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## GENERAL COUNSEL NOTE

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October 2006

Clients often think that everything they communicate to their attorney and everything that is communicated to them by their attorney is cloaked in that sacred security blanket called the "attorney-client privilege" and cannot be revealed under any circumstances. The purpose of this memorandum is to explore in general terms what is and is not protected by the attorney-client privilege and, by doing so, thus dispel some of the myths surrounding the privilege that protects confidentiality of communications between an attorney and a client. Because this memorandum is intended for those clients we serve in the corporate setting of Vanderbilt University, I will concentrate on the attorney-client privilege in that setting.

### 1. What is the Attorney-Client Privilege?

The attorney-client privilege is a well established and recognized common law concept that, in Tennessee, is codified in Tennessee statutory law at Tennessee Code Annotated §23-3-105, and reads as follows:

*No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.*

The purpose for the attorney-client privilege is to promote the administration of justice for the public good by safeguarding from disclosure by the attorney the confidential communications between the attorney and the client, thus encouraging the client to be completely open with the attorney and by doing so allowing the attorney to provide sound legal advice and counsel to the client.

This statute has been interpreted by the U. S. District Court for the Middle District of Tennessee (the federal district court in Nashville) as follows:

*The Tennessee Supreme Court has held the privilege "excludes all communications, and all facts that come to the attorney in the confidence of the relationship." Johnson v. Patterson, 81 Tenn. 626, 649 (1884). However, the privilege is not absolute. The requirements for the privilege to apply are:*

*(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the*

*attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Humphreys, Hutcheson & Moseley v. Donovan, 568 F. Supp. 161, 175 (M.D.Tenn.1983)(construing the Tennessee statute)*

Thus, for the privilege to apply, (1) the client must have an attorney-client relationship with a practicing attorney to whom the information is communicated; (2) the information must be communicated only to the attorney (or someone assisting the attorney); (3) the purpose of the communication must be to seek legal advice or counsel; and (4) the privilege has not been waived.

## **2. Who is the Client?**

In the corporate setting, the question is "who is the client?" While the "client" is the corporation, e.g. Vanderbilt University, a corporation can only operate through people. Therefore, the question is, who within the corporation would qualify as constituting the "client" with whom the attorney can communicate on the presumption that the communication will be covered by the attorney-client privilege. Generally, it is unquestioned that communications by corporate officers and directors with the corporation's attorneys (whether in-house counsel or outside counsel) made for the purpose of obtaining legal advice and counsel, will be accorded the protection of the attorney-client privilege. The question that is often raised, however, is how far down the corporate ladder are such communications protected. The U.S. Supreme Court addressed this issue in Upjohn Company v. United States, a case that came to the Supreme Court on appeal from the Sixth Circuit Court of Appeals (the circuit that includes Tennessee). In Upjohn, the Court stated that the attorney-client privilege would apply to communications between the corporation's attorneys (in this case the communications were actually with the corporation's in-house counsel) and corporate employees concerning "matters within the scope of the employees' corporate duties, provided that the employees themselves were sufficiently aware that they were being questioned [and communicating with the corporation's attorneys] in order that the corporation could obtain legal advice." Thus, while every case rests on its own set of facts, it is arguable that if the Office of General Counsel were asked to investigate a matter in order to provide legal advice and counsel to those officials of the University charged with responsibility to make corporate decisions, the communications between employees of the University conveying to the University's attorneys information within the scope of their corporate duties and responsibilities, should be accorded the protection of the attorney-client privilege against disclosure.

