



K&L GATES

2019 American Agricultural Law Association Annual
Symposium

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PRESENTERS



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Education

J.D., University of North Carolina at Chapel Hill School of Law, 1996 (with honors; *North Carolina Law Review*, Member; Order of the Coif)

B.A., University of North Carolina, 1993

Admissions

Bar of North Carolina

- 23 years' experience in restructuring, insolvency, litigation
- US Practice Group Coordinator for Restructuring & Insolvency
- Wake County Bar Professionalism Committee member
- Former Wake County Grievance Committee member
- Frequent speaker on ethics topics

PRESENTERS



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Education

J.D., Chicago-Kent College of Law, Illinois Institute of Technology, 1999 (order of the Coif; Dean's List)

B.A., Loyola University-Chicago, 1995 (*summa cum laude*; Dean's List)

Admissions

Bar of California

Bar of Idaho

Bar of Illinois

Bar of Oregon

- 20 years' experience in restructuring & insolvency
- Commercial & agricultural bankruptcies
- Oregon State Bar, Debtor-Creditor Editorial Board
- Oregon State Bar, Chair, Agriculture Law Section Executive Committee
- Food Alliance, Board of Directors

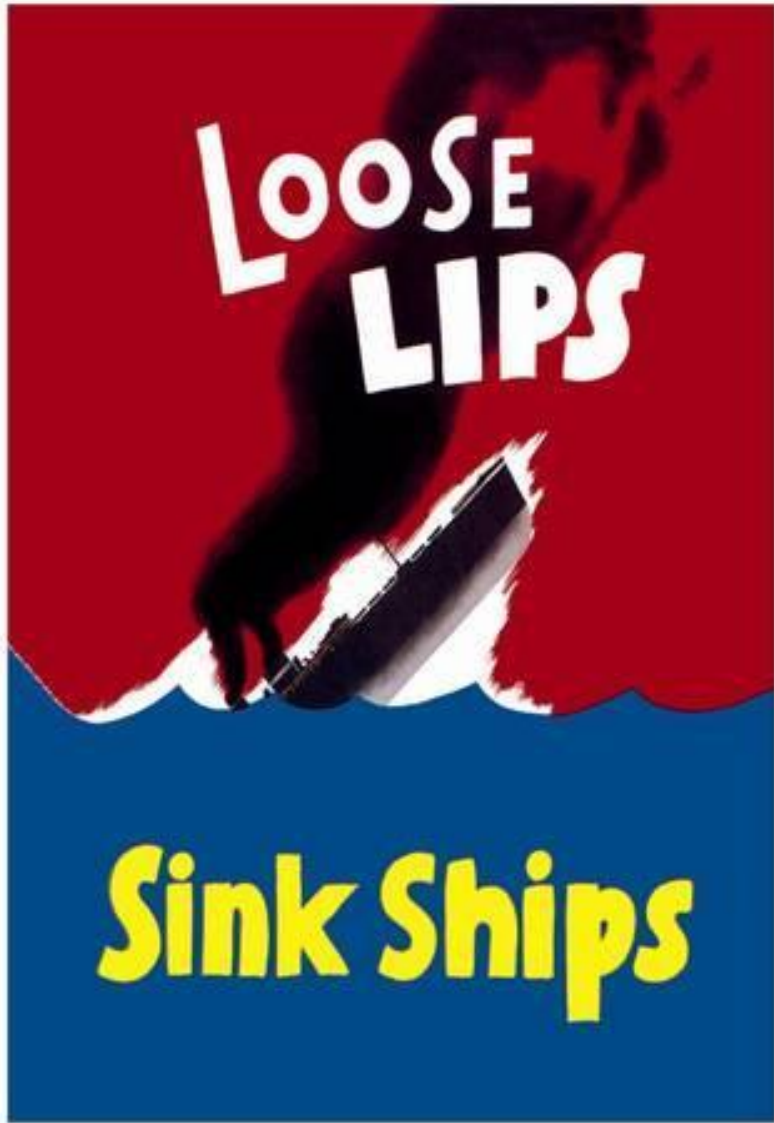
OUTLINE

- **INTRODUCTION**

- **TOP 10 WAYS TO LOSE THE PRIVILEGE**

1. Via Social Media
2. The Cloud
3. E-Discovery
4. Legal/Business Mix
5. Opening the Door / Internal Investigations
6. Lawyer not licensed
7. Overseas communications
8. Over-sharing
9. Merger/Dissolution
10. Crime-fraud exception

