

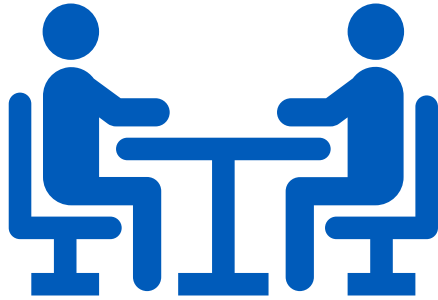


## ATTORNEY-CLIENT PRIVILEGE

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**Attorney-Client Privileged--Attorney Work Product-- Confidential**

# The Attorney-Client Privilege



- **When is the “privilege” relevant?**

- Discovery in disputes/litigation- when a 3<sup>rd</sup> party is trying to gain access to EDFR communications

- **Why does the privilege exist?**

- Encourages a client to contact an attorney to understand legal rights and obligations, and protects those communications from discovery
- Open client communication with attorney leads to greater likelihood client conduct conforms with legal requirements

- **The privilege is not as broad as you think!**

- Numerous exclusions and possibility of waiver

# The Attorney-Client Privilege (cont.)

## ELEMENTS OF THE ATTORNEY-CLIENT PRIVILEGE

### • A communication

- Verbal, written, email, text, Teams, etc.

### • Made between privileged persons

- For purposes of this discussion, EDFR is the “client” who acts through its officers and employees
- EDFR’s attorneys (both internal and outside lawyers) are the “lawyers”

### • In confidence

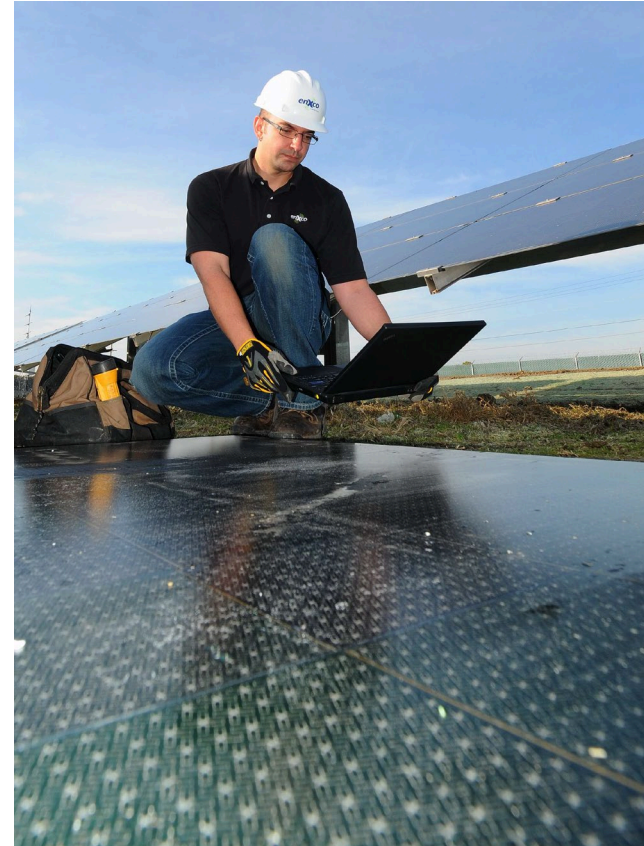
- Must be an intention to maintain confidentiality
- Presence of third parties generally destroys the privilege

