



# **May I Speak Frankly?**

## **The Attorney-Client Privilege at UC**

**Bridging the Gap**

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# INTRODUCTION

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- 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

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- 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"

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- 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”

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- 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”

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- 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

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- 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

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- 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

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- 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

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- 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

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- 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

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- 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

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- 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

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- 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