- **CONCLUSIONS / TAKEAWAYS**



INTRODUCTION

INTRODUCTION

- **History of the privilege**
 - Presumed to be about 500 years old but its origins are murky
 - A reported case in 1654 applied the privilege, but it clearly existed before then
 - *Walfron v. Ward, Style 449 (K.B. 1654)* (“a Counsellor at the Bar was examined upon his Oath to prove the death of Sir Thomas Conye. Whereupon Serjeant Maynard urged to have him examined on. . . some matters whereof he had been made privy as of Counsel in the cause. But Roll Chief Justice answered, He is not bound to make answer for things which may disclose the secrets of his Client’s cause, and thereupon he was forborn to be examined.”)

INTRODUCTION

- **History of the privilege**
 - Early decisions show that it was an important privilege
 - But not without controversy, and not widely invoked
 - Early in its history (before 1800), invoked by counsel
 - “Gentlemen do not reveal confidences”
- **Purpose of the privilege**
 - To enable/enhance the ability of lawyers to give effective representation
 - “to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisers must be removed” (Wigmore)

INTRODUCTION

- **Importance of the privilege**
 - “The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good.”
 - Prof. Geoffrey C. Hazard, Jr., in *An Historical Perspective on the Attorney-Client Privilege*, 66 *California Law Review* 1061

INTRODUCTION

■ Nuts and bolts requirements

- (1) Acting as attorney?
- (2) Who is the client?
 - The Entity Approach
 - “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents” VA 1.13(a)
 - Not presumed to represent individual constituents
 - Exceptions
 - Closely held family corporations (*In re Banks*, 584 P.2d 284 (Or. 1978)) (holding that where an attorney’s firm represented both the closely held family corporation and the individual who was the majority holder of the stock at the time that the contract between the parties was prepared, the firm could not subsequently represent either one without the consent of both)
 - Corporate affiliates
- (3) Primary purpose of communication
- (4) Reasonable expectation of privilege

INTRODUCTION

- **Not Privileged:**
 - General description of lawyer's services
 - Historical facts
 - Info learned from others and relayed between lawyer & client
 - Non-privileged communication marked "PRIVILEGED"

Introduction

Applicable Rules

- Virginia Rules of Professional Conduct
 - Rule 1.6– Confidentiality of Information
 - Rule 1.7– Conflict of Interest: Current Clients
 - Rule 1.13-- Organization as a Client
 - Rule 5.5– Unauthorized Practice of Law

Federal Rules of Evidence

- Rule 501– Privilege– governing law
- Rule 502-- Waiver

INTRODUCTION

- **The privilege belongs to the client (Rule 1.6)**
- **The privilege can be waived by the client**
 - Intentionally
 - Unintentionally
 - Strategically
- **Waiver is not limited to the precise thing that was disclosed**
- Exposes all communications and other documents on the same subject
 - *Waymo LLC v. Uber Techs., Inc.*, N.D. Cal., No. 17-cv-00939, 8/14/17

INTRODUCTION

Modern challenge: Is there such a thing as confidentiality anymore?



INTRODUCTION

- **Dire consequences of losing the privilege – a recent case filing**

Theodosios Roussos; Estate of
Paula Roussos

v.

David R. Haberbush; Haberbush
& Associates, LLP

11/13/2017 BC683395 Beaudet

Legal malpractice Defendants improperly divulged
privileged information, causing \$40 million in damages.

