



Corporate Counsel CLE

April 20, 2016

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Who is the client? When is it privileged?

Dave Dyroff and Jim Monafo

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Topics to Cover

- What are the privileges?
- How do they arise?
- How best to maintain them?
- How easy to lose them?
- Recent developments

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Two Related Privileges

- The attorney-client privilege.
- The work-product privilege.
- They arise in different contexts and often overlap.
 - Both provide for confidentiality and protection from disclosure.

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Goals for Today

- Gain a practical, working understanding of the attorney-client and work product privileges.
 - So that in-house counsel and management can maximize the likelihood that:
 - Certain communications within the corporation – and the bases for certain corporate decisions – can be maintained as privileged.
- Necessarily very high-level and general. Resolution in any particular matter is fact- and venue-specific.

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Common Misperceptions

- A survey of select Fortune 100 companies by an American University law professor found that:
 - 55% of senior managers believe that corporate counsel personally represent them.
 - 42% of senior managers do not believe that the attorney-client communication has to be made in confidence.
 - 28% of senior managers do not believe that the communication has to relate to legal advice.

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Common Misperceptions

- Privilege is Not the Same as the Attorney's Duty of Confidentiality
 - Principles of Attorney Client Privilege and Confidentiality are often conflated and confused, even among members of the legal community.
- Model Rule 1.6(a):
 - A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure permitted under an exception.

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Overview of the Two Privileges

- An issue is identified by a business manager. (not privileged)
 - Manager seeks advice from in-house counsel. (A/C)
- To provide advice, counsel investigates and researches the issue. (W/P and A/C)
 - Counsel provides advice to the manager. (A/C)

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The Origins of Attorney Client Privilege

- J. Wigmore on the Attorney Client Privilege:
 - “The history of this privilege goes back to the reign of Elizabeth [1558-1603], where the privilege already appears as unquestioned The policy of the privilege has been plainly grounded, since the latter part of the 1700sIn order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; and hence the law must prohibit such disclosure except on the client’s consent” 8 J. Wigmore, Evidence s. 2290.

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The Origins of Attorney Client Privilege (continued)

- Ensures: “That one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered.”
United States v. Grand Jury Investigation, 401 F. Supp. 361, 369 (W.D. Pa. 1975).

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Attorney-Client Privilege Basics

- Four Basic Elements:
 - A communication;
 - Made between attorney and client;
 - In confidence;
 - For the purpose of seeking, obtaining, or providing legal assistance

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Communication

Privilege Does **NOT** protect the underlying facts – just the “communication” with counsel

- Example – after accident, in-house counsel interviews plant manager about removal of safety shield for ease of operation
- Plant manager is later deposed
- Plant manager has to answer questions about whether, when, and why safety shield was removed (underlying facts)
- Plant manager does not have to answer questions about what counsel asked him, and what he told counsel, in post-accident interview
- (Assuming other elements are met)

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Attorney

- Missouri Rule 8.105
 - Limited Admission for In-House Counsel
- Illinois Rule 716
 - Limited Admission Of House Counsel
- Registration required
- Later admission
- Has been raised in privilege disputes

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Attorney

- In 1982, the [European Court of Justice \(ECJ\)](#) restricted the privilege to legal advice given by an “independent” attorney, i.e. outside counsel.
- The ECJ reaffirmed that decision in [Akzo Nobel Chemicals Ltd. v. Commission](#), stating unequivocally that an in-house lawyer cannot overcome the inherent conflicts in his or her employment relationship with a company, despite the professional ethical obligations each bar member holds.
- Another reminder that privilege is venue-specific.

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Who Is the Client?

- The company – the entity – is the client.
 - Not its directors, officers or employees.
 - Though they are “representatives of the client.”

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Which Employees Are Representative of the Corporate Client?

- One of two tests apply, depending on the location of the corporate office or where a lawsuit is filed:
 - Subject Matter Test: Missouri.
 - Control Group Test: Illinois.
- Both are somewhat subjective; the Control Group is more restrictive on what is privileged.

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Control Group

- First test; articulated in 1962.
- Focus is on the position of the person in the company.
- Is the person in a position to control the company?
 - Or to control the decision for which the legal advice is sought?
- Privileged communications are limited to employees in the “Control Group.”
 - Subjective and narrowly focused.
 - Favors broad production vs. broad privilege.
 - Very few states still use it: Illinois is one.

