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Common Misunderstandings about the Application of the Attorney Client Privilege and Work Product Doctrine to EHS Auditing

Jeff Porter

Colin Van Dyke

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What we often refer to as the Attorney Client Privilege involves two concepts with different purposes, elements and durability:

- The Attorney-Client Privilege
- The Work Product Doctrine



The Attorney-Client Privilege:

- The Attorney-Client Privilege ensures that the attorney has sufficient information to give informed professional advice.
- Elements of the Attorney-Client Privilege
 - *A Confidential Communication*
 - *By a Privileged Person*
 - *For the purpose of seeking legal advice*
 - Not to shield sensitive information
 - Not to support non-legal effort



The Attorney-Client Privilege:

- Communications can be oral or printed.
- Privileged Persons
 - *Client*
 - *Attorney*
 - *Attorney's agent*



Confidentiality:

- Marking a document “confidential” does not make it privileged.
- Failing to mark a document “privileged” may preclude its protection.
- Involvement of contractors may be protected only if essential to attorney-client communication.





In order for the client's documents to be privileged in the hands of the attorney, they must have been privileged in the hands of the client:

- A client cannot protect its own documents or its consultant's documents merely by conveying them to an attorney.
- A non-privileged document does not become privileged merely because it is attached to a privileged document.
- Notes made by a client in order to seek legal advice are privileged.
- If prepared for the simultaneous review of legal and non-legal personnel, a document may not be protected.



The Work Product Doctrine:

- The Work Product Doctrine provides qualified protection to materials prepared in anticipation of litigation.
- Elements of the Work Product Doctrine:
 - *A document, tangible item, or an attorney's opinions and thoughts*
 - *Prepared in anticipation of litigation*
 - Litigation need not have commenced. The First Circuit looks at whether the potential for litigation was the primary reason for the product.

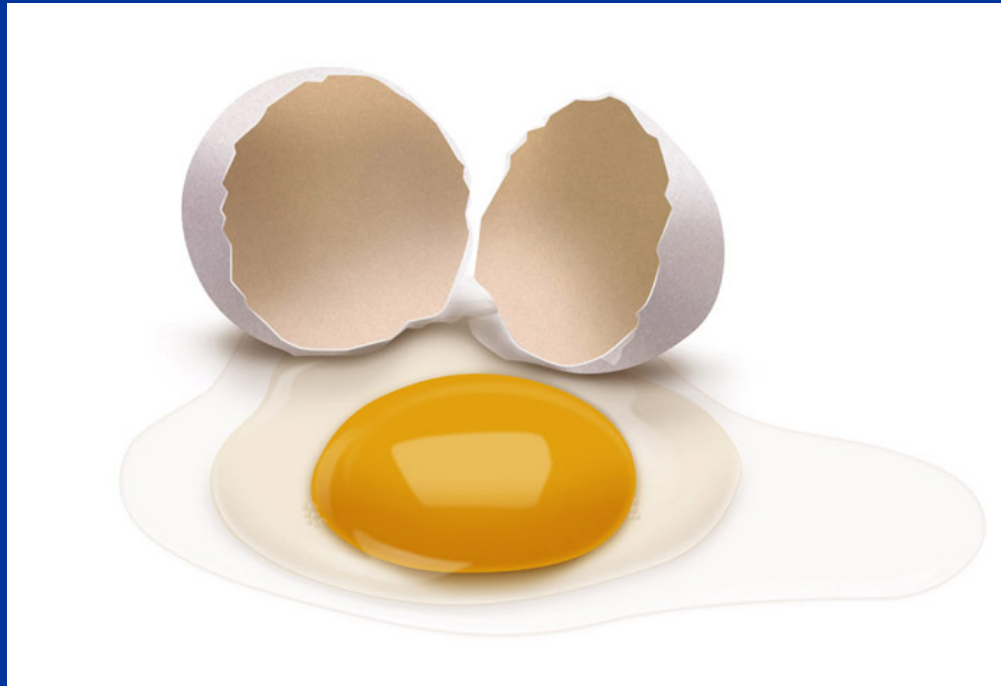


Comparisons to the Attorney-Client Privilege:

- The Work Product Doctrine protects more than communications.
- The Work Product Doctrine protects materials prepared by non-legal representatives of a party.
- Protection is qualified. Disclosure may be ordered upon an opponent's showing of:
 - *a substantial need; and*
 - *an inability to otherwise obtain the information without undue hardship.*

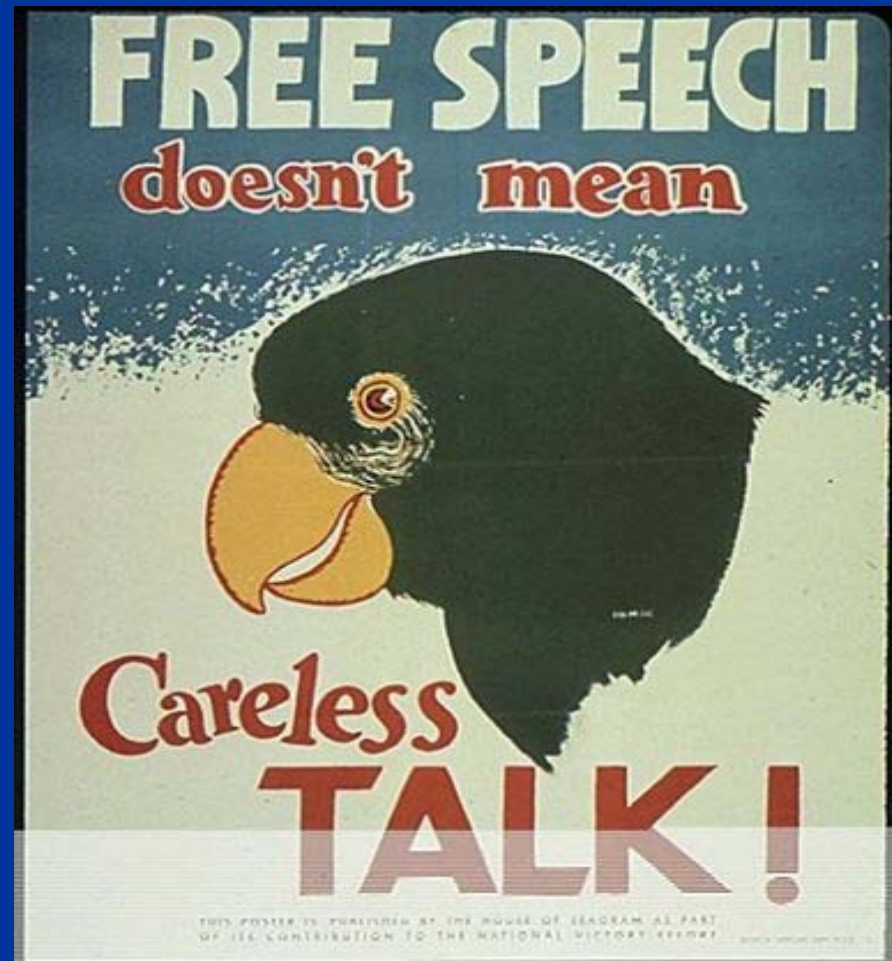


Waiver – The Egg Doctrine





- Accidental Disclosure
- Selective Waiver
 - *Government Investigations*
 - *Third Party Audits*





Questions to ask yourself in assessing whether your work is privileged or protected:

- Who hired you?
- Why?
- What did you do?
- With whom did you share your work?



Quiz Question 1:

Client commissions a Phase I Site Assessment of its own property in connection with a refinancing. Later, the client provides it to an attorney who uses it to advise the client.

Is the report a Privileged Attorney-Client Communication, Attorney Work Product or Fair Game?



Answer:

Fair Game



Quiz Question 2:

Client retains a consultant to conduct a voluntary compliance audit. After receiving the consultant's report, the client provides it to an attorney for advice.

Is the report a Privileged Attorney-Client Communication, Attorney Work Product or Fair Game?



Answer:

Fair Game (but communications to client about the report are likely privileged)



Some Basic Rules of Thumb

- Attorney and Consultant should communicate directly.
- In general, if an attorney retains and manages a consultant, it is not necessary for the attorney to take part in every conversation or to be present at every meeting.



Questions?