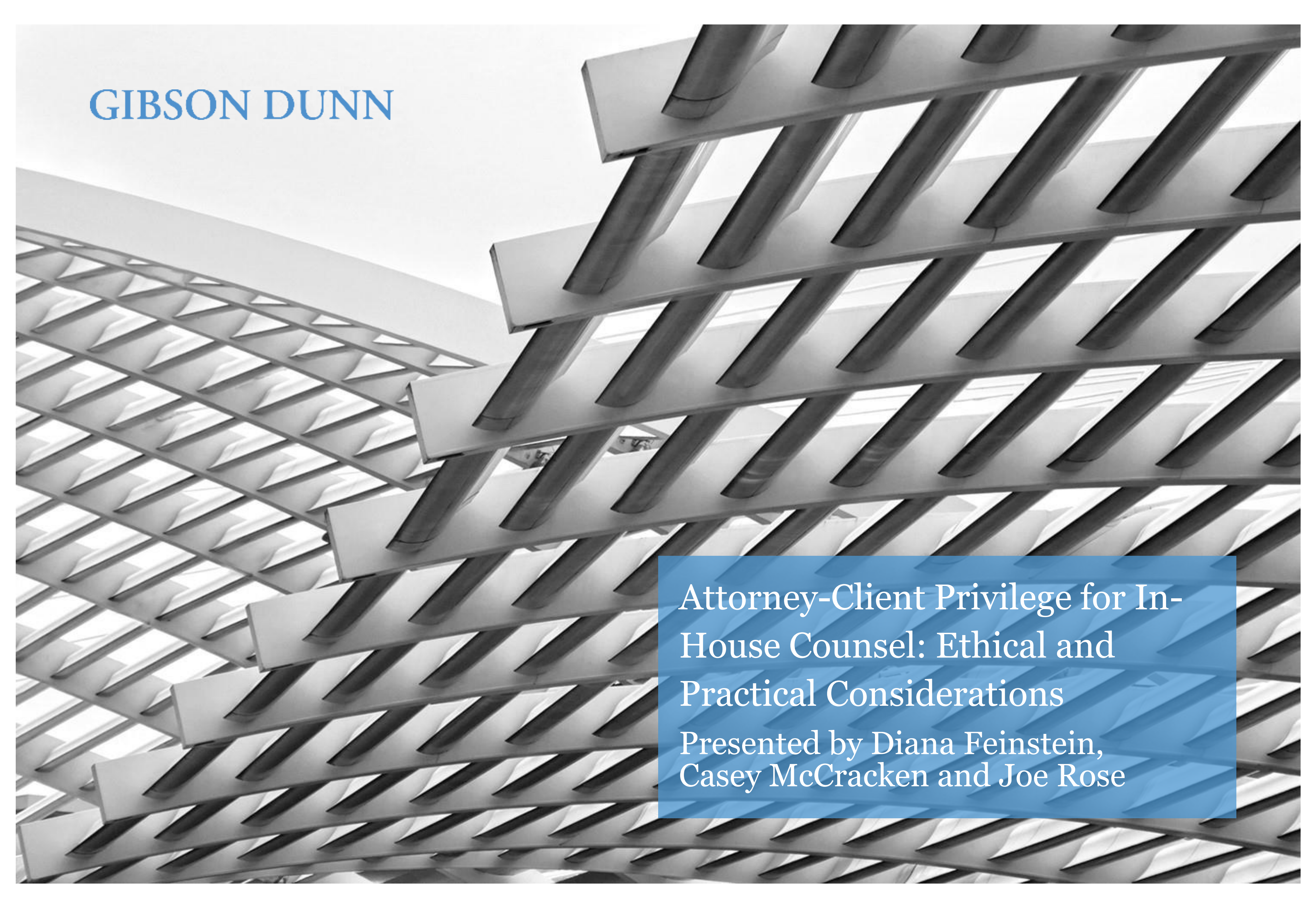
GIBSON DUNN
Attorney-Client Privilege for In-House Counsel: Ethical and Practical Considerations
Presented by Diana Feinstein, Casey McCracken and Joe Rose

Agenda

1. Attorney Ethics Rules Relating to Privilege
2. Overview of Attorney-Client Privilege and Ethical Considerations
3. Overview of Work Product and Ethical Considerations
4. Key Issues and Recommendations for In-House Counsel

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Attorney Ethics Rules Relating to Privilege

Privilege and Attorney Ethics: Confidentiality

- ABA Model Rule of Professional Conduct 1.6:
  - "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ." ABA Model Rule 1.6(a).
  - "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." ABA Model Rule 1.6(c).
  - "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." ABA Model Rule 1.6 cmt. [3].

