



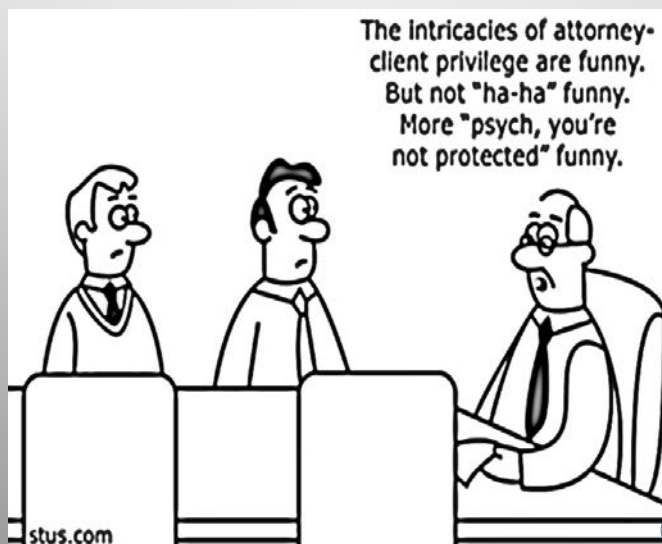
The Evolving Attorney-Client Privilege

The Cone of Silence v. The Smoking Gun

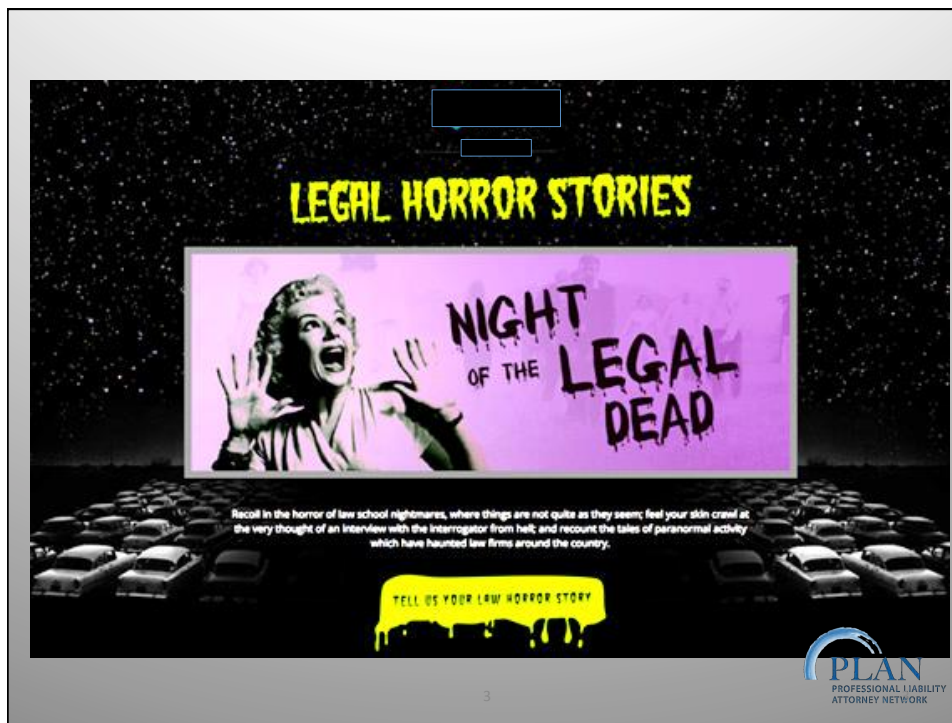


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A MISUNDERSTOOD PRIVILEGE



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Operational Rules for ACP Turn on Context

1. **Who is the Client?**
2. Who is the Attorney?
3. Was legal advice sought by the client (i.e. "was the communication undertaken to elicit or provide legal advice or other legal services")?
4. Was legal advice or services offered by the attorney?
5. Was the communication in confidence?
6. **Was the privilege waived?**

Shifting frameworks for:

- **Multi-Party Clients/Communications**
- Joint Defense Agreements
- Patent & IP Cases
- Whistleblower & Employment Investigations (*Ellerth & Faragher Defenses*)
- Legal Malpractice Cases
- **Communications in the Tri-Partite Context of an Insurance Claim**
- Crime Fraud Exception
- Sarbanes Oxley Issues
- **In-House Counsel**



An Ever-Shifting Concept of “Who’s The Client”?