Randall Awad



The Top 10 Ways To Lose The Privilege



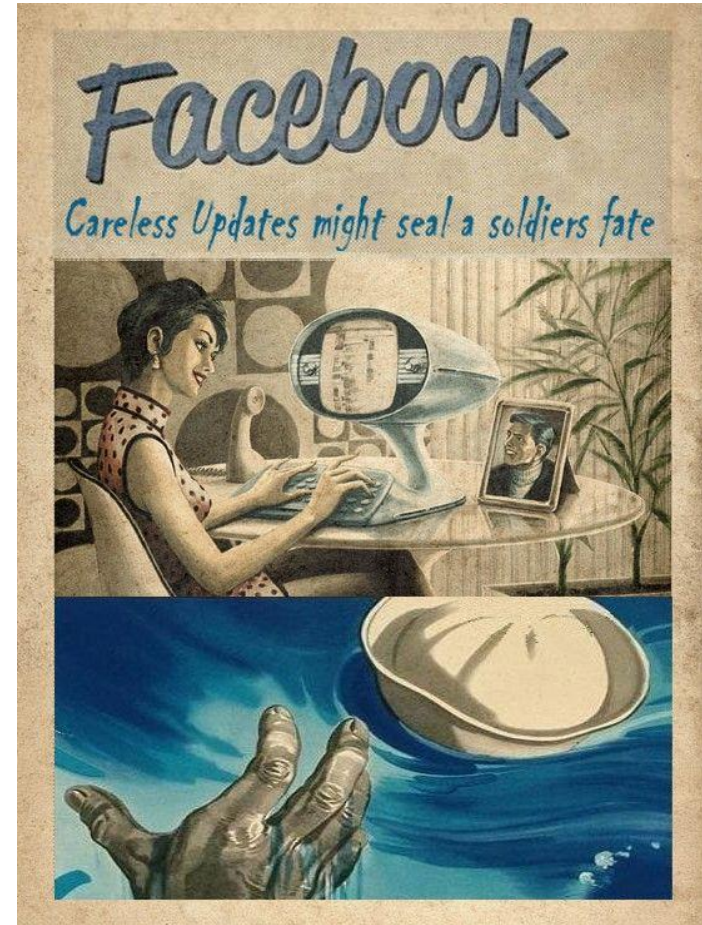
1. Social Media

- **What's different about social media?**
 - Ubiquity
 - Impulse control
 - Wide dissemination of everything
 - Misperception of anonymity
 - No bright line between personal & private life
 - Differences in generations in how they understand & value privacy



1. Social Media

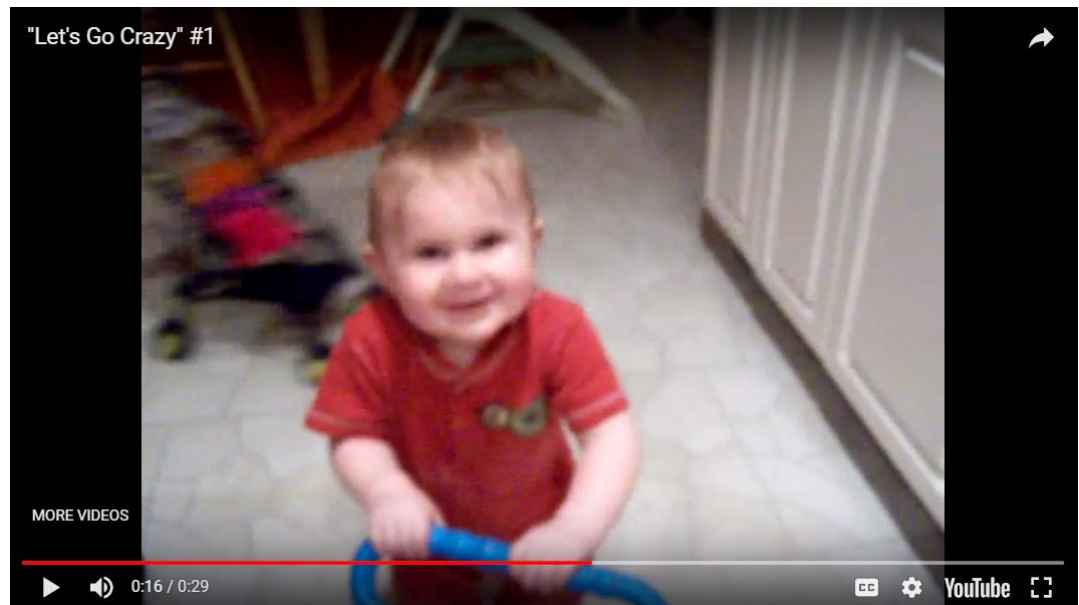
- Now well-established in case law: client or employee publication of attorney communications on Facebook, Twitter, blogs, etc. constitutes a waiver
 - These are not private
 - No expectation of privacy



