all relevant jurisdictions.

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The Attorney-Client Privilege and In-House Counsel

- In the abstract, the attorney-client privilege applies equally to in-house and outside counsel. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
- In reality, because in-house counsel often wear "two hats," courts may not treat in-house and outside counsel equally. Communications of in-house lawyers receive more scrutiny because they often serve as business, as well as legal, advisors.
- Bottom Line: Distinguishing between your roles as legal and business advisor is crucial to recognizing when the attorney-client privilege will apply.

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Example: In-house Counsel's Advice May Not Be Privileged

***Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 24, 1996): Privilege was not enforced where in-house counsel negotiated contract provisions. An in-house lawyer reviewed and commented on the environmental issues raised by a proposed agreement and made recommendations as to how his employer might negotiate the agreement and make changes to the contract.**

After explaining that "courts will not recognize the [attorney-client] privilege when the attorney is acting as a business advisor" the Court went on to hold that the privilege did not apply because "it is clear that [counsel] was not exercising a lawyer's traditional function." Instead, in-house counsel "was asked to review [the] proposed agreement with respect to the environmental provisions. He then negotiated the environmental provisions of the agreement, and after execution of the agreement, he served as negotiator of the matters to be included in [the agreement]. As a negotiator on behalf of management, [counsel] was acting in a business capacity." *Id.* at *10-11 (internal citations omitted).

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When Will the Privilege Apply?

- A communication is not privileged simply because it is made by or to a lawyer.
- Courts often consider whether the communication was made "predominantly" for legal purposes. *E.g., In re Vioxx Products Liability Litigation*, 501 F.Supp. 2d 789, 796-97 (E.D. La. 2007).
- The communication must be with a *client*. The company, not the company's employees, is the in-house attorney's client. See MODEL RULES OF PROF. CONDUCT R. 1.13.
- For a communication to be privileged, the communication must be within the scope of the employee's direct responsibility to the company. *In re Grand Jury Subpoenas*, 561 F. Supp. 1247, 1258-59 (E.D.N.Y. 1982).

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Communication is Key: Explaining the Boundaries to Your Client

- **Privilege Likely Applies:**
  - To a confidential communication where an employee seeks or receives legal advice related to a matter for which that employee is directly responsible.
  - To communications among non-legal employees that transmit or discuss advice given by an in-house lawyer. *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1077 (N.D. Cal. 2002).
  - To communications between in-house attorneys where one is acting as a legal advisor and one is acting as the client. *Chevron Texaco Corp.*, 241 F. Supp. 2d at 1077.

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Communication is Key: Explaining the Boundaries to Your Client *(Cont.)*

- **Privilege Is <u>Not</u> Likely To Apply:**
  - To communications between non-legal employees where in-house counsel is copied merely in an effort to cloak otherwise non-privileged messages.
  - To communications transmitting legal advice from an in-house lawyer to an employee where that employee does not have responsibility for the subject matter contained in the communication.
  - To drafts of letters or documents shared with third parties.
  - To communications that do not seek or provide legal advice to the corporation.
  - To cover letters if they do not contain confidential client communications.

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Basic Dos and Don'ts to Consider

- **Do:**
  - Use the title of legal counsel when communicating about legal matters.
  - Attempt to separate legal and business communications. When an email has a mixed purpose, advise employees to send one email to counsel and a separate email to non-lawyers.
  - Counsel employees that copying an in-house lawyer on emails does not automatically render the communication privileged.
  - Designate legal communications as "privileged" and "confidential." Warn employees that forwarding a communication to unnecessary or third parties may defeat the privilege.
  - Consider hiring outside counsel when a matter is particularly sensitive.

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Basic Dos and Don’ts to Consider *(Cont.)*

- **Don’t:**
  - Automatically designate *all* communications as “privileged.”
  - Disseminate sensitive communications to third parties.
  - Disseminate sensitive communications to employees other than those that have direct responsibility over the matter.
  - Fall victim to the “Reply All” trap. Carefully consider who receives messages containing legal advice.