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The Control Group Test

- Is the person the decision maker for a particular issue?
 - Or one of the advisors upon whom the decision maker directly relies for advice?
- Fact gatherers – even of technical data – if not advisors, will not be in the Control Group.
 - Information from fact gatherers, without more, will not be privileged.
- “The concern is not on what was said, but on who said what.” *(Hyams v. Evanston Hospital)*

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Who Besides the “Decision Maker” Is a Representative of the Client?

- Control Group includes advisors to “top management.”
 - Those whose opinions are generally sought for decisions of the type involved.
 - The question: what is the status of the employee in the hierarchy of the corporation?

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Subject Matter Test

- Grew from efforts to expand the range of employees with whom communication can be privileged.
- Test is more flexible, functional, and matter-specific
- Focus is less on how high employee is on org chart and more on their role vis a vis the specific communication

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The Five Upjohn Factors

(*Upjohn v. U.S.* 1981)

- Communications made to corporate counsel.
- At the direction of employee's superiors
- Concerning matters within the scope of employee's duties. (The "witness to events" exception.)
- For the corporation to secure legal advice.
- With employee aware of lawyer's role.

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A Missouri Modifier

- Missouri follows *Upjohn* with one twist:
- Limits dissemination of the communication with counsel to those who "have a need to know."
 - Sometimes referred to as the "Weinstein" approach.
 - From a 1978 8th Circuit case (*Diversified Industries*)

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Potential Conflicts of Interest

- Employees – especially senior management - often believe that corporate counsel represent them as individuals in the performance of their jobs.
- In most situations the interests are aligned and this does not pose a problem.
 - But, when an employee may be personally liable there may be a conflict.
- The privilege is the company's, not the employee's.

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Upjohn Warning

- “Mirandize” individual officers or employees that corporate counsel represents the corporation — and not the individual — and the company holds the attorney-client privilege for that statement.
- Therefore company can waive privilege for its own benefit, even if it exposes employee.

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A close-up photograph of a baseball glove and a baseball, with the glove's laces and the ball's red stitching visible.

When the Employee IS a Client

- Default assumption is that there is NO privilege between jointly represented clients.
- Be cautious about having company counsel represent both.
- Use engagement letters to modify default assumptions.
- Consider separate counsel for that purpose.

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A photograph of a baseball field, showing the brown dirt and a white base.

Confidential

- Restrict circulation of any communications with counsel only to those who qualify as “counsel” or “representatives of the client” and who need to know.
- Introducing third-parties waives the privilege.
- Exceptions include those truly necessary to the communication (e.g., translators).
- Some law in favor of others “necessary” to foster the legal advice (e.g., CPAs, investment bankers), but evaluate this case-by-case.

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Confidential

- Clearly mark records as privileged and confidential, attorney-client communications and/or work product, but don't over-designate.
- Routinely educate employees on nature and scope of the privilege, and warn against unintentional waiver of privilege.
- Practice good confidentiality.

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Legal Advice

- When are communications covered by the A/C privilege?
- The multiple roles of in-house counsel.
 - Multiple titles or "hats"
- Business vs. legal advice.
 - Or both.
 - Some aspects of the advice may be privileged, while other aspects are not.

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Predominant Purpose Test

- Was in-house counsel acting in the role of a lawyer?
- Ordinary course of business or legal advice?
- Was in-house counsel giving legal or business advice or both?
- No bright line; case specific.

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Some Examples

- Assisting the company to comply with statutes or regulations.
- Impact of proposed legislation or regulations.
- Negotiating a contract.
- Should we close a plant?
- Press release drafts.

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A close-up photograph of a white baseball with red stitching, resting on a green field. The background is a blurred green field.

More Misperceptions

- Passing documents through a lawyer's hands will not magically infuse the documents with privilege.
- Business advice is not necessarily privileged even if it is mixed with legal advice.
- Memos to the file will not be a-c privileged unless they memorialize a privileged communication (but they can be work product).

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A close-up photograph of a white baseball with red stitching, held in a brown leather baseball glove. The background is a blurred brown field.

