INTRODUCTION

The Attorney-Client Privilege shields certain communications that would otherwise be required to be disclosed under, e.g.:

- Public Records Act
- Information Practices Act
- Family Educational Rights & Privacy Act (FERPA)
- Litigation discovery
- Subpoena
ATTORNEY-CLIENT PRIVILEGE: THE BASICS

• Purpose: Encourage parties to seek legal advice and candor essential to proper representation

• Elements
  - A confidential communication
  - Between an attorney and a client
  - For purposes of seeking/delivering legal advice
  - On a matter within the scope of the engagement
“ATTORNEY”

• Person licensed to practice law (anywhere)
• For UC, also must be member of OGC or outside attorney retained by University/OGC
  - Excludes non-OGC attorneys
• Privilege extends to non-attorneys who are aiding/acting on behalf of/being supervised by “attorneys” (e.g. investigators, paralegals)
“CLIENT”

- Client is the corporate entity: The Regents
  - Exception: indemnity situations
- Those authorized to act on behalf of University on the matter that is the subject of the communication (*typically managers*)
- May include former employees within the scope of former duties
“COMMUNICATION”

- Includes all forms --- verbal, written, visual (e.g. photograph)
- Includes drafts intended ultimately to be conveyed, whether actually conveyed
- Privilege does not protect facts underlying the communication
PURPOSE

• Seeking/delivering advice
  – May include pre-engagement communications

• Legal in nature

• Relevant to engagement/relationship

• Common misperceptions
  - Lawyer as administrator/wearing “business hat”
  - Lawyer simply “in the room”
  - Lawyer as carbon copy recipient
CONFIDENTIALITY

• Communication must be limited to those
  - Within the University (not third-parties)
  - With a need to know

• Must be safeguarded
  - Use of confidentiality legend (but beware of overuse)
  - Access limited (e.g. locked file cabinets)

• Otherwise communication subject to waiver
  - Beware of selective waiver prohibition
    – Obligation to maintain confidences
VOLUNTARY WAIVER

• UC as a public institution
• “Optics” of asserting the privilege
  - Appearance of “something to hide”
• Pressures brought to bear to waive privilege
  “voluntarily”
• Privilege belongs to client--ultimately The Regents
EXCEPTIONS

• Crime/Fraud: Privilege does not apply “if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud”

• Joint Representation: Privilege does not apply to communications with jointly represented clients who later sue one another
COMMON UC SITUATIONS

• WB investigations/audits
  - Privilege may or may not apply---fact dependent

• Factors to consider
  - “Owner” of the process
  - Whether process is administrative or legal in nature
  - Whether process requires resolution of legal/regulatory questions
  - Potential for litigation/regulatory sanction

• Bottom line: protection is not categorical and not always clear---seek advice at outset
SEEKING PRIVILEGE PROTECTION --
ADVANTAGES

• Facilitates more candor by witnesses
• Enables investigator/compliance officer to include more details in record of investigation, particularly re sensitive matters
• Minimizes *(but does not eliminate)* risk of disclosing investigative notes, interviews, other materials
SEEKING ATTORNEY HELP -- POTENTIAL TRIGGERS

- Receiving court/regulatory agency order
- Receiving subpoena/discovery document
- Suspecting/discovering evidence of
  - A crime or other significant legal or regulatory violation
  - Noncompliance with a court or regulatory agency order
  - Fraud or other intentional misconduct
  - Damage or injury to parties outside the University
  - Activity creating risk of substantial financial/media/political harm to University
TAKEAWAYS

- A-C Privilege shields certain communications from disclosure
- Applies to communications with lawyers seeking or providing legal advice
- Requires that confidentiality be maintained
- Doesn’t protect underlying facts
- Belongs to University and can be waived by University