### • For the *primary* purpose of seeking, obtaining, or providing legal assistance to the client

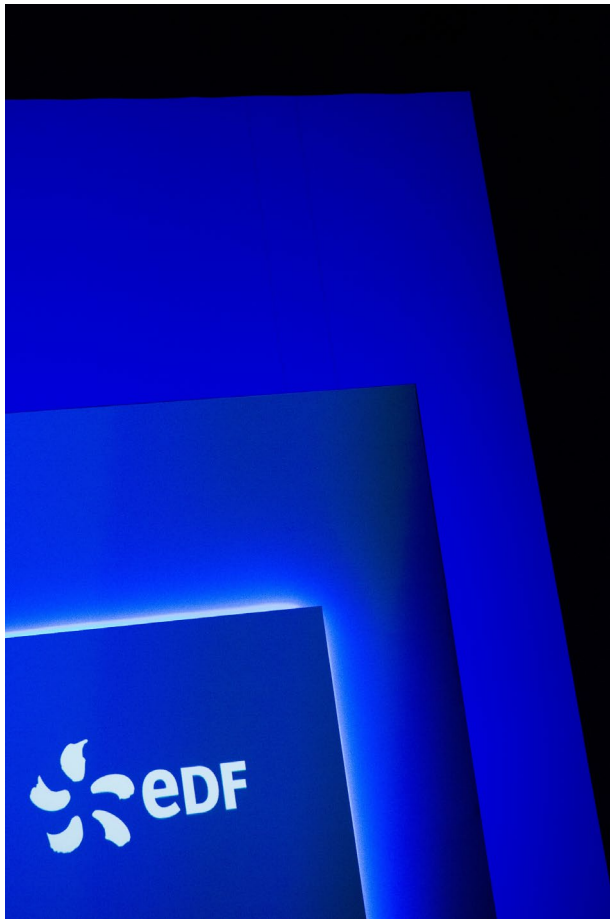
- Not sufficient that an attorney was involved in the communication (e.g., copied on an email or merely sitting in a meeting)
- Request for legal advice may be implicit (i.e. every communication does not need to begin with “Dear Josh- I need legal advice from you” in order to be privileged)
- However, starting an email with “Dear Josh- I need legal advice from you” is a GOOD IDEA if you want to ensure the privilege applies
- Whether a communication is primarily about legal assistance becomes more nuanced with in-house counsel communications

# Attorney-Client Privilege Within Corporations

- Difference between corporate clients and individual clients
- **Federal Standard**- *Upjohn Co. v. United States*, 449 U.S. 383 (1981): Communications from employees to in-house counsel are generally protected if matters discussed with counsel fall within the employee's corporate duties
- **State Standard**- Most state privilege laws are generally aligned with the federal standard (exceptions follow "control group" test)
- For in-house lawyers, court will analyze which hat the lawyer was wearing- attorney or business advisor?



# Examples of COMMUNICATIONS that ARE NOT Privileged



- Communications with 3<sup>rd</sup> parties, including consultants (e.g., species consultants and development consultants), accountants, bankers, co-developers, JV partners, etc., unless the 3<sup>rd</sup> party is engaged by a lawyer in the context of a dispute or specific transaction
- Communication seeking business, not legal, advice
- A business communication simply marked “privileged”
- Forwarded communication without commentary (“FYIs”)
- Non-privileged documents sent to an attorney
- Details regarding underlying privileged communication: the fact that legal advice was sought or given; who was present; when and where the conversation took place, and how long; entries and records of meetings (e.g., Outlook records)

# Waiver of the Privilege



- Privilege belongs to the client (e.g., EDFR, who acts through officers and employees), and can be waived by the client
- Privilege is waived once material is disclosed to a 3<sup>rd</sup> party
  - Intentional disclosure, including to consultants
  - Failure to take adequate precautions
  - Pay attention to email recipients and who is copied, especially when “replying to all”
- A confidentiality agreement with a 3<sup>rd</sup> party does not maintain the privilege
- Waiver of privilege for a single communication may result in waiver of privilege for all communications on that subject

# What can I do?

- Ask if your communication will be protected before you provide details
- **Pick up the phone!** Do not use emails, texts, Teams or social media if possible
- If you have to communicate by email and want it protected:
  - Explain in the communication that you, “are seeking legal advice”
  - Want to send a report or document, send it to an attorney, copy others that you want notified and begin with: “Per your instructions/direction, attached is the \_\_\_\_\_ you requested...”
- Avoid copying independent consultants or other third parties



# A Few Words On Electronic Communications

## BEWARE OF ELECTRONIC COMMUNICATIONS!

Every email, text, Tweet, post, etc. may some day be viewed by a 3<sup>rd</sup> party trying to use that information against you or EDFR

The communications seem casual and informal but they are no less relevant than formal legal positions of EDFR

Avoid sarcasm or humor that could be misinterpreted

Imagine each communication is a formal letter on EDFR letterhead

PLEASE BE THOUGHTFUL ABOUT WHAT YOU PUT INTO ELECTRONIC COMMUNICATIONS



# IF YOU ARE UNCERTAIN, PLEASE ASK

- If you have questions about whether you should send an email or other communication, pick up the phone and call a member of the EDFR legal team - we welcome these questions!

Thank You