Privilege and Attorney Ethics: Confidentiality

California:

- "It is the duty of an attorney to maintain inviolate the confidence, and at every peril to himself or herself to . . . preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e)(1).
- "A lawyer shall not reveal information protected from disclosure . . . unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule." Cal. RPC Rule 1.6(a).
- "A lawyer may . . . reveal information protected [from disclosure] . . . to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual . . . ." Cal. RPC Rule 1.6(b).

Privilege and Attorney Ethics: Organizational Clients

- ABA Model Rule of Professional Conduct 1.13:
  - "A lawyer employed or retained by an organization ***represents the organization*** acting through its duly authorized constituents." ABA Model Rule 1.13(a) (emphasis added).
  - "The lawyer may not disclose to . . . constituents [of an organizational client] information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6." ABA Model Rule 1.13 cmt. [2]

Privilege and Attorney Ethics: Misconduct

- ABA Model Rule of Professional Conduct 8.4(c):
  - "It is professional misconduct for a lawyer to … engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

- Misuse of privilege could be misconduct?
  - *See United States v. Google LLC*, No. 20-cv-03010 (D.D.C.), to be discussed today.

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Overview of Attorney-Client Privilege and Ethical Considerations

Attorney-Client Privilege: The Basics

- Four basic elements:
  - A communication
  - Made between an attorney and a client or related persons
  - In confidence
  - For the purpose of seeking, obtaining or providing legal advice

- Underlying Policy: the adversarial system functions best when clients are truthful with their lawyers.
- Privilege can arise in any setting in which attorneys are consulted in their professional capacity, and it exists regardless of whether litigation is threatened.
- The privilege applies to corporations as well as to individuals, and to both in-house and outside counsel.

The Basics: Who Can Claim the Privilege?

- The attorney-client privilege, and the right to waive it, belongs to the client.
- A "client" can be an individual or a corporation, association or other organization or entity.
- **ABA Model Rule 1.13**: When the client is a corporation, the client is the legal corporate entity, not the company's individual directors, officers or employees.

The Basics: What Is Privileged?

- The attorney-client privilege protects only **communications** between the attorney and client.
- It does not protect **underlying facts**.
- Case Study: *Tietsworth v. Sears, Roebuck & Co.*, 2013 WL 12155298 (N.D. Cal. Feb. 4, 2013).
  - Drafts of "submission[s]" to product safety commission "created" by in-house counsel.
  - Found non-privileged because <u>not</u> "exchanged or discussed between attorney and client" and contained "purely factual information." *Id.* at *1.

The Basics: What Communications Are Privileged?

- Only **confidential** communications are protected by the privilege.
- There must be an **expectation** that the communication will not be disclosed.
  - ➢ Thus, communications with an attorney in the presence of **outside parties** may not be privileged.

The Basics: Whose Communications Are Privileged?

- A corporation can only speak or act through its officers, directors or employees.
- When the client is a corporation, the question of *whose* communications are privileged can be difficult to answer in practice.
  - ➢ **Which corporate employees** are within the protection of attorney-client confidentiality?

The Basics: Whose Communications Are Privileged?

SUBJECT MATTER (*UPJOHN*) TEST (Federal and most States)

- Whether privilege extends to communications with employees depends on the **circumstances in which the communications were made**.

***CHADBOURNE* TEST** (California)

- A more complex application of *Upjohn* focusing on the **dominant purpose of the communication** and the **circumstances in which communications were made**.

