

Presenting a live 90-minute webinar with interactive Q&A

Protecting Privilege in Post-Accident Investigations

Successfully Asserting Attorney-Client Privilege, Self-Critical
Analysis Privilege, Work Product Doctrine and More

TUESDAY, MARCH 22, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Todd Presnell, Partner, **Bradley Arant Boult Cummings**, Nashville, Tenn.

Heidi G. Goebel, **Goebel Anderson**, Salt Lake City

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Protecting Privilege in Post-Accident Investigations

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The Issue

Agenda

- Illustrative case studies
- Attorney–Client Privilege
- Work-Product Doctrine
- Self-Critical Analysis Privilege
- Employment Law Pitfalls
- Peer-Review Privilege
- Special Problem—Claims Adjusters
- New case study
- Practice Tips

Case Study

*Segway, Inc. v. Special Olympics
Conn., Inc.,*
2015 WL 7421719 (Conn. Super. Ct.
2015)

Case Study

*Nelson v. Intercontinental Hotels
Group,*
2013 WL 5890612 (N.D. Ill. Nov. 1,
2013)

Attorney-Client Privilege



Attorney-Client Privilege



Written



Oral

Attorney-Client Privilege



**Confidential
when made**



**Intent to Remain
Confidential**

Attorney-Client Privilege



**For purposes
of rendering
legal advice**

Attorney-Client Privilege



**Employee—Outside
Counsel**



**Employee—In-House
Counsel**

Attorney-Client Privilege



**Employee—
Employee**



**In-House Counsel—Outside
Counsel**

Attorney-Client Privilege

- Communication made for purpose of rendering legal advice
- Made at direction of supervisor
- Request made to secure legal advice
- **Subject matter of communication within scope of employee's duties**
- Communication kept confidential

Work-Product Doctrine

- Governed by Fed. R. Civ. P. 26(b)(3)
- Doctrine encompasses sources outside client communications
- Broader than attorney–client privilege
- Qualified protection—depends on type of work-product sought and adversary’s need

Work-Product Doctrine

- Elements—
 - Documents
 - Prepared in anticipation of litigation or trial
 - By party or party's representative

Work-Product Doctrine

- Opinion Work Product
 - Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation
 - Absolute protection

Work-Product Doctrine

- Fact or Ordinary Work Product
 - Materials gathered at the attorney's request
 - Qualified Protection

Self-Critical Analysis Privilege

- Many jurisdictions do not recognize
- Narrow construction
- Must result from critical self analysis
- Strong public interest in not chilling free flow of information
- Information must be type which would be impeded or chilled if discovery were allowed
- Many jurisdictions require confidentiality of documents

Peer-Review Privilege

- More readily recognized than self-critical privilege
- Treatment varies by industry
- Health Care Quality Improvement Act 28 U.S.C. §§11101-11152
 - Grants immunity to participants in peer review process
 - Does not make peer review proceedings privileged
- No common law privilege for peer review proceedings

Special Problem—Claims Adjusters

- Primary role as a matter of course is to investigate claims
- Often not attorneys or paralegals
- Privileged materials sent directly to adjusters

Case Study

***Doehne v. Empres Healthcare
Mgt.,
2015 WL 4756393 (Wash. Ct.
App. 2015)***

Employment Law Tip

- Beware of the assertion of the Faragher/ Ellerth defense

Case Study

Williams v. United States Env'tl. Servs., LLC,
2016 U.S. Dist. LEXIS 18290, (M.D. La.)
(Feb 16, 2016)

Case Study

***Ambrose-Frazier v. Herzing, Inc.* 2016 U.S.
Dist. LEXIS 30174 E.D. La. (March 9, 2016)**

Practice Tips

- Be wary of forms
- Take steps to treat information as confidential
- Opinions and analysis is privileged but facts are not
- Legal department should address investigation



PRIVILEGED & CONFIDENTIAL

Confidential Memorandum

To: Todd Presnell
Risk Management Department

From: Heidi Goebel
Corporate Legal Counsel

Date: March 22, 2016

Subject: Investigation into Special Olympics Incident

On behalf of the Segway Legal Department, I request that you initiate, lead, and complete an investigation into the Connecticut Special Olympics incident that allegedly resulted in injuries to one or more persons. The purpose of your investigation is to provide Segway's legal department with information so that its members can provide the company with legal advice about this incident. Given the circumstances, it is reasonable to anticipate that litigation may arise from this incident, and your investigation is also conducted in anticipation of a claim or litigation. Please keep your investigation, including communications, confidential, and send your investigation conclusions solely to me.

Incident Details

On September 20, 2014, the

Practice Tips

- Use caution in verbiage describing incident details



PRIVILEGED & CONFIDENTIAL

Confidential Memorandum

To: Heidi Goebel
Corporate Legal Counsel

From: Todd Presnell
Risk Management Department

Date: April 22, 2016

Subject: Investigation Conclusions—Special Olympics Incident

This confidential memorandum, sent solely to you at your request, contains the findings of my investigation into the Connecticut Special Olympics incident. I understand that my investigation was conducted in anticipation of litigation arising from the incident and for the purpose of your providing legal advice to the company. I also understand that this memorandum is confidential, subject to the attorney–client privilege, self-critical analysis privilege, and work-product doctrine, and that I should not distribute it further without your written authorization.

Investigation Results

On September 20, 2014...

Practice Tips

- Consider describing incident details as summary of interviews of witnesses with impressions of credibility of witnesses
- Higher risk, but higher likelihood of preservation of privilege
- Ensure adequate *Upjohn* disclosures are made

PRESNELL ON PRIVILEGES

The latest developments on evidentiary privileges for corporate and outside counsel

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Growing recognition of
in-firm privilege covering
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their firm's general
counsel continues: [https:](https://www.presnellonprivileges.com/2016/03/10/yes...)
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Self-Evaluative Privilege"
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members counts for non-

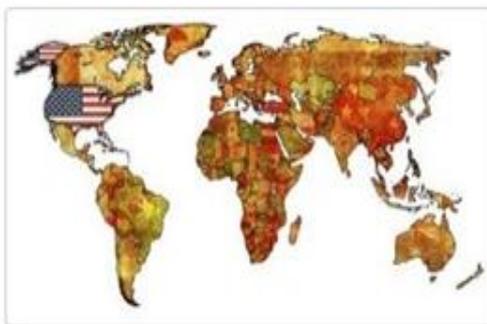
FEBRUARY 23, 2016

Privilege Issues for In-House Lawyers— Foreign and Domestic—in U.S. Litigation

Reply

Attorney-Client Privilege, In-House Counsel • Tags: *attorney-client privilege, corporate attorney-client privilege, foreign attorney-client privilege, in-house counsel, touch base doctrine*

For all of the rules, statutes, and common-law decisions adopting and applying the attorney–client privilege, the privilege’s application in the corporate setting



remains an enigma. And adding in-house lawyers into the privilege mix only increases its perplexity. American law acknowledges the protections of an in-house attorney–client privilege, but “what is unclear is exactly how far this protection

extends regarding the corporation’s employees and agents.” *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129, 1141 (Md. Ct. App. 1998).

The privilege protection for corporate-employee communications becomes even more suspect within multinational corporations with foreign-based in-house

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Questions?

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