### 3. What Information is (and is not) Protected from Disclosure by the Attorney-Client Privilege?

The fact that a “client” (including both officers and corporate employees below the level of officer) communicates factual information to a corporation’s attorney for the purpose of the corporation’s obtaining legal advice and counsel does not mean that the employee is protected from being required to disclose the underlying facts or what he or she knows about a situation. As the Supreme Court stated in Upjohn,

*The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying fact by those who communicated with the attorney: “[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.” Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 ( q2.7).”*

Remember, the purpose of the attorney-client privilege is to encourage a client to be completely open in the client’s communications with his or her attorney by prohibiting the attorney from being required to disclose information communicated to the attorney by the client for the purpose of obtaining legal advice. It does not prohibit the client from being asked about and being required to disclose a fact within the knowledge of the client, even if that knowledge was conveyed to the attorney. The client simply cannot be asked to say “what did you tell your attorney?” Or, put another way, as the Supreme Court stated in Upjohn, “the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer.”

### 4. Can the Attorney-Client Privilege be Waived or Lost?

The protection accorded confidential privileged communications between a client and the attorney can be waived. It can be waived voluntarily, such as authorizing the attorney to disclose to an investigative body confidential information provided to the attorney by the client. On the other hand, the privilege can be waived involuntarily or negligently by the client’s revealing the substance of the privileged communication to a person with whom the confidential relationship does not exist, i.e. sometimes referred to as a “stranger,” and to whom the communication did not have to be made in order to effect the legal advice and counsel provided by the attorney.

In the corporate setting, a stranger can be a person within or outside the organization who does not have a need to know about a particular matter. If an officer of the corporation

communicates confidential information to the corporation's attorney for the purpose of obtaining legal advice and counsel, and the officer then turns around and communicates the same information to another corporate official who does not have a need to know and who is not necessary for the purpose of implementing the advice and counsel provided by the corporation's attorney, the confidentiality of the information is arguably broken and the benefit of the privilege is lost.

In other words, communicating otherwise privileged information to a "stranger" is evidence that there is not a need to maintain the privileged nature of the information and, therefore, the information communicated is not longer accorded the privilege. On the other hand, if more than one corporate official is meeting with the attorney and the officials are involved in the matter which is the subject of the disclosure to the attorney, and the discussion is for the purpose of seeking legal advice and counsel, the communications with the attorney by one or more of the officials in the presence of one another is privileged.

The use of email increases the opportunities for a client to waive the attorney-client privilege. By simply inadvertently hitting the "reply all" button or forwarding to persons who do not have a need to know communications between the client and the attorney can constitute a waiver of the privilege. Therefore, when communicating with the corporation's attorney(s), be careful to include only persons whose corporate function requires that they be a part of the communication with the attorney and be certain that the communication is directly with the attorney. Copying the attorney on the email is arguably not a communication with the attorney any more than copying the attorney on a letter. When in doubt, communicate directly and only with the attorney and seek the attorney's advice how best to convey important information to others who have a need to know.

A single waiver of the attorney-client privilege can have dramatic effects that must be considered before deciding whether to voluntarily waive the privilege. In a recent case out of the Sixth Circuit, In re Columbia/HCA Healthcare Corporation Billing Practices Litigation, the Court of Appeals held that a client cannot selectively waive the privilege. In that case, Columbia/HCA voluntarily waived the privilege by providing the Federal government with privileged communications in order to resolve charges of criminal and civil violations brought by the government. The Court held that the waiver of the privilege to the government waived the privilege in all other Columbia/HCA cases for which the same information was sought, e.g. lawsuits by insurance companies seeking reimbursement for improperly billed medical services.

## 5. Conclusion

The attorney-client privilege is an important tool in the administration of justice in that it allows clients, including corporate clients, to communicate freely and openly with their attorneys without the fear that the attorneys will be required to disclose the content of that privileged communication. The privilege enhances clients' ability to obtain sound and

informed legal advice which is particularly important in this age of complex government regulation. In the corporate setting, the privilege is accorded communications between attorneys for the corporation (both in-house and outside legal counsel) and employees of the corporation acting within the scope of their employment and such communication is made for the purpose of enabling the corporation's attorneys to provide legal advice and counsel to corporate officials with authority to act on behalf of the corporation.

If you have questions regarding the attorney-client privilege, please do not hesitate to contact any of the attorneys in the Office of the General Counsel.

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