CONTROL GROUP TEST (Illinois, Maine, New Hampshire, South Dakota, Oklahoma, Alaska, Hawaii)

- Privilege only extends to small 'control group' of **top management** and **necessary advisors**.

Federal Standard: *Upjohn* Test

Privilege extends to communications with any corporate employee, regardless of status, provided:

- Communications concern matters within the scope of the employee's corporate duties;
- Employee is aware that they are being questioned so the corporation can obtain legal advice; and
- Communications are considered confidential when made and are kept confidential by the company.

Upjohn Co. v. United States, 449 U.S. 383 (1981).

The *Chadbourne* Test

Whether a communication with an employee is privileged depends on:

- Whether the employee may be potentially liable for the incident;
- Whether the employee understands the communication is confidential;
- Whether the statement is within the scope of the employee's responsibility;
- Whether the company directed the employee to make the statement; and
- Whether the "dominant purpose" of the communication was for legal advice.

D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 736-38 (1964).

Control Group Test

Privilege extends only to:

Top Management – *i.e.* employees or officers who have authority to make decisions based on legal advice; or

Necessary advisors to top management on whom management actually relies in reaching its decision.

Consolidation Coal Co. v. Bueyrus-Erie Co., 89 Ill. 2d 103 (1982).

What about Parent-Subsidiary Communications?

Federal Law:

- Privilege extends to communications with employees of subsidiary when:
  - employee **possesses information** critical to the representation of the parent; and
  - the communications concern matters within the **scope of employment**.

  Admiral Ins. Co. v. U.S. Dist. Court, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989).

- In practice, the standard also requires:
  - sufficient **common interest** between parent and subsidiary; and
  - affirmative steps by parent to maintain confidentiality.

What about Parent-Subsidiary Communications?

California Law:

– Privilege extends to communications with employees of parent/subsidiary when:

- Parent and subsidiary have **common interest** in securing legal advice relating to same matter;
- The communications were **made to advance shared interest** in securing legal advice on common matter; and
- The communications **would otherwise be protected** from disclosure by a claim of privilege.

Oxy Resources Cal. LLC v. Superior Court, 115 Cal. App. 4th 874, 888-91 (2004).

The Basics: Communications Seeking or Obtaining Legal Advice

- The attorney-client privilege attaches only when an attorney acts in their capacity as an attorney.
- Four paradigmatic cases:
  - Client is **asking** for legal advice
  - Attorney is **rendering** legal advice
  - Attorney is **asking for information** in order to render legal advice
  - Client is **providing information** in order for attorney to render legal advice

The Basics: Communications Seeking or Obtaining Legal Advice

- The privilege does not attach when an attorney is engaged in nonlegal work such as rendering business or technical advice.
- Special role of in-house counsel: because communications are protected only when an attorney is acting in a legal capacity, it may be unclear whether a communication with an in-house counsel is protected.
  - For the privilege to apply, the communication must generally satisfy two requirements:

The in-house counsel must have been acting in the role of an attorney

The advice given must be legal, not business advice

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Overview of Work Product and Ethical Considerations

Privilege vs. Work Product

- Attorney-Client Privilege: Protects **communications** between an attorney and client that are made in confidence.
  - Belongs to the **client**.
- Work Product Doctrine: Protects the confidentiality of **materials** prepared by attorneys or at the direction of attorneys in the course of their legal representation.
  - Belongs to the **attorney**.
  - Disclosure to third party does not necessarily waive protection.

The Work Product Doctrine Defined

FEDERAL STANDARD

- Federal law requires work product to be prepared "**in anticipation of litigation**." FRCP 26(b)(3). Work product protection is therefore not usually available for transactional work.
- Adopted by numerous states, including New York and Texas.

CALIFORNIA STANDARD

- Work product need not be prepared 'in anticipation of litigation' for the doctrine to apply. Unlike federal law, California law renders opinion work product "**not discoverable under any circumstances**." Cal. Cod. Civ. Proc. § 2018.030.