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The Attorney-Client Privilege in the Employment Environment

Mark S. Floyd

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Expanding Roles:

- In-house lawyers often provide counsel during decision-making processes.
- In-house counsel may lead an investigation of workplace misconduct.
- These expanded roles can result in better risk assessment and promote compliance with the law.
- They can also pose challenges to the attorney-client privilege.

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Separating Your Roles: The Challenges

- Business and legal advice are often inextricably intertwined.
- Many employees do not understand the boundaries of the privilege.
- Modern day use of email and technology has greatly increased the number of documents subject to difficult privilege determinations.
- Different jurisdictions may have different standards. Even the same test can lead to different outcomes depending on the circumstances.

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Business or Legal Purpose?

- As previously discussed, mixed purpose communications are susceptible to claims that they were made for business, not legal purposes.
- For example, an in-house lawyer may be asked to conduct a disparate impact analysis related to a potential Reduction in Force and assess reasons regarding termination decisions.
  - Privilege applies if the communications were to provide legal analysis.
  - Privilege does not apply if the attorney actually acted as the decision maker.

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Investigating Complaints Against Employees

- An employer may have a duty to investigate complaints about employees.
- These investigations may lead to litigation down the line.
- Again, privilege is only applicable if the investigation constitutes legal work.
  - Legal work may include investigating facts in preparation of litigation or preparing an analysis of legal risk.
  - Non-legal work may include enforcing the company's human resources policies or taking action as a decision maker regarding an employment decision.

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Who is the Client?

- Remember, the company is the client. See MODEL RULES OF PROF. CONDUCT R. 1.13.
- Employees should be advised that in-house counsel represents the employer, and not the individual employee. *United States v. Stein*, 463 F. Supp. 2d 459, 465 (S.D.N.Y. 2006) (Subjective belief on behalf of employee is not sufficient to prove privilege exists).

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Potential Waiver of Privilege

- The corporation holds the privilege.
- The desire for privilege must be balanced against the fact that a company's prompt and appropriate response may be its best defense.
- The attorney-client privilege might be waived if the employer asserts the adequacy of the investigation as a defense brought by an employee. See *Walker v. County of Contra Costa*, 227 F.R.D. 529, 533 (N.D. Cal. 2005) (collecting cases).

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Preserving Privilege

- Privilege may be maintained if the attorney advised, but did not directly participate in, the investigation.
  - “If an attorney had been consulted about an investigation but did not himself or herself conduct interviews, make disciplinary decisions, or otherwise participate in the investigation itself, the contents of the attorney's advice to the client about the investigative process and the decisions made by the employer remain privileged.” *McKenna v. Nestle Purina PetCare Co.*, 2007 U.S. Dist. LEXIS 8876, *11 (S.D. Ohio Feb. 5, 2007).

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Protect All Forms of Communication

- Remember, plaintiffs can and will seek anything that could potentially support their case.
  - Letters
  - Memoranda
  - Reports
  - Handwritten notes
  - Audio tapes
  - Email messages
  - Computer/electronic records
- Take precautionary steps to protect *all* of these items during internal investigations.

Tips

- Make sure that there is a designated non-attorney decision maker involved in all employment decisions.
- Document that in-house counsel is acting as an attorney and not in a management role.
- Decide at the outset of an investigation if you want an attorney to act as a witness. If not, consider having a non-attorney lead the investigation.
- Advise employees that in-house counsel represents the corporation, not the employee. Advise individual employees to seek independent legal counsel when appropriate.
- Be prepared to waive the privilege if you plan to use the investigation as an affirmative defense.

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The Attorney-Client Privilege and Internal Investigations

Richik Sarkar

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Key Considerations

- Is an investigation necessary?
- If so, who should conduct the investigation?
- What is the proper scope of the investigation?
- What should be done at the conclusion of the investigation?

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Internal Investigations: When Are They Appropriate?

- Generally, an investigation is an appropriate response to:
  - Government investigations and enforcement actions;
  - Allegations of employee or company wrongdoing; or
  - A lawsuit against the company.
- Investigations should begin as soon as possible after a triggering event.

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Who Should Conduct the Investigation?

