

## ATTORNEY-CLIENT PRIVILEGE AND CORPORATE COMPLIANCE

November 18, 2015

**Heather L. Fields**  
414-298-8166  
hfields@reinhartlaw.com

**Reinhart Boerner Van Deuren s.c.**  
1000 North Water Street, Suite 1700, Milwaukee, WI 53202  
www.reinhartlaw.com

### Presentation Overview

- Differences between confidential communications and work-product privileges
- How recent cases have affected application of attorney-client privilege to in-house counsel
- Strategies for preserving privilege in context of internal investigation

# Understanding the Attorney-Client Privilege and Attorney Work Product Doctrine

2

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Basics of Attorney-Client Privilege

- Privilege is an evidence concept
  - Wis. Stat. 905.03: A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . .
- Privilege applies to proceedings
  - MR 1.6, Comment [3]: The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client
- Multiple exceptions and possibility for waiver
  - Crime or fraud
  - Breach of duty by lawyer or client
  - Joint clients

3

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Key Privilege Elements

- Confidential communication between an attorney and client
  - "Client" is clear to participants (e.g., employees) in the communication in the corporate setting (*Upjohn Co. v. United States*, 449 U.S. 383 (1981))
  - Communication to proper audience
  - Communication kept confidential
- Purpose of communication is to obtain or provide legal advice to the client
- Only the communication is protected, not the underlying facts

4

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Who Is the Client?

- Significant potential for confusion regarding who is being represented
  - Corporation
  - Key management employees
  - Nonmanagement employees
- Limitations of joint defense agreements
- "*Upjohn*" warning best practice

5

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

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

- In-house counsel investigated foreign offices after allegations of bribes, including interviews with nonmanagement employees, and IRS attempted to obtain copies of investigation documents
- Court held that the privilege applies when "[t]he communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice"

6

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## *Upjohn Co. v. United States* 499 U.S. 383 (1981) (cont.)

- Only the company, not the individual employee, can decide to waive attorney-client privilege
- This must be clearly communicated to employees
- Essentially a privilege *Miranda* warning

7

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Lessons from *Upjohn Co.*

- When conducting employee interviews, must be clear
  - Corporation is the client—not the individual
  - Corporation holds the privilege and may decide to waive the privilege, and has the right to disclose statements made by the individual to third parties
- Best practice to summarize this warning in writing and provide copy to the employee

8

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## What Communications Are Protected?

- Courts have had difficulty evaluating the application of the privilege to communications with mixed purposes
- Privilege is considered on a case-by-case basis
- Communications with outside counsel generally are privileged, absent a clear showing to the contrary
- Communications with in-house counsel subject to scrutiny and privilege generally must be justified and strategically asserted

9

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## *In re Vioxx*

501 F. Supp. 2d 789 (E.D. La. 2007)

- Products liability litigation that created the "primary purpose" test requiring that the corporation must establish a primary legal purpose for each communication to invoke the privilege
- "Business advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client"

10

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Basics of Work-Product Doctrine

- Wis. Stat. 804.01(2)(c): Codifies the work-product rule, providing that qualified protection from discovery is available for work product; see also Federal Rules of Civil Procedure 26(b)(3)
- Purpose: Create "a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries"; *Hickman v. Taylor*, 329 U.S. 495 (1947)
- Test: Whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation

11

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Scope of Work-Product Doctrine

- Protects:
  - Documents or tangible things prepared in anticipation of litigation or for trial;
  - By or for another party or that party's representative
- UNLESS the party seeking discovery demonstrates both substantial need for those materials and it is unable, without undue hardship, to obtain the equivalent of those materials
- Materials prepared with only a remote possibility of, or mere speculation as to, future litigation generally may not be protected

12

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Scope of Work-Product Doctrine (cont.)

- To apply, must demonstrate the threat of litigation was impending:
  - Articulable claim at time the material prepared
  - Motivation behind creation of the material
- Various tests
  - "Because of" test (Wisconsin—majority approach)
  - Primary motivating factor test
  - For use in litigation test

13

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Dual Purpose Documents

- Documents created for both a business purpose and legal purpose
- Split in federal circuits analyzing dual purpose documents
- Work product doctrine may protect documents that would not have been prepared in substantially the same form "BUT FOR" the prospect of litigation

14

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Application of Attorney-Client Privilege to In-House Counsel

15

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law



## What's Changed?

- Increasing complexity of laws and regulations have caused general counsel to be involved in more business operations
- Shift from legal advisor to business advisor, with significant responsibilities for business strategy as well as risk management, compliance and governance
- Scrutiny of legal counsel role in business decisions related to recent scandals (e.g., GM)

16

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## The Many "Hats" of the General Counsel

- Business strategist
- Risk manager
- Compliance overseer/enforcer
- Various governance roles
- General counsels now often have a nonlegal title (e.g., EVP, SVP, VP, etc.)

17

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Courts Recognize the Change

- "[M]odern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues." *In re Vioxx*, 501 F. Supp. 2d 789 (E.D. La. 2007).

18

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Inherent Tensions With Multiple Roles

- Identifying the client
- Dealing with intersection of "ethics" and "Ethics" obligations
- Preserving attorney-client privilege
- Managing affirmative reporting obligations

19

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Who is the "Client"?

- SCR 20:1.13(a):
  - A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents . . .
- MR 1.13 Comment [1]:
  - An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client . . .

20

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Who is the "Client"? (cont.)

- SCR 20:1.13(f):
  - In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- MR 1.13 Comment [10-11]:
  - There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent . . . that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

21

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Who is the "Client"? (cont.)

- SCR 20:1.13:
  - (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7.
- SCR 20:1.7:
  - (a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
    - (1) the representation of one client will be directly adverse to another client; or
    - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

22

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Who is the "Client"? (cont.)

- MR 1.7 Comment [35]:
  - A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors.

23

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Recent Cases Impacting Privilege and Work Product

- *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002, 2012 WL 5415108 (M.D. Fla. Nov. 6, 2012): E-mails to or from in-house counsel that seek both legal *and* business advice may not satisfy this primary purpose requirement
- *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015): Attorney-client privilege extends to summary reports prepared by nonattorney investigation where the purpose was to put in usable form the information obtained from a client, but such documents subject to qualified privilege protection as work product
- *United States v. Wells Fargo Bank, N.A.*, No. 12-CV-7527 JMF, 2015 WL 5582120 (S.D.N.Y. Sept. 22, 2015): An employee could not assert the advice-of-counsel defense because his employer refused to waive the attorney-client privilege over the relevant communications between the employee and company legal counsel

24

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Strategies for Preserving Privilege in Context of Internal Investigations

25

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Tips for Preserving Privilege and Work-Product Protection

- Have a plan!
- Ensure role of general counsel well-defined and consider use of outside counsel
- Train control group members regarding privilege requirements and proper management of communications
- Consider memorializing initiation of internal investigation—documenting purpose and participants
- Manage distribution carefully—limit to those who are truly "need-to-know"

26

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Additional Privilege "Best Practices"

- Be clear who the client is—provide an *Upjohn* warning when necessary
- Separate legal advice from business advice
- Institute procedures for e-mail communications and train key employees regarding these processes
- Document when employees are acting on instructions of general counsel

27

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Additional Work Product "Best Practices"

- Keep work product material separate from other materials prepared in ordinary course of business
- Be mindful of "dual purpose" documents
- Do not designate all materials as "attorney work product"

28

32949178 ©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law

## Questions?



## THANK YOU!

29

©2015 All Rights Reserved  
Reinhart Boerner Van Deuren s.c.

**Reinhart**  
Boerner Van Deuren s.c. Attorneys at Law