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Protecting the Attorney-Client Privilege

Practical Considerations for Public Power Lawyers

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The views herein are the author's alone and not necessarily those of FPB's Directors or management.

Considerations for Public Power Lawyers

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Purpose of the attorney-client privilege

- "The privilege is based on two related principles. The first is that loyalty forms an intrinsic part of the relationship between a lawyer and client in our adversary system. This loyalty is offended if the lawyer is subject to routine examination regarding the client's confidential disclosures. The second principle is that the privilege encourages clients to make full disclosure to their lawyers. A fully informed lawyer can more effectively serve his client and promote the administration of justice."
- Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (citations omitted).
- This differs from the lawyer's obligation not to "reveal information relating to the representation of a client." Model Rules of Prof'l Conduct R. 1.6(a).
- This obligation is broader than the attorney-client privilege since "[t]he confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rules of Prof'l Conduct R. 1.6 cmt. 3.
- See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 480 (March 6, 2018) (discussing Rule 1.6 with respect to lawyer blogging).

Purpose of the attorney-client privilege

- “Privileges exist as a matter of policy, not reason. Reason mandates admission of evidence that is relevant, competent, and properly authenticated. Policy, however, may mandate exclusion of evidence where necessary to promote a free flow of communication under circumstances indicating an ‘imperative need for confidence and trust.’”
- Stidham v. Clark, 74 S.W.3d 719, 723 (Ky. 2002) (citation omitted).

Purpose of the attorney-client privilege

- "'[T]here is little case law addressing the application of the attorney-client privilege' in the government context."
- Pritchard v. County of Erie, 473 F.3d 413, 417 (2d Cir. 2007).
- Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005).
- "[T]here is a dearth of case law analyzing which employees in a municipal corporation can waive the attorney-client privilege."
- Sullivan v. Warminster Twp., 274 F.R.D. 147, 153 (E.D. Pa. 2011).

Purpose of the attorney-client privilege

- Privilege is strictly construed and even more so in the government context.
- "The attorney-client privilege accommodates competing values; the competition is sharpened when the privilege is asserted by a government. On the one hand, non-disclosure impinges on open and accessible government. On the other hand, public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest[.]"
- Pritchard v. County of Erie, 473 F.3d 413, 418-19 (2d Cir. 2006) (citation omitted).

Governing law creating the privilege

- “[E]xists by virtue of statute, court rule, or common-law doctrine in every jurisdiction. [There are] important jurisdictional variations.” Charles W. Wolfram, Modern Legal Ethics 250-51 (West Publishing Co.) (1986).
- State court – Common law or state rules of evidence.
- “Unlike the testimonial privileges recognized in federal courts that, pursuant to Federal Rule of Evidence (FRE) 501, are the product of common law development, Kentucky's testimonial privileges are codified in Article V of the Kentucky Rules of Evidence (KRE). KRE 501 includes no provision for common law development of testimonial privileges[.]” Stidham v. Clark, 74 S.W.3d 719, 723 (Ky. 2002) (footnote omitted).

Governing law creating the privilege

- Federal court – Federal rules of evidence, federal common law.
- "Fed. R. Evid. 501 dictates federal common law govern privilege in federal court. However, 'in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.' Fed. R. Evid. 501. . . . [However,] [w]here a federal question is presented to a court with pendant state law claims, federal common law governs privilege disputes."
- Burkhead & Scott, Inc. v. City of Hopkinsville, 2014 U.S. Dist. LEXIS 166374, at *4 (W.D. Ky. 2014) (citation omitted).

Governing law creating the privilege

- So,
- State court – state rules of evidence or common law.
- Federal court –
  - Federal question and pendant state law claims use federal common law.
  - State law claim use state rules of privilege.

Elements of privilege

- Generally, “(1) a person (client) who seeks legal advice or assistance (2) from a lawyer acting in behalf of the client, (3) for an indefinite time may invoke, and the lawyer must invoke in the client’s behalf, an unqualified privilege not to testify (4) concerning the contents of a client communication (5) that was made by the client or by the client’s communicative agent (6) in confidence (7) to the lawyer or lawyer’s confidential agent, (8) unless the client expressly or by implication waives the privilege.”
- Charles W. Wolfram, Modern Legal Ethics 251 (West Publishing Co.) (1986).

Elements of privilege

Kentucky Rules of Evidence Rule 503(b) – General Rule of Privilege:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(2) Between the lawyer and a representative of the lawyer;

(3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Among lawyers and their representatives representing the same client.

Elements of privilege:

"The Sixth Circuit articulates the elements of privilege as:

> 1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) unless the protection is waived."