1. Social Media

“Dancing Baby” case –

Lenz v. Universal Music
Case 5:07-cv-03783-JF
(N.D. Cal. November 17,
2010)



Held: plaintiff waived attorney-client privilege by (a) emailing friends about legal strategy; (b) a gmail chat with a reporter, and (c) repeatedly posting on her blog about the case, including responses to comments.

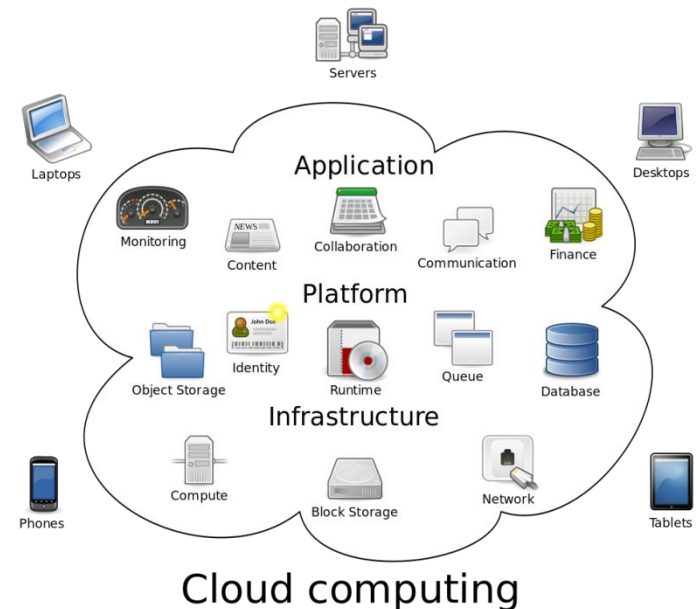
1. Social Media

Important: even the “private” portions of social media sites are not truly private – the operators themselves can view the material and disseminate it

- *McMillen v. Hummingbird Speedway* (Pa. 2010)
 - “When a user communicates through Facebook or MySpace, however, he or she understands and tacitly submits to the possibility that a third-party recipient, i.e., one or more site operators, will also be receiving his or her messages and may further disclose them if the operator deems disclosure to be appropriate.”

2. The Cloud

- Storage of large volumes of information
- May include privileged information
- How is it protected?
- Do third-parties have access?
 - *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, W.D. Va. 2017
- Can it be hacked?
- Best practices
 - Password protect, limit availability, adopt comprehensive information-security program



3. E-Discovery

- **Large volumes of information produced**
- **Protecting Your Own Information**
 - Restrict internal dissemination
 - Recent limits on protective orders
 - Watch for inadvertent production

2 sets of eyes if possible; Clawback provisions
- **Protecting information produced to you**

4. Mix of Business & Legal Advice



“Excellent—let’s run it through legal.”

4. Mix of Business & Legal Advice

- “[M]odern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.”
- “Business advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client.”
 - *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 795 (E.D. La. 2007)
- In-house counsel – no presumption of privilege
- “Mixed” communications – privilege not likely to attach
- “Joint client” issues for in-house counsel
- Privilege log issues for in-house counsel-- *EEOC v. BDO USA, LLP*, 5th Cir. (2007)

4. Mix of Business & Legal Advice

■ Best Practices

- Provide a label (“Privileged”) or descriptor (“In response to your request for legal advice”)
 - Don’t put it on everything, every time – use judgment
- Avoid using business title when giving legal advice
- Give an “Upjohn warning” (I represent the corporation) when doing interviews
- Segregate legal and business functions, communications, files, meetings
- Don’t include unnecessary participants
- Be clear on “client” identification and information sharing