Even More Misperceptions

- Putting a lawyer on a business decision making team does not make everything done by the entire team privileged.
- Marking a document "Confidential" or "Privileged" does not necessarily make it so.

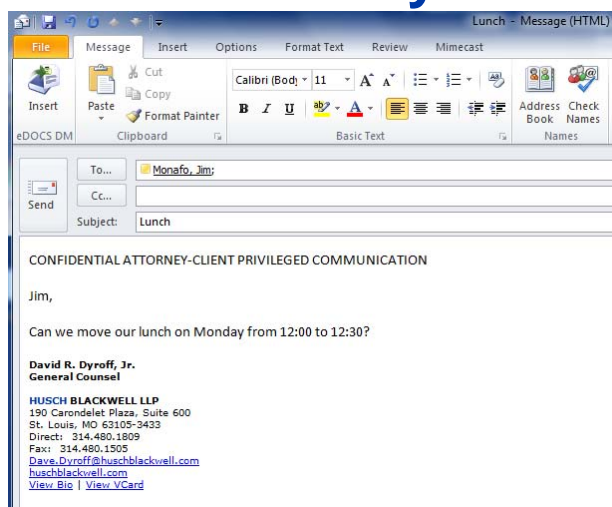
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In Camera Review

- Who decides the closest privilege questions?
- The Judge/Special Master
- How will your documents look?

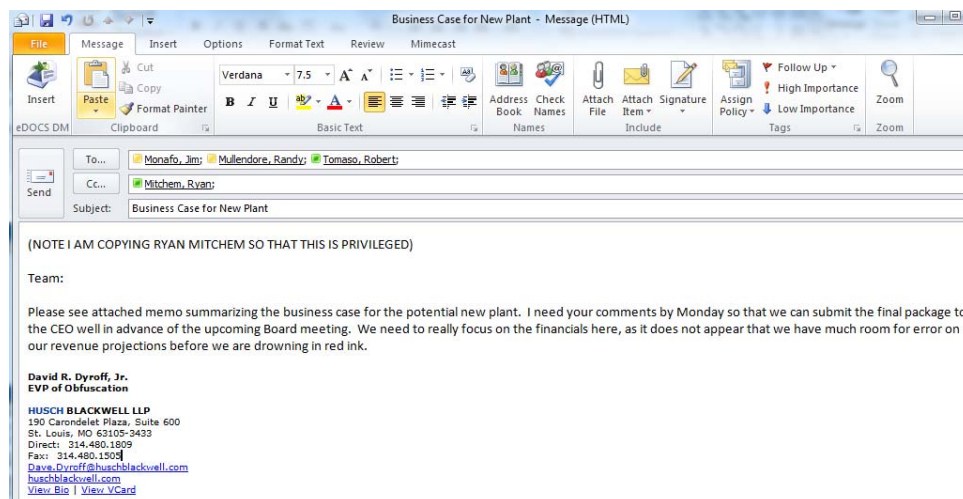
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Auto-Add Confidentiality Header



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CC Counsel



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Practice Points

- If business advice is sought along with legal advice, address each issue separately.
- Take particular care to clarify your role if you wear multiple hats.

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Practice Points

- Carefully weigh the pros and cons of written communication vs. oral communication before choosing one.
- Be wary of emails, which can be forwarded or inadvertently sent to a party outside of the zone of privilege, which can be construed as a waiver.

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Work Product Doctrine/Privilege

- A/C Privilege does not extend to the attorney's notes of witness interviews, third party witness statements, internal memoranda/emails, and other written documents reflecting the mental impressions/strategy of the lawyer.

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Work Product Doctrine/Privilege

- *Hickman v. Taylor*, 329 U.S. 495 (1947):
 - *It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.*

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Work Product Doctrine/Privilege

- *Hickman* is codified in Federal Rule of Civil Procedure 26(b)(3)A):
 - *Ordinarily a party may not discover documents and tangible things that are **prepared in anticipation of litigation or for trial** by or for another party.*
- Does not apply to materials prepared in the “ordinary course of business.”

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Work Product Doctrine/Privilege

- Protections afforded under work product doctrine are NOT absolute.
- Opposing party may obtain “**fact**” work product by showing that it has a “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”
 - Photo/Video taken contemporaneously with an accident.
 - Witness statement from a dead witness.