Representation of multi-party clients, such as:

- Board Managed Corporations
- Shareholder Disputes involving multiple members of the Board (or intra-Board disputes)
- Homeowner’s Associations (HOA) or other like-entities
- Closely held LLCs

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An Ever-Shifting Concept of “Who’s The Client”?

In the context of the Tri-Partite Relationship:

- **Connecticut, Texas, Montana, Michigan:** policyholder is the only client
 - **Colorado:** lawyer’s client is the insured and not the carrier/insurer
 - **Wyoming:** when insurer retains under ROR, that is an obvious divergence of interests, lawyer represents the insured
 - **Minnesota and Alabama:** the policyholder and the insurer have been considered dual clients
 - **Arizona:** consider the policyholder the “primary client,” implying that the lawyer has at least has a secondary obligation to the insurer, until ROR then insured is the client
 - **California:** California Civil Code § 2860 (1996) a conflict of interest creates a duty for the carrier to provide independent counsel, unless the policyholder waives the right in writing. (“Cumis counsel”)
- Where coverage is under ROR
 - Where bad faith/first party claims at issue

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An Ever-Shifting Framework for In-House Counsel

- The in-house attorney maintains a **dual role as legal and business advisor** to the corporation
- “The **Fiduciary Exception** to the attorney-client privilege is based on the idea that a communication between an attorney and a client is not privileged as to those to whom the client owes a fiduciary duty.”
47 A.L.R.6th 255 (Originally published in 2009)

Wal-Mart Stores Inc. v. Pension Trust Fund IBEW (S. Ct. DE 2014)

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An Ever-Shifting Framework In Different Venues

Different states with widely varying laws on evidentiary privilege (attorney-client, critical self-analysis).

Choice of law issues provide vastly different results in:

- State court cases
- federal diversity cases (Fed. R. Evid. 501)
- federal question cases (federal common law privilege principles govern federal question cases)
- Multi-venue cases (MDL)
- Choice of Law provisions (i.e. breach of contract)

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Waiver Issues

Intentional Waiver

- Ellerth & Faragher
- Whistleblower Cases
- “Sword and Shield”



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Waiver Issues

Implied Waiver

Inadvertent Disclosure

ESI Challenges

Case Management Order/Protective Order



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Waiver Issues

Inadvertent production.

- a. If a party inadvertently produces a document containing Confidential Information without marking or labeling it as such, or inadvertently discloses other information without designating it confidential, the information shall not lose its protected status through such production or disclosure and the Parties shall take all steps reasonably required to assure its continued confidentiality if the producing party provides written notice to the receiving party within ten (10) business days of the discovery of the inadvertent production or disclosure, identifying the document or information in question and the corrected confidential designation for the document or information.
- b. Any party who inadvertently discloses documents that are privileged or otherwise immune from discovery shall, promptly upon discovery of such inadvertent disclosure, so advise the receiving party and request that the documents be returned. The receiving party shall return such inadvertently produced documents, including all copies, within 10 days of receiving such a written request or may challenge the assertion of privilege within the 10 day period. Pending a motion challenging the privileged designation, the receiving party shall not make any use of the disputed documents. If the receiving party wishes to submit the disputed documents with its motion, such submission shall be done in camera to the court to preserve the asserted privilege. The party returning such inadvertently produced documents may thereafter seek re-production of any such documents pursuant to applicable law.

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Waiver Issues

Litigation: Ignoring privilege log obligations may prove costly

Practical tips may help in-house and outside counsel avoid privilege waiver

BY TODD FREEMAN
MARCH 3, 2013



FOLLOW INSIDECOUNSEL



For many lawyers, constructing an appropriate privilege log is a mere afterthought in the overall discovery process. Several reasons exist for this privilege log apathy. Some in-house counsel routinely draft or approve written discovery responses, but simply do not exhibit the same level of detailed attention to privilege log preparation. Outside counsel often delegates this perceived grunt work task to younger attorneys. Complacency also develops when lawyers refuse to insist on a detailed privilege log from their adversaries out of fear that these adversaries will respond in kind. And some lawyers decide that legal strategy calls for keeping privilege claims intentionally vague and provide a general privilege log with no specifics.

Whatever the reason, courts are increasingly scrutinizing the adequacy of privilege logs and imposing sanctions, including waiver, for insufficient privilege log descriptions. Consequently, it is

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Waiver as a Discovery/ Evidentiary Sanction

Privilege Logs: How much is enough?

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Questions



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