

# Common Misunderstandings About Legal Privileges

Health Law Webinar

September 13, 2023

**Fredrikson**

*Where Law and Business Meet<sup>®</sup>*

BATTER DIPPED  
**KIKIES &  
KEYES**

**DEEP  
FRIED BUCKEYES**

STRAWBERRY  
POWDERED SUGAR  
CHOCOLATE

Menu

winkies.....	\$6
(Plain).....	\$7
(Batter Dipped).....	\$8

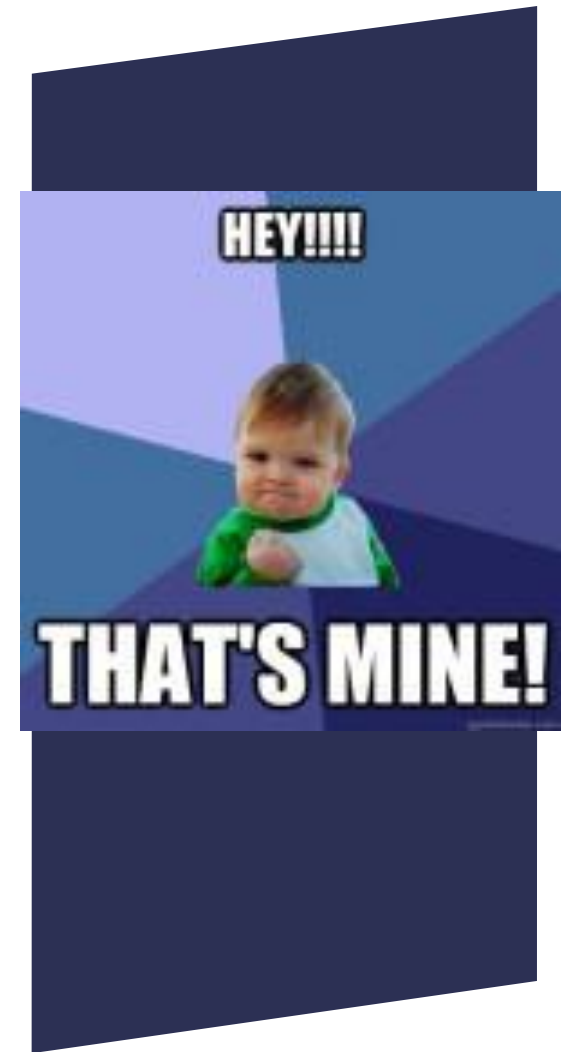
Oh my!  
**Ohio**  
  
**Buckeye**  
*A love affair with your taste buds.*



# Understanding Attorney-Client Privilege

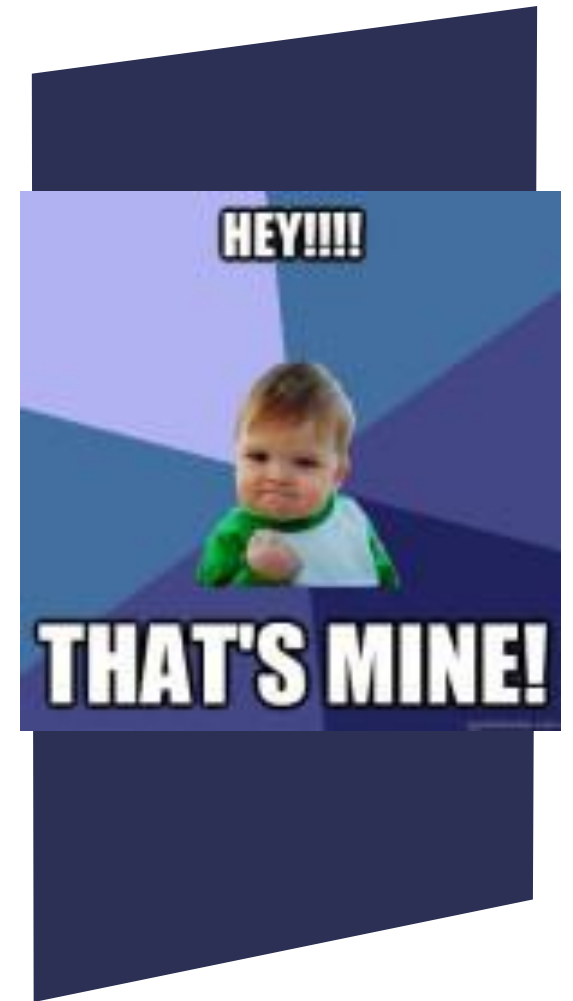
To establish that the protections of the attorney-client communication privilege exist, there must be:

- communications
- between lawyer and client
- that are intended to be confidential and
- made for the purpose of seeking or giving legal advice.