Burkhead & Scott, Inc. v. City of Hopkinsville, 2014 U.S. Dist. LEXIS 166374, at *5 (W.D. Ky. 2014) (citation omitted).

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Scope of privilege in the "corporate context." Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).

- However, principles apply in the government/municipal context.

- Landmark case re: privilege. As of September had been cited 4,625 times.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Facts:
- Accountants informed general counsel that "questionable payments" were made to foreign officials "to secure government business." Id. at 386.

- General counsel then conferred with Chairman of the Board and outside counsel. Id. at 386.

- They decided to conduct an internal investigation. Id. at 386.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Facts:
- The attorneys prepared a letter to company managers for the Chair's signature. Id. at 386.
- The letter noted:
  - General counsel was instructed by the Chair to investigate and management needed information about the payments. Id. at 387.
  - Investigation was 'highly confidential' and managers were not to discuss with anyone other than those who might have useful information. Id. at 387.
  - "Responses were to be sent directly to Thomas [the general counsel]" Id. at 387.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Facts:
- IRS later requested all the files and responses to the questionnaires. Id. at 387-88.

- Sixth Circuit held that no privilege existed except for those top executives within the "control group." Id. at 388-89.

- Employees who could not direct the legal affairs of the company were not the client according to the Sixth Circuit. Id. at 388.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Holding:
- The Court rejected this control group test. Id. at 390.

- Instead, the Court noted that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id. at 390.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Holding:
- The Court reasoned that "[m]iddle-level – and indeed lower-level – employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." Id. at 391.

- Moreover, legal advice must be given not only to top executives, but also to those "who will apply it." Id. at 392.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Holding:
- The Court also noted that the control group test limited "the valuable efforts of corporate counsel to ensure their client's compliance with the law." Id. at 392.

- Compliance is even more complicated for a corporation than an individual. Id. at 392.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Holding:
- The Court found the communications were privileged:
  - General counsel was directed to investigate. Id. at 394.
  - The corporate employees were interviewed regarding matters within the scope of their employment. Id. at 394.
  - The employees "were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." Id. at 394.
  - Thomas was identified as the general counsel in the questionnaire. Id. at 394.
  - Questionnaire included a policy statement that commissions were not to be used for bribery. Id. at 394-95.
  - The questionnaires were kept confidential. Id. at 395.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- In Kentucky, Collins v. Braden, 384 S.W.3d 154, 162 (Ky. 2012) held that KRE 503(a)(2) applies only to communications "'[c]oncerning the subject matter of [the employee's] employment.'" There, the defendant hospital claimed investigative reports regarding a patient's death commissioned by its in-house counsel were privileged. Id. at 157. The court explained the difference between an employee who is a client and one who is simply a witness. Id. at 162.
- The court wrote:
  - "Analogizing to the hospital setting, when a physician and a nurse are involved in caring for a patient who later brings a claim against the hospital for the care provided by the physician and the nurse, statements made by the physician and the nurse to the hospital's counsel while preparing for the litigation would meet the requirement that they concern the subject matter of the employment. But if a second nurse who was not involved in the patient's care but just happened to be in that part of the hospital saw the critical moment of alleged negligent care, any statement by the second nurse to the hospital's counsel about the event would not be protected because the statement would not concern the subject matter of the nurse's employment. The second nurse was not employed in caring for the patient and was merely a witness to what happened." Id. at 162.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Holding:

- "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney[.]" Upjohn Co., 449 U.S. at 395.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Holding:
- Upjohn's general counsel also interviewed former employees. Id. at 394 n.3.
- However, the majority did not address whether communications with former employees are privileged. Id. at 394 n.3.
- The concurring opinion noted such communications should be privileged. Id. at 402-03.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Whether communications with former employees are privileged depends on the jurisdiction.
- In Kentucky, they are not. "[A] statement made by a former employee after the employment relationship has ceased is not covered because the statement is not made in the course or scope of employment as required by KRE 503(a)(2)(B)(i)." Collins v. Braden, 384 S.W.3d 154, 162 (Ky. 2012) (citation omitted).

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Upjohn noted that the employees were aware they were being questioned so that the company could obtain legal advice.
- This is an objective test. The "corporation asserting attorney client privilege does not have to show as a factual predicate that lower level employees subjectively believed that the communication was an attorney-client communication." Williams v. Duke Energy Corp., 2014 U.S. Dist. LEXIS 109835, at *15 (S.D. Ohio 2014).