- Using counsel to evaluate facts helps establish and preserve privilege.
- Consider whether to use in-house or outside counsel:
  - **In-House Counsel:**
    - Does counsel serve as both a business and legal advisor?
    - Was counsel involved in the underlying activity?
  - **Outside Counsel:**
    - Privilege may be more secure because the role of legal advisor is often more clearly defined but costs of may be higher.

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Should You Use Consultants?

- Consultants can provide critical expertise.
- When engaging consultants, take steps to preserve privilege.
  - Consultants should be hired by, and work at the direction of, counsel.
  - Consultants should report directly to counsel.

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How Do You Deal with Employees?

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
- At a minimum, a proper *Upjohn* warning must inform employees that:
  - The attorney is there to conduct a privileged and confidential interview of the employee;
  - The attorney represents the employer, not the individual;
  - The employer, not the individual, enjoys an attorney-client privilege with the attorney; and
  - The employer may, as it sees fit, disclose the employee's information and statements to third parties, including the government.

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Should Employees Have Joint Counsel or Separate Counsel?

- A joint defense agreement may be advantageous when both the company and its executives are being investigated.
  - The attorney-client privilege belongs to all clients. Therefore, a company's ability to waive the privilege may be limited in a joint representation.
  - Tread carefully when faced with potential conflicts of interest. Taking on a joint representation under such circumstances raises both ethical and privilege issues. See *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

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Should Employees Have Joint Counsel or Separate Counsel? *(Cont.)*

- An employee should have separate counsel when:
  - The potential for individual liability exists.
  - There is a potential or actual conflict of interest between the employee and the company. See MODEL RULES OF PROF. CONDUCT R. 1.13.
- Failure to properly advise an employee to retain separate counsel may lead to the inadvertent creation of an attorney-client relationship with an individual employee. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.13, Comment 10.

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A Cautionary Tale: The "Broadcom Litigation"

The Facts:

- Broadcom Corp. hired outside counsel to conduct an internal investigation related to backdating of option grants. The CFO was warned that the firm's engagement did not extend to issues related to self-dealing or board integrity. However, when civil suits were filed against company executives, the law firm agreed to represent the CFO.
- A few days later, the CFO participated in an interview related to the company's stock option practices. The company subsequently authorized the law firm to disclose information obtained at this interview to outside auditors.
- When accounting irregularities were discovered, government investigators questioned the law firm about the CFO's interview. He claimed that because the firm represented him in the civil suits, these communications were privileged, and therefore, could not be used against him. The CFO was indicted on criminal charges.

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A Cautionary Tale: The "Broadcom Litigation" *(Cont.)*

The Outcome:

- The District Court held that the communications were privileged, despite the lawyer's testimony that they had given the CFO "*Upjohn*" warnings at the outset of the meeting.
- Finding that the CFO had reasonably believed that the attorneys represented him individually, the court held that without informed, written consent from the CFO, dual representation and/or disclosure of the communications were improper. The court suppressed all communications from the meeting and concluded its opinion by referring the lawyers to the state bar for discipline.

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A Cautionary Tale: The "Broadcom Litigation" *(Cont.)*

The Outcome:

- On appeal, the Ninth Circuit held that the communications were not privileged. *However*, the Court found that there was *no dispute* that an attorney-client relationship existed. Instead, the court's ruling hinged on the fact that the CFO did not make the communications with the expectation of confidence as he knew such communications would be shared with third parties. *U.S. v. Ruehle*, 583 F.3d 600 (9th Dist. 2009).

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Best Practices

- Make an initial determination regarding conflicts.
- Inform everyone involved in the investigation that their communications with counsel are privileged, but make clear that the company holds the privilege.
- Explain in writing whether information will be disclosed to third parties.
- Clarify in writing exactly whom the outside lawyers represent.

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Best Practices *(Cont.)*

- Mark any privileged communications or attorney-work product accordingly.
- Restrict access to any potentially privileged information.
- Precisely note that employees were given "*Upjohn* Warnings" and make an exact record of what was said.
- Take notes during the interview, but avoid making a "transcript" to increase the likelihood that the work product doctrine will apply.