“In Anticipation of Litigation”

- Work product applies if document:
  - Would not have been prepared in substantially similar form but for the prospect of litigation.
  - Does not have to be **privileged** or **legal** in nature.
  - Protected even if also intended to assist in business dealings.
- “Litigation” defined broadly enough to include proceedings or investigations of a civil, criminal or administrative nature, internal investigations conducted in anticipation of potential litigation or other forms of adversarial proceedings, like arbitration or mediation.

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Key Issues and Recommendations for In-House Counsel

Overview: Pitfalls for Corporate Clients

- The privilege does not cover every communication involving a lawyer.
- Nor does it protect underlying business information or facts.
- Does not cover business advice, even from an attorney.
- The scope of the privilege can vary from jurisdiction to jurisdiction, and judge to judge.
- Asserting the privilege without critical thought can be a strategic misstep.

Key Issue: Dual-Purpose Communications

- A communication that mixes business and legal advice does not automatically lose its privilege.
- The test for whether a 'dual-purpose' communication counts as privileged varies by jurisdiction.
- Courts look at a number of different factors:
  - Substance of the communication
  - Purpose of the communication or meeting
  - Title of the in-house counsel
  - Who was included in the communication

Dual-Purpose Communications: Evolving Federal Caselaw

- Current circuit split on when dual-purpose communications may be privileged:
  - Second, Fifth, Sixth and Ninth Circuits: attorney-client privilege attaches if **the primary purpose** of communication is to obtain or provide legal advice.
  - D.C. Circuit: attorney-client privilege attaches if **one of the significant purposes** is to obtain or provide legal advice.
  - Seventh Circuit: attorney-client privilege **never attaches** to dual-purpose communications regarding tax return preparation.
- This term, the U.S. Supreme Court will decide a case potentially resolving this circuit split: *In re: Grand Jury*, No. 21-1397.
  - Ethics perspective: ABA, as amicus, takes broadest view of privilege.

Dual-Purpose Communications: Scenario 1

HR Manager emails presentation to in-house counsel (who supports the HR group) and asks for her comments, and the lawyer emails back proposed language changes to reduce risk posed by ongoing litigation against the company.

- Is the email to the lawyer privileged?
- Are the lawyer's comments privileged?
- Is the revised slide deck privileged?

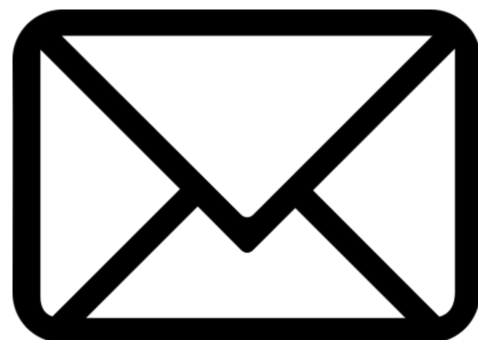
Dual-Purpose Communications: Scenario 2

In-house counsel is asked by General Counsel to ensure company employees in particular region are paid in compliance with new wage and hour laws. To formulate her advice, the in-house counsel asks an HR employee to compile compensation data for affected employees and to highlight those whose compensation may not comply with the new laws.

- Is the lawyer’s request privileged?
- Is the data sent back to the lawyer privileged?

Recommendation: Label Communications Appropriately

- Clearly indicate when a communication is legal in nature.
  - Email subject lines; Header / footer labels that are deliberately placed.
  - Use your title in your signature, so that at some later point there is no doubt that communication involved a lawyer.
- Labeling can help confirm that a document is privileged and protect against waiver.
- Separate legal discussions from business discussions by starting a new email chain, if appropriate.