Privilege in the municipal context

A. Privilege for municipal governments

- Ross v. City of Memphis, 423 F.3d 596, 598 (6th Cir. 2005) held that "a municipality can maintain the [attorney-client] privilege."
- There, the police chief relied on the advice of counsel in an employment dispute. Id. at 598-99. He refused to disclose the content of those discussions. Id. at 599.
- The City maintained that it controlled the privilege and the chief could not waive it in asserting his reliance on counsel defense. Id. at 599.

Privilege in the municipal context

- The Ross Court found that while there is "surprisingly little case law on the issue", it is "'generally assume[d] [there is] a governmental attorney-client privilege in civil suits between government agencies and private litigants.'" Id. at 601.
- "In fact, the existence of a governmental privilege in the civil context is sufficiently entrenched that parties seeking to prevent application of the privilege in other areas, such as grand jury proceedings, have conceded its applicability in the civil context." Id. at 601 (citation omitted).

Privilege in the municipal context

- The Ross Court noted secondary sources support a governmental privilege as well:
- Proposed Federal Rule of Evidence 503 mentions “public officers”. Id. at 601.
- Likewise, Restatement (Third) of the Law Governing Lawyers recognizes a privilege for governments. Id. at 602.

Privilege in the municipal context

- The court found that the city held the privilege and the chief could not waive it. Id. at 605.
- It was not appropriate to balance the need for the chief to disclose the material to support his defense against the city's need to maintain the privilege. Id. at 604.
- This makes application of the privilege too uncertain. Id. at 604.
- This differs from the work-product privilege. "Unlike other, qualified privileges, such as the work-product privilege, great need and hardship cannot even begin to obviate the absolute attorney-client privilege." Collins v. Braden, 384 S.W.3d 154, 159 (Ky. 2012).
- Moreover, "[t]he attorney-client privilege is not contingent on actual or threatened litigation." Id. at 160.

Privilege in the municipal context

- “[G]enerally in conversations between municipal officials and the municipality's counsel, the municipality, not any individual officers, is the client.” Ross, 423 F.3d at 605.
- However, the individual employees may hold the privilege in some circumstances if they “clearly claim[]” that they seek advice in an individual capacity. Id. at 605.

Privilege in the municipal context

B. Assertion or Waiver – Examples

- Ross found that the privilege existed for municipal organizations and that the city controlled it, but remanded the case to determine whether the city could "prove[] the existence of the privilege." Id. at 605-06.
- However, other cases are less clear as to "who" controls the privilege.
- Depends on the jurisdiction.

Privilege in the municipal context

- In Guidiville Rancheria v. United States, 2013 U.S. Dist. LEXIS 135944 (N.D. Cal. 2013), Councilmember Butt wrote to the Attorney General's office "quot[ing] the contents of certain legal memoranda prepared by [the City's attorneys], stating his disagreement with those attorneys' conclusions and seeking [a further opinion]." Id. at *2.
- The court found that the privilege can be "'asserted or waived by the responsible public official or body. The identity of that responsible person or body is a question of local governmental law.'" Id. at *6. (citation omitted).

Privilege in the municipal context

- The court determined that Butt did not have the authority as an individual councilmember to waive the city council's privilege. Id. at *8-9. (citing *Sampson v. Sch. Dist. of Lancaster*, 262 F.R.D. 469, 479 (2008) ("If a board president cannot execute even minor contracts and 'other papers' without the board's approval, we conclude that the board president cannot waive the attorney-client privilege-a much more significant decision-on behalf of the school district without the board's approval.")).
- A similar rule exists in Kentucky where the theories of implied contract and apparent authority are inapplicable to municipal corporations. City of Princeton v. Princeton Electric Light & Power Co., 179 S.W. 1074, 1079 (Ky. 1915). So, in Kentucky, an argument exists that waiver requires board action.
- The Guidiville Court also noted that despite Butt having produced a portion of the city's opinion letter, the city was not obligated to produce the remainder of it because Butt lacked the authority to waive the privilege at all. Id. at *14-15.

Privilege in the municipal context

- But, in Sullivan v. Warminster Twp., 274 F.R.D. 147, 153 (E.D. Pa. 2011), the court found that the chief of police had the authority to waive the attorney-client and work-product privileges on behalf of the municipality.
- The court noted "[w]e are satisfied that as the head of the Warminster Police Department, Chief Murphy's position is sufficiently managerial to justify the conclusion that he has authority to waive these privileges on behalf of the municipality." Id. at 153.
- There, the chief of police commented publicly about an investigation prior to the filing of a lawsuit. Id. at 154.
- The court noted that waiver is not limited to just officers and directors. Id. at 153.
- However, the waiver only applied to those communications actually disclosed and not to the report in its entirety since the disclosure was made prior to litigation. Id. at 154. The court noted "a distinction between partial waivers that occur within the context of judicial proceedings, and extrajudicial partial waivers." Id. at 154.