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Work Product Doctrine/Privilege

- If “relevant and non-privileged facts remain hidden in an attorney’s file and production of those facts is essential to the preparation of the case, discovery may be made” *Hickman*.
- Mental impressions, as distinguished from “facts” are nearly absolute.

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Crime Fraud Exception

- If a client seeks advice to assist with furthering a crime or fraud or the post-commission concealment of the crime or fraud, communication is not privileged.

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Recent Cases

- **GM Ignition Switch litigation:** *In re General Motors LLC Ignition Switch Litigation*, 80 F.Supp.3d 521 (2015)
 - Ongoing MDL litigation over the massive GM recall resulting from vehicles switching off while in operation on the highway.
 - Multiple deaths and injuries nationally.

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GM Ignition Switch (continued)

- GM engaged law firm to conduct an internal investigation into the defects and to determine the cause of the delays in the automobile recall.
- GM disclosed the resulting report to Congress, DOJ, and ultimately to the public but refused to disclose the law firm's notes and memoranda relating to the witness interviews ("Interview Materials").
- GM claimed the Interview Materials contained privileged communications and also constituted work product.

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GM Ignition Switch (continued)

- Court's Opinion and Order relied upon *Upjohn* in finding that the Interview Materials were privileged because:
 - 1) GM intended to keep the Interview Materials confidential, and
 - 2) a primary purpose for generating the Interview Materials was to assist in providing legal advice.
- All witnesses were advised at the outset that the purpose of the interview was to collect information to assist in providing legal advice to GM and that they should keep the interview confidential.

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GM Ignition Switch (continued)

- GM disclosed the report, but it does not follow that GM did not intend to keep the **communications** reflected in the Interview Materials confidential. Court distinguished between information and communications and ruled that even though GM disclosed the facts/information in the report it was not required to disclose the communications in the Interview Materials.

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GM Ignition Switch (continued)

- Court also concluded that even though a purpose for the report was to respond to a public relations fiasco, **a primary purpose** for the interviews was to assist law firm in providing legal advice.
- Court also found that Interview Materials were prepared in anticipation of litigation – thus work product privilege applied as well.

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Allied Irish Banks Decision

- GM Court distinguished its own decision in the *Allied Irish Banks* litigation (240 F.R.D. 96), in which the materials underlying a report were not privileged.
- In that case, bank hired non-lawyer consultant to prepare the report.
- Engagement of consultant did not include the provision of legal advice, it was limited to a stated business purpose.
- The fact that consultant hired lawyer to assist with investigation and preparation of the report was insufficient because no clear evidence that the lawyer actually provided legal advice to the company.

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Allied Irish Banks Decision

- Company cannot insulate itself from discovery by hiring an attorney to conduct an investigation that otherwise would not be afforded protection.
- In GM case, privilege was upheld because clear evidence that the law firm was engaged to assist in providing legal advice in anticipation of litigation (DOJ investigation) – even if the report itself did not provide legal advice.

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Practice Points

- Corporations should hire outside counsel to conduct internal investigations.
- Execute a written engagement letter with the law firm expressly noting the confidential and legal nature of the services that the investigator is providing and, if possible, insure that outside counsel reports back to in-house counsel, not company business groups, during the course of the investigation.
- Document that report is being prepared “in anticipation of litigation.”

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Waiver of Privilege

- Client has the authority to assert or waive the privilege.
- Privilege may be waived explicitly through knowing disclosure of privileged information; *Cormack v. US*, 2014 WL 3555255 (2014).
- Privilege may be implicitly waived by injecting privileged communications into the case; *Scott v. Chipotle Mexican Grill*, 67 F.Supp.3d 607 (2014).
- Chipotle defended wage-hour claims by asserting a “good faith” defense.

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Waiver of Privilege

- The Court permitted discovery of A/C communications regarding decision to classify apprentices as “executives” who would be exempt from overtime.
- Even if a party does not attempt to make use of a privileged communication, she may waive the privilege by asserting factual allegations the truth of which can only be assessed by examination of a privileged communication.

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Waiver of Privilege

- Courts will not allow litigant to use attorney client privilege as both a sword and a shield.
- Inadvertent disclosures are common in the digital age.
- Reasonableness of precautions taken to preserve privilege will be scrutinized.
- Must make prompt and diligent effort to “claw back” the information once producing party learns of the mistake.