Recommendation: Don't Overuse Privilege Labels

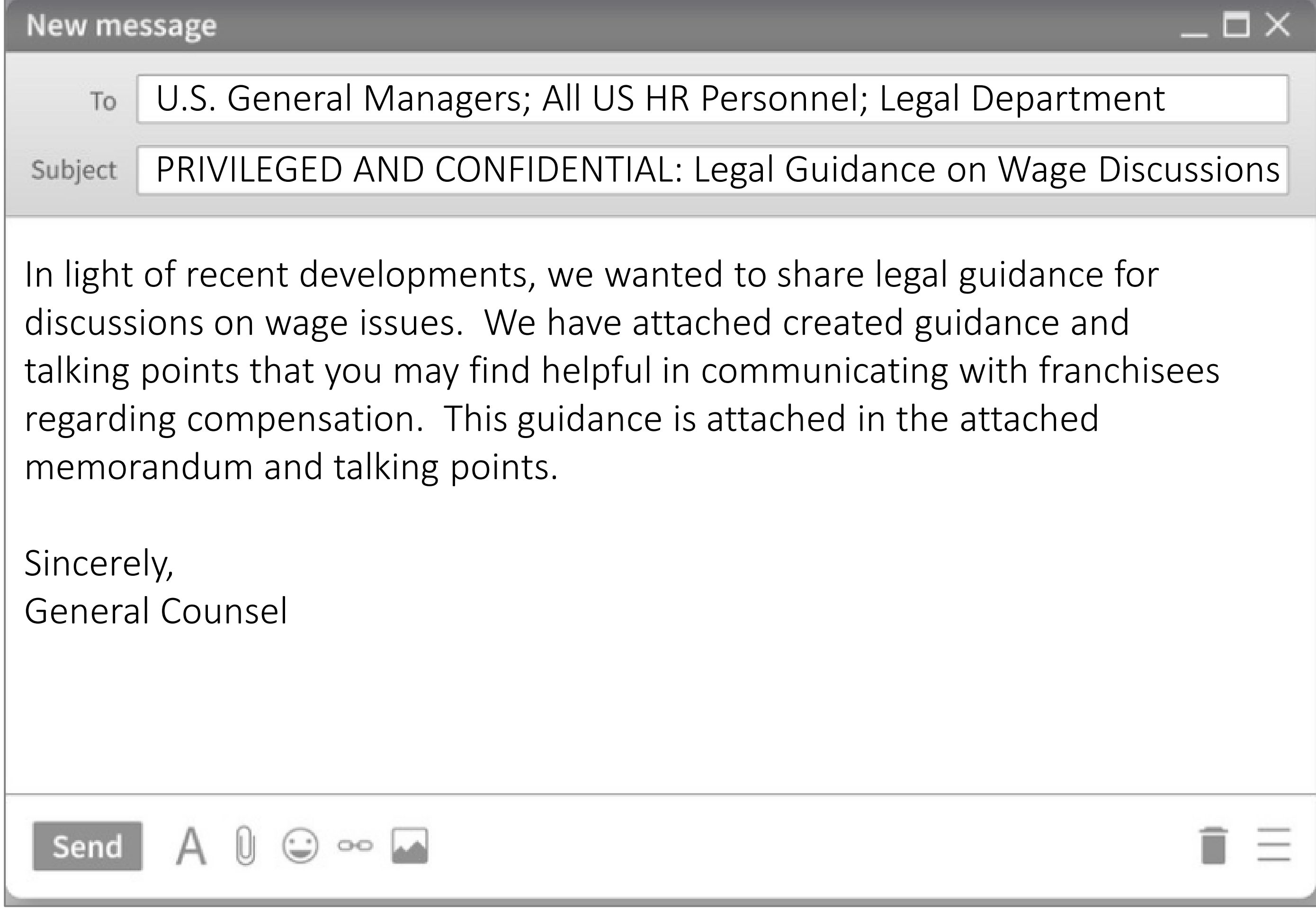
- **Do not overuse labels** such as "privileged and confidential," as misused labels can call into question labels on properly marked documents.
- Can also lead to ethical trouble and sanctions. **ABA Model Rule 8.4 (c)**.
- Case Study: *United States v. Google LLC*, No. 20-cv-03010 (D.D.C. 2022)
  - The government argued Google should be sanctioned for allegedly training and directing its employees to add an attorney, a privilege label and a generic "request" for counsel's advice to shield sensitive business communications, regardless of whether any legal advice was actually sought. Google vigorously denied these allegations.
  - The court declined to sanction Google but directed it to re-review all claims of privilege over 21,000 "silent-attorney emails" (*i.e.*, communications between non-attorneys where an in-house attorney was included but did not respond in the chain of communication).

