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How Not To Lose the Important Protection of the Attorney- Client Privilege

Presented by:

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A red sphere is positioned on a grey path that splits into two directions, set against a green background. The sphere is slightly reflective and sits on the path.

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Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

Speaker

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Fern Bomchill is a prominent litigator, mediator, and counselor whose practice deals with a broad spectrum of corporate, commercial, and financial matters. Since joining Mayer Brown in 1972, Fern has built a well-earned reputation as a skilled, knowledgeable trial lawyer and courtroom manager, and a proficient, well-informed mediator who masters case detail and achieves realistic, equitable, and timely solutions. In addition, she provides effective coordination and consultation regarding a wide variety of corporate concerns, including liability and exposure, consumer information and protection issues, and risk-management strategies. Fern has been recognized as an “Illinois Super Lawyer,” a “Top Lawyer in Illinois” and a “Leading Lawyer.” She is a past National President of the Federal Bar Association and a member of the American Bar Association’s Standing Committee on Judicial Improvements.

How Not To Lose the Important Protection of the Attorney-Client Privilege

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What Is the Attorney-Client Privilege?

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- Communication
- Between Privileged Persons in Confidence
- For purpose of seeking, obtaining and providing legal assistance to client

What Is Protected?

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- Communication – not Facts
- Communication has to be with lawyer wearing “legal hat”
- Communication has to be confidential
- Be Aware of Foreign Law
- Narrow Construction – burden on party seeking protection

Who Owns the Privilege?

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- Privilege belongs to client
 - Only client can waive privilege
 - But who is client?
- What happens to the privilege on the sale of the company or its assets?

Exceptions to the Attorney-Client Privilege

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- Fiduciary Exception
- Shareholder Derivative Actions (“Garner Exception”)
- Majority/minority shareholder disputes
- Heirs dispute
- Crime-Fraud
- Public Policy

How To Lose Privilege

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- Express Waiver
 - Subject Matter Waiver
 - Inadvertent Disclosure
- Implied Waiver
 - “At Issue”
 - Dual Representation
 - Not reasonable belief of confidentiality

How Not To Lose Privilege

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- Know applicable law
 - Be alert to varying protections under different U.S. jurisdictions and under foreign law
- Ensure communication meets definition of attorney-client privilege
 - Wear your “Legal Hat” – separate non-legal function
 - Maintain confidentiality – employ practices that show confidential intent
- Careful dissemination
 - Watch out for subject matter waiver – witness preparation/document disclosure/use of common interest exception
 - Demonstrate efforts to preclude/recover inadvertent disclosures
- Use legal advice/compliance as defense prudently
- Provide for explicit transfer of privilege in change of control

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Questions?

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