

A corporation's in-house legal department initiated an internal investigation after being informed of potential misconduct involving payments made to government officials. As part of the investigation, an attorney from the legal department interviewed every member of the corporation's accounting department responsible for making such payments. The attorney took detailed notes of the accountants' statements and her corresponding mental impressions. Upon completing the internal investigation, the corporation's legal department informed the Internal Revenue Service (IRS) of the payments. The IRS then opened an investigation into the legality of such payments and now seeks the production of the interview notes. The corporation's legal counsel has objected on the ground of privilege.

Which portion of the notes, if any, is likely privileged?

- A. All of the notes are privileged.
- B. Only the portion concerning the accountants' statements is privileged.
- C. Only the portion containing the attorney's mental impressions is privileged.
- D. None of the notes are privileged, provided that the IRS can show a substantial need for the notes and cannot otherwise obtain them without undue hardship.

Explanation:

Attorney-client privilege for corporate clients

Control-group test	Confidential communication* privileged if it: was received from employee in position of control or who takes substantial part in decision-making
(minority state view)	
Federal standard	Confidential communication* privileged if it: was made by any employee for express purpose of securing legal advice for corporation <i>and</i> related to employee's specific corporate duties
(& majority state view)	

*A communication is confidential if it was intended to be & was kept confidential.

The **attorney-client privilege** protects confidential [communications](#) between an attorney and a client made for the purpose of obtaining or providing legal assistance for the client. When an attorney represents a **corporate client**, some states limit this privilege to communications received from employees in a position of control or who take a substantial part in decision-making (ie, the "control group"). However, federal law extends this privilege to communications from **non-control-group employees** if the communication:

concerned **matters within** the employee's **corporate duties** *and* was made for the **purpose of securing legal advice** for the corporation.

Here, the attorney's notes include statements made by employees in the corporation's accounting department. Although these employees may not be part of the "control group," the statements concern payments made to government officials—a matter that likely is within the accountants' corporate duties. And since the accountants presumably knew that they were being interviewed so that the corporation could obtain legal advice about those payments, the communications contained in the notes are likely privileged (**Choices C & D**).

However, the attorney's mental impressions are not covered by the attorney-client privilege; they are protected by the [attorney work-product](#) privilege. Under this doctrine, ordinary work product (eg, witness statements) is discoverable if the requesting party shows a substantial need for the information and cannot otherwise obtain it without undue hardship. But *opinion* work product (eg, mental impressions) is discoverable only in rare instances. Therefore, the portion containing the attorney's mental impressions is likely privileged too (**Choices B & D**).

Educational objective:

For corporate clients, federal law extends the attorney-client privilege to confidential communications from any employee that (1) concerned matters within the employee's corporate duties and (2) were made for the purpose of securing legal advice for the corporation.

References

Upjohn Co. v. United States, 449 U.S. 383, 394 (1981) (extending attorney-client privilege to employee communications concerning matters within the employee's corporate duties made to obtain legal advice for the corporation).

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