5. Opening The Door / Internal Investigations

- **When the “door” opens, it may swing further open than you expect**
- What causes the “door” to open?
 - Putting the A-C communication in evidence
 - Using it as a “sword”
 - Examples:
 - Patent and tax opinions
 - Internal investigations
 - Fiduciary “good faith reliance” opinions

5. Opening The Door / Internal Investigations

Example: Baylor University

- Allegations of sexual misconduct
- Football coach, AD, President – fired, demoted, resigned
- Internal investigation findings published

AUGUST 15, 2017

Sweeping Privilege Loss—Baylor Must Produce Documents From Sexual-Assault Investigation

Attorney-Client Privilege, Waiver, Work Product Doctrine, internal investigations • Tags: attorney-client privilege, Baylor University, internal investigations, Pepper Hamilton, sexual assault scandal, waiver, work-product doctrine

In a significant ruling that may exacerbate the continuing fallout from Baylor University's sexual-assault scandal—and provide lessons for those conducting internal investigations—the USDC WDTX rejected Baylor's "unsupported and unconvincing" privilege argument and ordered it to produce "all materials,



communications, and information" provided to its investigating law firm.

The court held that Baylor's intentional release of the law firm's factual findings and recommendations necessarily disclosed attorney-client communications and

constituted privilege waiver. *Doe v. Baylor Univ.*, No. 16-CV-173-RP (W.D. Tex. Aug. 11, 2017). You may read the opinion [here](#).

5. Opening The Door / Internal Investigations

Key Questions:

- Was the investigation conducted for business or legal reasons?
 - Battleground: is “compliance” a business or legal reason?
- Was the report prepared for the purpose of communicating with legal counsel?

6. Lawyer Not Licensed

■ Inside Counsel (Rule 5.5)

■ What if inside counsel is not licensed?

- Effect on Privilege

■ State registration or licensure requirements

- Most states, INCLUDING VA: get licensed or register
- Virginia has not adopted the ABA Model Comments 15-18 to Rule 5.5 (these comments provide exceptions for in-house counsel residing and employed in one state but admitted in another state to provide legal services to employer – not applicable in VA)
- Must not opine on VA law and cannot appear in court

6. Lawyer Not Licensed

- **Outside Counsel (Rule 5.5)**
 - *Birbrower* case and the aftermath
 - *Birbrower*: NY attys prosecuting arbitration in CA is UPL
 - IL Advisory Op: regular conduct of arbitrations in IL by out-of-state counsel is UPL
 - *Desilets*: federal court rules trump state UPL rules in federal courts
 - *Fought, the Restatement, and Model Rule 5.5*: OK if “reasonably related” to proceedings in the state of licensure
 - VA also allows for occasional unlicensed practice if “reasonably related to the representation of a client” whom attorney represents elsewhere

7. Overseas Communications

Problem: Most countries outside the U.S. do not observe the attorney-client privilege. Even the U.K. does not recognize it for in-house counsel

- When will you face this problem?
 - Communicating with overseas employee
 - Action to be taken in foreign country
 - Litigation or arbitration in foreign country

8. Over-Sharing

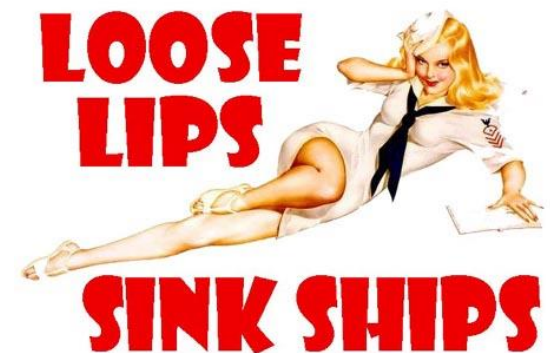
Problem: Privilege can be waived (or fail to exist in the first place) if disclosure goes beyond attorney and client

- PR Firm (*Universal Standard Inc. v. Target Corp.*, S.D.N.Y., 2019)
- Investment Bankers
- Insurance Claims Adjusters (*Olsen v. Owners Ins. Co.*, 2019 WL 2502201 (D. Colo. June 17, 2019))
- Experts / Consultants
- Contract Employees
- Non-essential persons