Privilege in the municipal context

- In Interfaith Housing Delaware, Inc. v. Town of Georgetown, 841 F. Supp. 1393, 1402 (D. Del. 1994) the court found that a council member's statement was sufficient to waive his attorney-client privilege but only for that issue and not for the city.
- There, the councilmember testified that a condition imposed on a housing development had been eliminated on advice of counsel. Id. at 1396.
- The court found that the privilege was analyzed according to Delaware state law since the council's authority to impose a condition on a housing development was decided with state law. Id. at 1396.

Privilege in the municipal context

- The court examined “who” is the client. It concluded that both the individual councilmembers as well as the town itself were clients of the town solicitor. Id. at 1397.
- Thus, individual meetings with the town solicitor did not waive the privilege. Id. at 1397-98.
- “Because of their joint obligations and commonality of interest, the members of the Town Council share in its attorney-client privilege when a third party sues both the town and each councilmember.” Id. at 1398.

Privilege in the municipal context

- Here, the councilmember waived his privilege by testifying as to the communication. Id. at 1399. But, only as to that particular communication so the court did not require the production of all documents. Id.
- However, this waiver did not extend to the city council. Id. at 1400. While a Mayor could waive on behalf of the council, the individual councilmember could not. Id. at 1399.
- The result varies depending on the jurisdiction.

Privilege in the municipal context

- For instance, in Reed v. Baxter, 134 F.3d 351, 358 (6th Cir. 1998), the court held that the attorney-client privilege did not apply to conversations between two city councilmembers and the city attorney.
- Plaintiffs alleged that the city attorney met with the two council members, the city manager and the fire chief regarding a promotional decision. Id. at 354.
- During that meeting, the city attorney provided legal advice to that group. Id. at 353-54.

Privilege in the municipal context

- Plaintiff sought to depose the city attorney and councilmembers regarding the meeting. Id. at 354.
- The district court excluded "testimony regarding statements made during the [meeting with the city attorney.]" Id. at 354.
- Plaintiff maintained that the councilmembers "participated in the . . . meeting as third parties rather than as clients." Id. at 355.

Privilege in the municipal context

- The court noted “there is little authority about which agents of an organizational client are the client for purposes of the attorney-client privilege.” Id. at 357.
- The court determined that the meeting “was not a full meeting of the city council.” Id. at 357. Instead, the council members “were elected officials investigating the reasons for executive behavior” and as such were not clients of the city attorney. Id. at 357.
- That is, “[t]he interests of the councilmen and the interests of the city executives were not the same.” Id. at 357.

Privilege in the municipal context

- The dissent noted that this narrow construction of the privilege makes it "nearly impossible for a city council to ever invoke the attorney client privilege." Id. at 360.
- The city council was required to evaluate the propriety of the promotion so all of the members were entitled to meet with the city attorney to gather information according to the dissent. Id. at 360.
- However, any private meetings with the city attorney would not be privileged. Id. at 360.

Privilege in the municipal context – Governing agency

- City council or city commission's right to inspect privileged records of the utility?

- In Kentucky, KRE 503(b) defines the lawyer-client privilege.

- This is incorporated into Kentucky's Open Records Act via KRS 61.878(1)(l) which provides that records made confidential by enactment of the General Assembly are exempt from production.

Privilege in the municipal context – Governing agency

- So, generally cannot use the open records act in Kentucky to defeat claims of lawyer-client privilege.

- However, members of the utility's governing agency are in a different category.

- In OAG 80-369, 1980 Ky. AG LEXIS 295 (Ky. A.G.), the Kentucky Attorney General determined that "a member of the Plant Board and a member of the City Council are not subject to the exemptions listed in KRS 61.878."

Privilege in the municipal context – Governing agency

- The Kentucky Attorney General reasoned that "the City Council has the power to remove from office upon a vote of a majority of the members of the Council any member of the Plant Board for inefficiency, neglect of duty, misfeasance, nonfeasance, or malfeasance in office. We believe, therefore, that a member of the City Council has the same right to inspect the records of the Board as does a member of the Plant Board."

- Thus, no attorney-client privilege exception to an open records request from a member of the governing agency.