Recommendation: Limit Distribution

- Be cognizant of recipients of communications; does this person need to receive this? **Avoid bulk "cc's."**
- **Remind employees to be vigilant when repeating legal advice.**
  - Forwarding legal communications.
  - Copying or restating legal advice in separate emails.
  - Intranet, Teams, text messages and other forms of chat (e.g. WhatsApp, iMessages) are discoverable.
- Because of uncertainty regarding the application of attorney-client privilege, prepare written communications with the view that they may ultimately be disclosed.

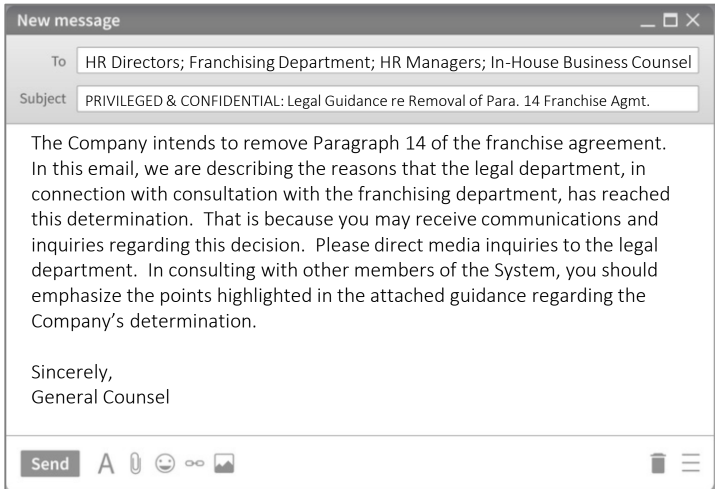
Broadly Distributed Guidance: Example 1

Broadly Distributed Guidance: Example 2



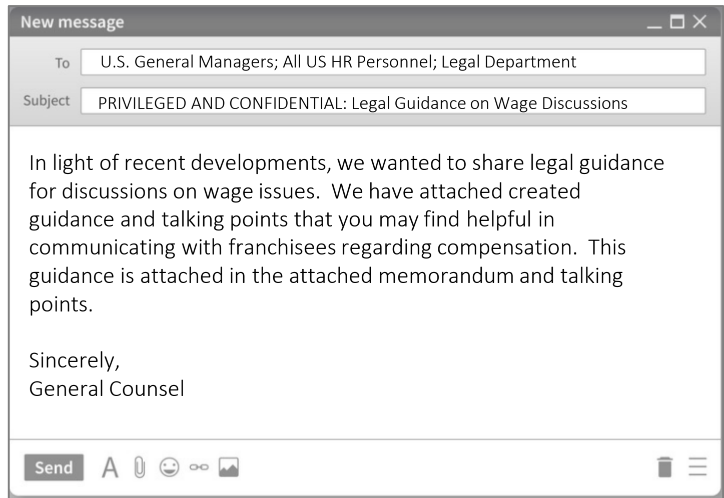
Email Examples: Broadly Distributed Guidance

Example 1



Privileged

Example 2



Not Privileged

Key Issue: Investigative Interviews

- ABA Model Rule of Professional Conduct 1.13: "A lawyer employed or retained by an organization ***represents the organization*** acting through its duly authorized constituents." **ABA Model Rule 1.13(a)** (emphasis added).
- Privilege belongs to the organization, not to individuals.
- An *Upjohn* warning prevents scenario in which an employee confides in in-house counsel on the incorrect assumption that the employee controls the privilege.
  - *Upjohn* warning:
    - The attorney represents the corporation, not the employee;
    - The communication with the attorney is covered by privilege, but the privilege belongs to the corporation, not to the employee; and
    - The corporation may decide to waive the privilege and disclose the information to third parties, including the government.

Purpose of Investigation

- An "investigation" isn't privileged simply because it is called an "investigation." Rather, in order to be protected by privilege, investigations must be for the purpose of enabling counsel to provide legal advice. If the investigation is performed for business purposes it will not be protected.

- Document who requested the investigation and for what purpose.