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Waiver of Privilege

- Party in possession of inadvertently produced information must “return, sequester or destroy” the information under FRCP 26(b)(5).
- Should **not** operate as a waiver if reasonable steps were taken to preserve privilege and prompt steps were taken to rectify the error (claw back).

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Questions?

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What Every Corporate Counsel Should Know About a Major Capital Project

Brennen D. Soval

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Major Capital Projects

Objectively evaluate strengths and weaknesses

- Your team
- Business requirements for approval of capital expenditures

Do you need to add any key players?

- Construction Manager
- Other consultants

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Major Capital Projects

Establish a Selection Process for the project team:

- Engineers, Architects, Design-Builder, EPC Contractor, Construction Manager/Owner's Representatives
- Focus on:
 - Quality
 - Reputable
 - Experienced professionals
 - Fit your organization
- Best Practice: Lowest price may not be the key factor

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Major Capital Projects

Establish a Selection Process for the project team:



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Major Capital Projects

Choose a project delivery method - Options

- Design-bid-build
- Design-build
- Construction Management

Which method is best suited for your project?

Which method is best given your team's strengths and weaknesses?

- Do you have a building manager or facilities manager that should be consulted to help determine

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Major Capital Projects

Establish clear project criteria, goals budget, specifications

- The earlier you can establish these the better you will be able to manage
 - ✓ The Project
 - ✓ Your Budget
 - ✓ The Schedule
- Helps to reduce changes, change orders

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Major Capital Projects

Include a Contingency: Rainy day fund to help address risk and changes

- Design contingency
 - prices are hard to estimate until plans are finalized
- Construction contingency
 - No project is completed without change orders
- Owner's contingency
 - Not for distribution

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Major Capital Projects

Choice of Contract Form:

- General Contractor's Form
- Master Services Agreements
- AIA and ConsensusDocs
- Your own form

Best practice: prepare a form and include the form in the RFP

- Speeds the negotiation process
- Key contract clauses
 - Indemnity
 - Consequential Damages (and carve outs)
 - Insurance
 - Termination for Convenience

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Major Capital Projects

Identify Corporate and other Policies

- Does the construction team need to comply with policies?
 - ✓ MBE/WBE requirements
 - ✓ Safety
 - ✓ Access/entry/security requirements
 - ✓ Drug Testing
 - ✓ Other
 - Public bodies (certification of payroll, etc.)
 - Healthcare (privacy, business ethics, etc.)
- Best Practice: Make sure all policies are included in the RFP

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Major Capital Projects

Establish a Construction Administration and Dispute Resolution Process

- Best practice is to ensure you are in the loop to monitor and resolve at the earliest stage possible before an issue spirals out of control
 - ✓ Put process in the construction contract documents
 - ✓ Make sure your organization is aware of the process
- How will disputes be resolved quickly?
- How will you be advised as the project progresses?
- Does the change order process work for your organization?

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Questions?

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Break

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Stealing signs: Privacy takeaways

Wade Kerrigan and Pete Enko

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Pair up in threes

- Avoid becoming a privacy (and security) headline
- How to (and not to) respond to a breach
- Using contracts (and other tricks) to mitigate liability

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You can observe a lot just by watching

- Baiting
- Phishing
- Spear phishing

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Baiting Example



It's Tournament Time!

Who doesn't love following the college basketball tournament? And to make things interesting, this year we are sponsoring an office pool here at Husch Blackwell. The first, second and third place winners will all receive gift cards to their choice of restaurant.

Bracket scoring system

First Round

Second Round

Sweet 16

Elite 8

Final 4

Championship Game

1 Point

2 Points

3 Points

4 Points

6 Points

10 Points

Points are awarded for each correct pick. In the event of a tie the results of the play-in games will be used. The rules are simple, using [this form](#) fill out your picks for each round and submit it. Each correct pick earns you points depending on which round the game is played in.

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Baiting Example



Visit below to redeem your Starbucks Reward-Points...