# Understanding the Work Product Doctrine

- **Work Product**
  - Applies to work product created by or at the direction of company attorneys.
  - Includes only documents prepared “in anticipation of litigation.”



# Communications



Communications between attorney and client may be in many forms:

- Mail, email, phone calls, meetings
- Attorney documents and notes regarding phone calls or meetings
- Client documents and notes:
  - made in preparation of seeking legal advice or
  - at attorney's direction during the course of representation
- Communications among attorneys

# Privileged Parties

Evaluate whose communications with counsel are protected, and whose aren't:



“What do you mean, ‘Have your lawyer call my lawyer’?...you are my lawyer!”

- Employees outside the “control group”?
  - Maybe – depends on state law.
- Former Employees?
  - Maybe – depends on adversity/presence of individual counsel for the former employee.
  - Depends on state law.
- Consultants & Advisors (e.g., forensic accountants, translators, investigators, or PR consultants)?
  - Maybe, if consultant is essential to legal advice.
- Auditors? – No.
- Co-defendants? – Maybe, if there’s a common interest.
- Government agents? – Almost never. No common interest.

# Seeking Legal Advice

- Mixing business and legal advice is the biggest risk to privilege for in-house lawyers.
- Some courts require a “clear showing” that in-house lawyer communications were for a legal vs. business purpose
- Think before you email!
  - In-house attorneys should send separate emails for business and legal analyses, even on the same subject.
- Board minutes should note when discussions are held with company counsel under privilege.
- All investigation team members should mark emails, notes and memos with “privileged” or “work product” designations as appropriate.



*Say nothing, you understand?*

# Made in Confidence



- Widespread company communications generally won't be regarded as privileged.
- Warn control group employees against discussing the matter without counsel present.
- Instruct witnesses and document custodians on the need for confidentiality.
- When gossip is already rampant, consider sending a notice to all employees:
  - Instruct them not to talk about the matter.
  - Tell them to direct any inquiries or comments to the lead counsel.
  - Know that some employees will ignore your instructions.



# Waivers and Exceptions

Privilege can be waived in several ways:

- Inadvertent
- Express
- Implied

Privilege Waivers can vary in scope:

- Full
- Partial
- Selective

Who has the power to waive privilege?

- Individual Clients
- Corporate Clients
- The Lawyer?



# Waivers and Exceptions

There are several exceptions to the attorney-client privilege:

- Crime-Fraud Exception
- Fiduciary Exception
- Necessary to Prevent Harm or Death
- Testamentary Exception



# Other Exceptions: Common Interests

- Common interest versus joint defense agreement
- Joint client “exception”

## Assessing risk of relying on common interest exception

	Common Interest	Joint Defense
Litigation Matters	State: Majority of courts acknowledge Federal: Majority of courts acknowledge	State: Yes Federal: Yes
Transactional Matters	Application Unclear	Not applicable



*Better together!*

# Internal Investigations – Practical Considerations

1. Learn the privilege rules
2. Put a lawyer in the lead
3. Make a communications plan
4. Limit internal reporting
5. Cut off the grapevine
6. Separate legal and business advice
7. Label documents accurately
8. Don't record interviews
9. Give clear privilege warnings
10. Manage third party communications



# Internal Investigations – Practical Considerations

- Every interview with a witness under privilege should begin with an “*Upjohn*” warning, stating that:
  - You are (or are reporting to) a lawyer who is representing the company.
  - The witness has been asked to participate so that company counsel can gather facts to provide legal advice to the company.
  - The witness’s statements are protected by attorney-client privilege, meaning he or she can’t be forced to disclose what was said unless privilege is waived.
  - The privilege belongs to the company, so the company has the right to waive it and disclose the witness’s statements without notifying the witness.
  - The witness must not disclose the questions asked or answers given during the interview.

# Presenters



**David Glaser**  
Attorney  
612.492.7143  
[dglaser@fredlaw.com](mailto:dglaser@fredlaw.com)



**Lousene Hoppe**  
Attorney  
612.492.7402  
[lhoppe@fredlaw.com](mailto:lhoppe@fredlaw.com)

# Thank you!

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