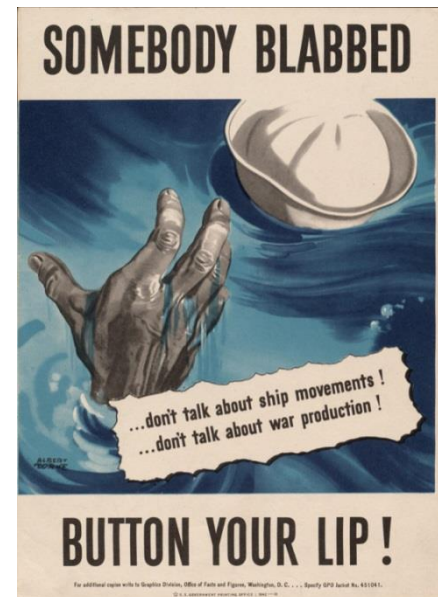
8. Over-Sharing

- ***United States v. Stewart***, (S.D.N.Y. 2003)
 - Privileged waived because defendant shared counsel's email with her daughter
- ***American Legacy Foundation v. Lorillard Tobacco Co.***, (Del. Ch. 2004)
 - Privilege waived by sharing law firm's advice with PR firm
- ***Stenovich v. Wachtell, Lipton***, (NY 2003)
 - A commercial, rather than legal, "common interest" does not justify sharing privileged info (to investment advisor)



8. Over-Sharing

- **Even over-sharing inside the corporation can waive the privilege**
 - *Verschoth v. Time Warner, Inc.* (S.D.N.Y. 2001) – privilege waived if communication disseminated beyond “need to know”
- Practice tips:
 - Pay attention to email lists and “reply all”
 - “Need to know” is a legal question focused on the communication
 - Example: in remedying an auto design defect, VP and engineer need to know lawyer’s advice, but assembly line worker does not



9. Merger/Dissolution

- Privilege belongs to corporation, not individuals
- **Scenario: sale of corporation – Seller corp. no longer exists – who (if anyone) gets the privilege?**
- 2014 Delaware decision in *Great Hill Equity Partners*:
 - Absent a contractual clause specifying otherwise, the Buyer acquires the privilege
 - Problem: what if Buyer sues management and/or shareholders of Seller for fraud?
 - Held: they gave up the privilege
 - Solution: privilege retention clauses in sale-acquisition agreements

9. Merger/Dissolution

- **Scenario: Corporation dissolves or enters insolvency proceeding or wind down**
 - *Red Vision Sys., Inc. v. Nat'l. Real Estate Info Servs., LP*, 108 A.3d 54 (Pa. Sup. Ct. 2015).
 - “Communications between a business entity and its lawyers remain protected by the attorney-client privilege after the company dissolves or ceases operations “so long as the company retains some form of continued existence evidenced by having someone with the authority to speak for the ‘client.’”
 - *Gilliland v. Germita*, 71 Fed. R. Evid. Serv. 285 (W.D.Pa. Sept. 14, 2006)
 - “[C]ounsel has no duty to assert the attorney-client privilege on behalf of a nonoperating/defunct corporation, and indeed, counsel lacks the ability to do so. The better rule ... is that there should be a presumption that the attorney-client privilege is no longer viable after a corporate entity ceases to function, unless a party seeking to establish the privilege demonstrates authority and good cause.”

10. Crime/Fraud Exception

- Covers not a past crime or fraud, but an ongoing or future one
- The communication itself must be in furtherance of the crime or fraud
- The crime or fraud does not have to be carried to fruition for the exception to apply
- *Clark v. United States*, U.S. Supreme Court 1933:
 - “A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.”



Conclusions / Takeaways



CONCLUSIONS / TAKEAWAYS

1. Know the Rules
 - Look at the applicable Rule(s) for your jurisdiction
2. Be Circumspect & Limit Dissemination
3. Tell Employees / Clients Not to Post or Talk



CONCLUSIONS / TAKEAWAYS

4. Don't Delete (Spoliate) If There Is a Leak
5. Get Advice & Talk About It





Questions?





Thank You



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