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Best Practices *(Cont.)*

- Final reports (written or oral):
  - Should contain a summary of the relevant issues, facts and law
  - Should explain the scope of the investigation and the methodology used
  - Should include findings and recommendations

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Attorney-Client Privilege Considerations Under ERISA

Patricia A. Shlonsky

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Attorney-Client Privilege Considerations Under ERISA

- Forget everything you thought you knew.
- Assume no privilege.

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General Rule

- When an attorney represents a fiduciary, the client is not the fiduciary – it is the plan beneficiaries.
- See *Washington-Baltimore Newspaper Guild v. Washington Star Co*., 543 F. Supp. 906 (D.D.C. 1982).
- See also *U.S. v. Jicarilla*, 131 S.Ct. 2313 (7/25/2011), Sotomayor dissent at 2333.

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Who is a Fiduciary?

- A person is a fiduciary to the extent that person:
  1. Exercises any discretionary authority or control respecting management of the plan or disposition of assets,
  2. Renders investment advice for a fee or other compensation, direct or indirect, with respect to plan assets – or has any authority or responsibility to do so, or

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Who is a Fiduciary? *(Cont.)*

3. Has discretionary authority or responsibility in administration.

ERISA § 3(21)(A); See also DOL Reg. § 2510.3-21.

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Plan Administration

- Ohio District Courts have recognized that an ERISA fiduciary cannot assert the attorney-client privilege against plan beneficiaries on matters of plan administration. See *Shields v. UNUM Provident Corp.*, 2007 U.S. Dist. Lexis 17836 (S.D. Ohio 2007); *Allard v. Coenen*, 2010 U.S. Dist. Lexis 134779 (N.D. Ohio 2010).

Plan Administration *(Cont.)*

- Sixth Circuit has not spoken.
- Covers claims and appeals and general fiduciary advice.

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Department of Labor (DOL)

- Fiduciary exception to attorney-client privilege rule extends to communications regarding plan administration between an ERISA fiduciary and plan attorney in the context of a DOL investigation.

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Department of Labor (DOL) *(Cont.)*

- See *Solis v. Food Employees Labor Relations Association*, 2011 U.S. App. Lexis 9110 (4th Cir. 2011).
- DOL acts on behalf of beneficiaries in ERISA civil actions and investigations.

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Work Product Doctrine

- See *Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 v. Boeing*, 2010 U.S. Dist. Lexis 27093 (D. Kan. 2009).
- Generally courts apply same rules for work product doctrine as applied to attorney-client privilege.
- See *Shields* – Work product doctrine may not apply during claims and appeals process.

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When is There an Attorney-Client Privilege Under ERISA?

- Settlor functions – non-fiduciary functions such as adopting, amending or terminating an ERISA plan. See *In re Long Island Lighting Co*., 129 F.3d 268 (2d. Cir. 1997); *Allard v. Coenen*, 2010 U.S. Dist. Lexis 134779 (N.D. Ohio 2010).
- When ERISA fiduciary consults an attorney to defend fiduciary personally against claims. See *Shields*; *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999).

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Specific Considerations

External –

- Legal advice regarding fiduciary relations with clients probably not protected.
- *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007)
    - Exception to attorney-client privilege does not apply to insurer.

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Specific Considerations *(Cont.)*

- *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007) *(Cont.)*
    - Beneficiaries not "real clients" based on four factors:
        1. Unity of ownership and management.
        2. Conflicting interests regarding profits.
        3. Conflicting fiduciary obligations.
        4. Payment of counsel with the fiduciary's own funds.

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Specific Considerations *(Cont.)*

- *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007) *(Cont.)*
  - Rejected by *Moss v. UNUM*, 2011 U.S. Dist. Lexis 8635 (W.D. Ky. 2011) – Noting legal advice obtained from in-house counsel and therefore UNUM did not incur any additional cost.

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Specific Considerations *(Cont.)*

Internal –

- Advice to fiduciary committees and claims and appeal denials – probably not protected. See *Carr v. Anheuser Busch Companies, Inc.*, 2011 U.S. Dist. Lexis 59609 (E.D. Mo. 2011).

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General Considerations

- Who are you representing and in what capacity?
- How are you documenting your advice?
- Are in-house lawyers sitting on fiduciary committees?

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