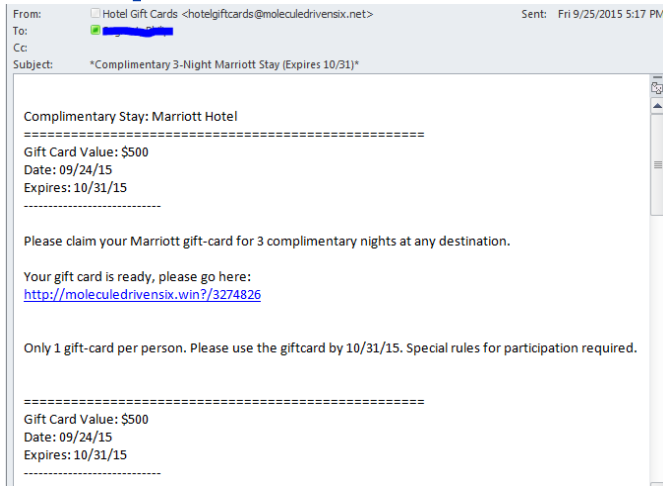
Get TWO (2) Complimentary-Cups of Starbucks Coffee Because!

[Visit Here to Redeem Your Coffee-Reward](#)

http://coffeebonus.coffeeneewbonuspoints.xyz
Click to follow link

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Baiting Example



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Phishing Example

From: LogMeIn.com Auto-Mailer [<mailto:support@logmein.com>]
Sent: Monday, March 30, 2015 10:47 AM
Subject: Order Confirmation #789508 - Credit Card approved

Dear customer,

Thank you for purchasing our yearly plan for LogMeIn Pro on 25 computers.

Your order has been processed and your credit card has been charged.
 For more information regarding this order, please click on the link below to download your invoice from our website, in PDF format : http://happymonkeyclub.com/img/igm_order_confirmation.zip/
 Click to follow link

https://secure.logmein.com/download.aspx?payment_id=789508&order_status=billed

Date : 30 March 2015
 Amount : \$720
 Credit Card : XXX-XXX-XXXX-8012

Your computers will be automatically upgraded the next time you sign into your account.

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Phishing Example

From: [Donella Schaffner](mailto:donellamboxq@rambler.ru) [<mailto:donellamboxq@rambler.ru>]
Sent: Monday, November 23, 2015 4:41 AM
To: Logan, Julie
Subject: Any openings?

Hello there,

I saw your website and I'm very interested in working for your company.

Please see my attached CV.

Your help is greatly appreciated,

[Donella Schaffner](#)

<CV_8576.doc>

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Phishing Example

From: Rafiq Hasanov <Rafiq.Hasanov@securefileshares.com>
Subject: Contract-1474

Please review attached document, Contract-1474 (MQ1474.doc).

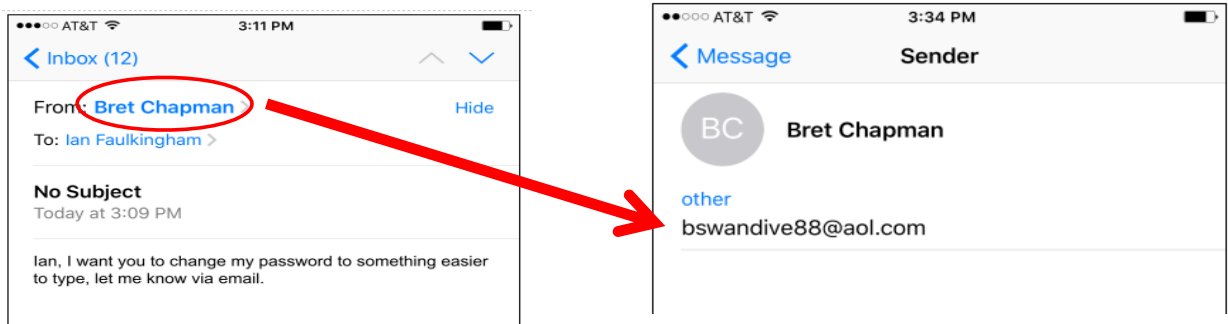
Best Regards,
Mr. Rafiq Hasanov

CONFIDENTIALITY NOTICE: This email and any files attached to it are confidential. If you are not the intended recipient you are notified that using, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited. If you have received this email in error please notify the sender and delete this email.