Privilege in the municipal context – Open Meetings/Records

- In Kentucky, documents that are subject to the attorney-client privilege may be withheld. KRS 61.878(1)(l).
- Likewise, preliminary documents are exempt until the agency incorporates those documents into its final action. 94-ORD-88, 1994 Ky. AG LEXIS 226, at *9 (Ky. A.G.). However, an agency's reliance on legal advice in its decision does not operate to "forfeit" the preliminary documents exception in KRS 61.878(1)(j). Id. at *9.
- However, no parallel exception exists to discuss matters in a closed session pursuant to the open meetings law.
- Only for pending or proposed litigation. KRS 61.810(1)(c).

Privilege in the municipal context – Open Meetings/Records

- The Kentucky Attorney General in OAG 97-1, 1997 Ky. AG LEXIS 2 (Ky. A.G.) held that there is no legal advice exception to the Open Meetings Act.
- In 96-OMD-191, the Attorney General had held that the privilege could be a basis for a closed session. Id. at *1.
- However, there is no exception authorizing a closed session for legal advice. Id. at *11-12.
- The Attorney General refused to create an exception where it was not included in the statute. Id. at *19.
- The Opinion noted different states take different approaches. Id. at *12. Some states are silent whereas others include both a “pending litigation” and “legal advice” exception. Id. at *12.
- In Kentucky, the “pending litigation” exception is narrowly construed and litigation must be more than a “remote possibility.” Id. at *10.

Dual Roles: Legal and Business/Policy Advisor

- Legal advice is privileged.
- Business and policy advice is not.
- However, both are often related.

Dual Roles: Legal and Business/Policy Advisor

- In Pritchard v. County of Erie, 473 F.3d 413, 420 (2d Cir. 2007), the court discussed the predominant purpose test to determine whether a communication is privileged.

- There, a county attorney provided advice to the local sheriff regarding whether a policy violated the Fourth Amendment. Id. at 416.

- The district court reasoned that the attorney provided "policy recommendations" and not legal advice so the communication was not privileged. Id. at 416.

Dual Roles: Legal and Business/Policy Advisor

- The issue of first impression addressed by the court was "whether the attorney-client privilege protects communications that pass between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light." Id. at 417.
- The court considered the elements necessary to maintain the privilege and noted "[t]he rule that a confidential communication between client and counsel is privileged only if it is generated for the purpose of obtaining or providing legal assistance is often recited. The issue usually arises in the context of communications to and from corporate in-house lawyers who also serve as business executives." Id. at 419.

Dual Roles: Legal and Business/Policy Advisor

- "[L]egal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct." Id. at 419.

- But often more than that is involved according to the court.

Dual Roles: Legal and Business/Policy Advisor

- "The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer." Id. at 420-21.

Dual Roles: Legal and Business/Policy Advisor

- Factors when determining the predominant purpose of a communication:
- Capacity in which the lawyer is consulted. “When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged.” Id. at 421.
- Positions held by the attorney. Staff Attorney/Assistant G.M. Id. at 421.
- Client’s objectives. How to comply “rather than save money or please the electorate.” Id. at 421.

Dual Roles: Legal and Business/Policy Advisor

- In Collins v. Braden, 384 S.W.3d 154, 160 (Ky. 2012), the Kentucky Supreme Court wrote that "the fact that the communications were collected pursuant to hospital policy does not make them business advice or otherwise remove them from the privilege."
- There, statements were collected after a patient death pursuant to a policy titled "Professional/General Liability Incident Reporting Procedures" promulgated and signed by the hospital's general counsel. Id. at 157.
- The court reasoned "[t]he policies here were not general business policies, such as those aimed at reducing waste or hiring qualified employees; rather, they were promulgated by the hospital's in-house *lawyer* for the purpose of assessing the risk of and preparing for possible litigation." Id. at 160.

Dual Roles: Legal and Business/Policy Advisor

- The court noted that "redaction is available for documents which contain legal advice that is incidental to the non-legal advice that is the predominant purpose of the communication." Pritchard, 473 F.3d at 421 n.8.
- For instance, in 09-ORD-075, 2009 Ky. AG LEXIS 142 (Ky. A.G.) the Kentucky Attorney General discussed the disclosure and redaction of attorney billing records. The Attorney General found that "generalized descriptions of the nature of the services rendered, . . . including 'research and analysis,' 'prepare,' 'revise,' 'edit,' 'review,' 'proof,' 'draft,' 'conference with,' 'email,' 'call,' 'meeting with,' 'finalize and forward,' and 'discussed[]'" were not privileged.
- In contrast, the issues researched, subject of meetings or calls and identity of individuals called or emailed were privileged and properly redacted.

Questions?

Thank you