



Attorney-Client Privilege & Its Impact on Compliance Activities

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PRIVILEGE OVERVIEW

- Purpose: candor essential to proper representation
- Elements
 - A confidential communication
 - Between an attorney and a client
 - For purposes of seeking/delivering legal advice
 - On a matter within the scope of the engagement
- Effect: prevents disclosure per discovery, subpoena, PRA request



“ATTORNEY”

- Involves licensed active member of a state bar
- For UC, also must be member of OGC or outside attorney retained by University/OGC
 - Excludes “shadow” attorneys
- Privilege extends to non-attorneys who are aiding/acting on behalf of/being supervised by “attorneys” (*e.g. investigators, paralegals*)



“CLIENT”

- Those authorized to act on behalf of University on the matter that is the subject of the communication (*typically managers*)
- May include former employees within the scope of former duties
- May include pre-engagement communications (*e.g. UC as a prospective client*)
- Client is the corporate entity: The Regents
 - Exception: indemnity situations



“COMMUNICATION”

- Includes all forms --- verbal, written, visual (*e.g. photograph*)
- Includes drafts intended ultimately to be conveyed, whether actually conveyed
- Distinguishable from attorney work product
 - Complete vs. qualified protection
- Privilege does not protect facts underlying the communication



PURPOSE

- Seeking/delivering advice
- Legal in nature
- Relevant to engagement/relationship
- Common misperceptions
 - Lawyer as administrator/wearing “business hat”
 - Lawyer simply “in the room”
 - Lawyer as carbon copy recipient



CONFIDENTIALITY

- Communication must be limited to those
 - Within the University (*not third-parties*)
 - With a need to know
- Must be safeguarded
 - Use of confidentiality legend (*but beware of overuse*)
 - Access limited (*e.g. locked file cabinets*)
- Otherwise communication subject to waiver
 - Beware of selective waiver prohibition



COMMON UC SITUATIONS

- WB investigations/audits/ERM
 - Privilege may or may not apply---fact dependent
- Factors to consider
 - “Owner” of the process
 - Whether process is administrative or legal in nature
 - Whether process requires resolution of legal/regulatory questions
 - Potential for litigation/regulatory sanction
- Bottom line: protection is not categorical and not always clear---seek advice at outset



SEEKING PRIVILEGE PROTECTION -- ADVANTAGES

- Facilitates more candor by witnesses
- Enables investigator/compliance officer to include more details in record of investigation, particularly re sensitive matters
- Minimizes (*but does not eliminate*) risk of disclosing investigative notes, interviews, other materials



SEEKING ATTORNEY HELP -- POTENTIAL TRIGGERS

- Receiving court/regulatory agency order
- Receiving subpoena/discovery document
- Suspecting/discovering evidence of
 - A crime or other legal or regulatory violation
 - Noncompliance with a court or regulatory agency order
 - Fraud or other intentional misconduct
 - Damage or injury to parties outside the University
 - Activity creating risk of substantial financial/media/political harm to University



POLITICAL REALITIES

- UC as a public institution
- “Optics” of asserting the privilege
 - Appearance of “something to hide”
- Privilege belongs to client--ultimately The Regents
- Pressures brought to bear to waive privilege “voluntarily”