Sent from my mobile phone using [SecureFileShares](#)

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Spear Phishing Example



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Spear Phishing Example

From: Facebook [mailto:notification+hy1v6foe@facebookmail.com]
Sent: Thursday, April 07, 2016 5:15 AM
To: Kerrigan, Wade
Subject: Kris Kerrigan wants to be friends on Facebook



Kris Kerrigan wants to be friends with you on Facebook.



Kris Kerrigan

Confirm Request

See All Requests

This message was sent to wade.kerrigan@huschblackwell.com. If you don't want to receive these emails from Facebook in the future, please [unsubscribe](#).
Facebook, Inc., Attention: Community Support, Menlo Park, CA 94025

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Spear Phishing Example

From: Gregory R. Smith [mailto:gregory.smith@huschblackwell.com]
Sent: Wednesday, February 17, 2016 9:26 AM
To: Snow, Levi
Subject: Request

Kindly send me the 2015 W-2 (PDF) of our company staff for a quick review

Thanks

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It's like déjà vu all over again



US-CERT United States
Computer Emergency
Readiness Team

National Cyber Awareness System:

[IRS Issues Alert for Tax Phishing Scheme](#)

03/02/2016 01:36 PM EST

Original release date: March 02, 2016

The Internal Revenue Service (IRS) has issued a news release addressing a new spear phishing scheme targeting payroll and human resource professionals. In this scheme, cybercriminals pose as company executives requesting personal information on employees.

US-CERT encourages users and administrators to review the IRS [news release](#) for details and refer to US-CERT Security Tip [ST15-001](#) for information on tax-themed phishing attacks.

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Never answer an anonymous letter



- Slow down!
- Research!
- Delete requests for financial information or passwords
- Reject requests for or offers of help
- Don't let links control where you land
- Beware of downloads


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We made too many wrong mistakes

- Initiate the incident response plan
- Investigate and report confirmed breaches

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If you don't know where you are going you might not get there

- Have a breach response plan
- Update the plan
- Drill the plan

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It was impossible to get the conversation going, everybody was talking too much

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It ain't over till it's over

- Contain the incident
- Engage forensic experts
- Take affected systems offline, but do not turn them off

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When you come to a fork in the road, take it

- Fight the urge to blurt
- Know whom to notify and when
- Review your insurance policies and contracts!


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The future ain't what it used to be

- Limiting your risk in the following transactions:
 - Software installations
 - Software as a Service (SaaS) agreements
 - Cloud computing agreements
 - Data licensing deals

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How can you think and hit at the same time?

- Understand the deal
 - Installed software
 - SaaS
 - Platform as a service
 - Cloud services
 - Data license services

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I usually take a two-hour nap from one to four

- Understand the data
 - Consumer data
 - SSN / Driver's License / Account Numbers / PHI
 - Payment information / Credit Cards
 - Intellectual Property (trade secrets)

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Baseball is 90% mental and the other half is physical

- You understand the deal and the data involved. Good, now what else should you consider?
 - Data transition issues (pre-deal and post-deal)
 - Data storage issues
 - Cyber liability insurance
 - SOC (f/k/a SSAE 16)

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We have deep depth

- Who has your data?
- Limiting the effect of subcontractors
- Does your vendor control your data?
- Third party terms and conditions (e.g. Amazon Web Services)

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In baseball, you don't know nothing

- Provisions to consider for your agreements
 - Encryption
 - Employee training
 - Service organization control (SOC) reports
 - Penetration testing (internal and external)
 - Business continuity / disaster recovery plans

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A nickel ain't worth a dime anymore

- The (cold?) comfort of representations and warranties/indemnification rights
- Limitation of liability
- Cyber liability insurance from your vendor
- Addressing regulatory issues (HIPAA / GLB)

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Always go to other people's funerals, otherwise they won't come to yours

- Termination rights and duties
 - Data transition issues
 - Other transition services
 - Reorganizations / M&A Transactions

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Even Napoleon had his Watergate

- What else should you consider?
- Website privacy policy / terms and conditions
- Internet of Things
- Big Data
- Data retention
- FTC

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If the world were perfect, it wouldn't be

- Cyber liability insurance
 - Preparing for your meeting with your underwriter
 - Preparing for your next meeting with your underwriter
 - Reviewing (gulp!) your policy when it matters

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Questions?