- Case Study: *Cruz v. Coach Stores, Inc.,* 196 F.R.D. 228 (S.D.N.Y. 2000): Investigative audit was not privileged where it was:
  - Commissioned by in-house counsel and her executive superior, who used the findings to dismiss implicated employees; and
  - Not conducted consistent with *Upjohn*'s factors—employees were not informed that it was confidential and that its purpose was for the corporation to receive legal advice.

Recommendation: Prepare Careful Notes

- Clearly document that a full *Upjohn* warning was given and that the witness confirmed they understood its terms.
- Intersperse mental impressions/opinions in interview notes and summaries.
- Avoid draft interview memos or reports. Do not email, save versions or otherwise create copies of the document until it is final.

Recommendation: Limit Disclosure of Investigative Findings

- Typically, investigation results should be reported only to the client. **Always ask: "who is the client?"**
  - If board members or executive management are implicated in the subject matter of an investigation, consider establishing mechanisms whereby those individuals may be recused from briefings or other involvement.
  - Ensure that your day-to-day client contact is not a target of the investigation.
  - *Ryan v. Gifford*, 2007 WL 4259557, at *3 (Del. Ch. Nov. 30, 2007): Board Special Committee waived privilege by orally disclosing its investigative findings during board meetings attended by defendant directors (whose conduct was at issue in the investigation) and their personal attorneys.
- Be mindful of Board minutes and attachments.

Key Issue: Third-Party Disclosures

- Disclosure to third parties, including outside auditors, investigators, experts and public relations/crisis management firms, may waive attorney-client privilege and work product protection.
  - Waiver as to one third party may constitute a waiver as to all.
- What is the balance?
  - Auditors: Section 10A(b)(1)(B) of the Exchange Act requires outside auditors to "inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer . . . is adequately informed with respect to illegal acts"
  - Financial reporting obligations
  - PR/crisis management firms, experts, investigators and other consultants needed to assist in providing legal advice

Communications with Outside Auditors

- **Majority view**: disclosures of privileged communications to outside auditors constitute waiver of attorney-client privilege but not work product waiver.
  - An independent auditor is not an adversary or a conduit to a potential adversary. *United States v. Deloitte LLP*, 610 F.3d 129, 140-42 (D.C. Cir. 2010).
  - In California, disclosures to auditors made in audit response letters have been protected as work product. *Laguna Beach Cty Water Dist. v. Super. Ct.*, 124 Cal. App. 4th 1453, 1461 (2004).

- **Minority view**: disclosures to outside auditors also waive work product protections when interests of independent auditor and company are not aligned. *Medinol Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 117 (S.D.N.Y. 2002).

Recommendation: Stick to the Facts (Auditors)

- When communicating with outside auditors:
  - Stick to the facts
  - Avoid disclosing mental impressions or legal conclusions
  - Communicate orally as much as possible
  - Avoid sharing written materials like a final investigative report or PowerPoint presentation

Communications with Consultants
(experts, investigators, PR/crisis management firms)

- ***Kovel* Doctrine ("necessity test")**: Communications with a consultant are privileged "if the presence of the [consultant] is necessary, or at least highly useful, for the effective consultation between the client and lawyer which the privilege is designed to permit." *See United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

- **"Functional equivalent test"**: Protects communications between organizations and nonemployees who are the "functional equivalent" of employees. *See In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 215 (S.D.N.Y. 2001). Factors that courts consider in applying the test:
  - Whether the consultant had primary responsibility for a key corporate job.
  - Whether there was a continuous and close working relationship between the consultant and the company's principals on issues interrelated with legal issues.
  - Whether the consultant is likely to possess information unique to anyone else at the company.

Recommendation: Stay Closely Involved (Consultants)

- Whenever possible, have outside counsel directly retain the consultant. If not possible, have in-house counsel, not business, directly retain.
- Ensure the engagement letter expressly sets forth that the consultant's work is **intended to assist counsel in the provision of legal advice**.
- Once hired, counsel direct consultant's work.
- Limit written exchanges with consultant and always include counsel.
- If litigation is anticipated, direct consultants to label their internal communications with consultant staff as work product.

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Questions

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