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Internal Investigations

Sonni Nolan and Matt Schelp

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Overview

- Hot topics in Corporate Investigations
- Practical tips on conducting compliant and effective investigations

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When to Conduct an Investigation

- Due Diligence
- Complaints-Internal or External
- When the Law Requires an Investigation
- Threats of Violence
- Alleged Violation of Work Rules
- Internal Controls

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Government Investigation into Corporations On the Rise.

- Federal, State, Local, and Foreign Governments
- Political Climate
- Incentivizing Whistleblowers

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The Business Case:

Why good investigations are critical.

- Uncover facts to assist in making sound business decisions
- Stop and prevent misconduct
- Memorialize company's corrective actions
- Insulate the company, its management, and officers
- Promotes the company's compliance program

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The Investigation Team:

- Non-Legal Resources
- Inside Counsel
- Outside Counsel
- IT (Litigation Hold)
- Experts

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Impact of the Yates Memorandum

- Revised Instructions to Federal Prosecutors Regarding Corporate Misconduct
- Instructs Prosecutors to Focus on Individual Criminal Liability
- A corporation must fully disclose all non-privileged information about individuals involved in wrongdoing before finalizing any settlement agreement to obtain full cooperation

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UP NEXT: DOJ Process Requiring Companies to Confirm Full Disclosure of All Non-privileged Information

- Part of settlement documents?
- Settlement conditioned on accuracy of certification?
- Independent basis to void settlement?
- Who will have to sign on behalf of company?
- Subject to individual liability for a false certification?

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Does the Yates Memorandum Change the Investigative Team Lineup?

- Should counsel represent both the company and its employees in government interviews or related civil litigation?
- Issues with joint representation:
 - DOJ believes that the Company does not intend to turn over all relevant evidence
 - Increased risk counsel will learn a privileged fact
 - Could create a non-waivable conflict of interest

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Does Yates Dictate Outside Lawyer for Employees in an Investigation?

- Company should consider separate counsel for employees facing potential individual criminal liability before the employees are interviewed as part of an internal investigation.
- Given implications of Yates Memorandum, there is an inherent fairness to securing separate counsel.
- Advancing and indemnifying attorneys' fees is permissible for a company cooperating pursuant to DOJ policy.

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Stealing Signs

- Privacy Concerns in Internal Investigations
- Breach response
- Social media
- Private Devices
- Self-Help Issues

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How to Document an Investigation

The image shows two handwritten baseball scorecards. The left scorecard is for 'INDIAN SWEETS GAME XII - DINGS OUT 22' and the right is for 'CARDINALS vs. N. 10-9, in 11 INNS.'. Both scorecards include columns for innings, runs, hits, errors, and player statistics (at-bats, runs, hits, RBI, errors). The right scorecard has red handwritten notes and circled numbers, possibly indicating specific events or errors.

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Considerations when Documenting and Reporting

- Properly reporting the investigation
- Reports in personnel files
- How to provide information to third-parties
- Obstructing justice

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Proactively Notifying Authorities

- Employee Misconduct-Sweep it Under the Rug or Tell the World?
- Precedent to deter future misconduct
- Deter whistleblower activity
- Understand further business distraction
- Exposing weakness in company controls

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Self-Disclosure-Considerations

- Potential consequences for criminal and civil laws that were violated.
- Administrative sanctions? Debarment, Suspension and Exclusion.
- Aggressive disclosure strategy could lead to mitigation of offense type and reduce collateral consequences.
- Terms of Post-Resolution Cooperation

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Internal Communications

- Have a Communications Plan.
- Have a Policy and Procedure.
- Develop Forms.
- Designation of Responsibilities.

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The “Wild Card”- Now What Do We Do?

Your team is conducting an investigation, the employee wants to bring their:

- Lawyer
- Co-worker
- Tape Recorder
- Union Representative

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Preventative Measures

- Policy that requires employees to cooperate with company investigations. Enforce it.
- Policy against recording in the workplace.
- Just say “No”.

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It Ain't Over Until...

- Tell complaining party that an investigation was conducted.
- Someone has to draw a conclusion.
- Someone has to make recommendations.
- Someone must follow up to make sure that there is no fall out from the complaint or investigation.

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Questions?

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