

Understanding Attorney-Client Privilege



BECCA HUMAN

Attorney, Perkins Coie



ADA BANASIK

Principal Engineer, Maul Foster &
Alongi

What is attorney-client privilege?





Attorney-client privilege is NOT:

- A get-out-of-jail free card
- An all-access pass to confidentiality
- An excuse to start a criminal enterprise with your attorney 😊

Attorney-client privilege IS:

- Protection for written, verbal, and other confidential communications between a lawyer and a client relating to legal advice or services.

The basics of ACP:

- Confidentiality between attorneys and clients is an old doctrine, coming from the English common law.
- Most states have ACP in statute, and it is also in the Professional Rules of Conduct.
- Washington, RCW 5.60.060(2):
 - “An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.”



When does ACP apply?

- The ACP applies when a lawyer is providing advice to a **client**, or the client seeks advice from their lawyer (or the company's lawyer).
- Key terms:
 - **LAWYER:** means a licensed attorney, engaged by a client.
 - **ADVICE:** means legal or strategic advice.
 - **CLIENT:** a person or entity that has engaged the lawyer, and all persons employed by an entity that has engaged the lawyer.





When does ACP NOT apply?

- 1) Gossip:
 - Confidentiality is breached by the inclusion of a third party that is not the client or the lawyer.
- 2) The “cc” or “potted plant” strategy:
 - Simply cc’ing an attorney on a document or email is not necessarily sufficient to invoke the attorney-client privilege.
 - Legal advice needs to be sought.

When does ACP NOT apply?

- #3: Internal discussions
 - All internal documents, emails and discussions among client's staff where the lawyer is not present or asked for advice (including communications about the lawyer or the case).
 - Gray areas for consultants and contractors:
 - Most secure: when the attorney/law firm engages the consultant and pays them directly. Consultant is assisting the lawyer in representing/advising the client.
 - Less secure: when the consultant is engaged directly by the client, but the attorney is involved in document review and discussions
 - Likely okay in most situations; good to evaluate risk



EXAMPLE: Consultant ACP

- Concrete Plant (Plant) is inspected by Ecology for compliance with the Sand & Gravel Permit
- Ecology sends a Notice of Violation and Enforcement Action alleging that:
 - The Plant has missed collection of stormwater samples
 - The pond is not designed consistent with the Permit requirements and the Stormwater Manual
 - Employee training has not been conducted for 2 years
 - Site Management Plan does not reflect current site conditions
- Plant manager believes some of the allegations are incorrect and hires Perkins Coie to appeal the Enforcement Action
 - Perkins Coie recommends that the Plant hire Maul Foster & Alongi as a technical expert

EXAMPLE: Consultant ACP

- MFA and PC conduct a site visit and review available compliance records
 - MFA, PC and the Plant conduct an initial call/virtual meeting to discuss the site visit findings under attorney-client privilege confidentiality
- MFA then:
 - Reviews stormwater sampling records and rain gauge data and determines that the “missed” samples were during months that insufficient rainfall occurred to cause a discharge; the Plant did not properly document “no discharge” conditions, but no sample was missed
 - MFA prepares a hydrologic model of the site and pond to determine whether the current condition meets the permit and Stormwater Manual requirements
 - MFA conducts an employee training session virtually
 - MFA updates the Site Management Plan to reflect current site conditions
 - MFA discusses the results of the hydrologic model, recommended pond improvements and “no discharge” documentation with the Plant and PC during an attorney-client privileged virtual meeting

What is the risk of non-privileged communication?

Non-privileged information may be disclosed in a few ways:

- #1: Government Enforcement
 - Subpoenas for information
 - CERCLA 104(e) information demands (and equivalent state authority)
- #2: Discovery in Litigation
 - Requests for Production (document requests)
 - Depositions



ACP Quiz: Scenario 1

- Andy is the EHS lead at ABC Co. Manufacturing Plant. Andy emails Plant Manager Cindy and says in the email: *Cindy, samples we took today show that we are above our permit limit for BOD and TSS. The permit says we need to report to the agency by COB tomorrow.*
 - Is it attorney-client privileged?



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 - Not attorney-client privileged, because there is no attorney included in the email.



ACP Quiz: Scenario 2

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 - Not attorney-client privileged, because there is no attorney included in the email.
- Cindy writes back, *Can we re-sample? We were over these limits last month and I would hate to have to report this to the agency.* Cindy cc's Tom, ABC's in-house attorney.
 - Is this attorney-client privileged?



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 - Not attorney-client privileged, because there is no attorney included in the email.
- Cindy writes back, *Can we re-sample? We were over these limits last month and I would hate to have to report this to the agency.* Cindy cc's Tom, ABC's in-house attorney.
 - Probably not attorney-client privileged. Cindy is not asking Tom for legal advice. Tom as a “potted plant” does not create ACP.



ACP Quiz: Scenario 3

- Andy emails Cindy, Tom, and ABC's outside environmental counsel, Martha, and says: *I read our permit as requiring us to report this permit as a violation by COB tomorrow. Do you agree?*
 - Is this attorney-client privileged?



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- Andy emails Cindy, Tom, and ABC's outside environmental counsel, Martha, and says: *I read our permit as requiring us to report this permit as a violation by COB tomorrow. Do you agree?*
 - Yes, because Andy is asking Tom and Martha, lawyers of ABC, to give legal advice on what the permit requires.



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- What if Cindy replies all and says *Are you sure? We were over last month, and I would really like to not report again.*
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 - Yes, because Andy is asking Tom and Martha, lawyers of ABC, to give legal advice on what the permit requires.
- What if Cindy replies all and says *Are you sure? We were over last month, and I would really like to not report again.*
 - Yes, because Cindy is contributing to a legal/strategic question and seeking advice from the attorneys.



ACP Quiz: Scenario 5

- What if Tom (in-house counsel) replies to all and says *I've taken a look at the permit and agree with Frank but want to see what Martha has to say.*
 - Is this attorney-client privileged?



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- What if Tom (in-house counsel) replies to all and says *I've taken a look at the permit and agree with Frank but want to see what Martha has to say.*
 - Yes, because Tom is providing legal advice and seeking input from another attorney.



ACP Quiz: Scenario 6

- What if Tom (in-house counsel) replies to all and says *I've taken a look at the permit and agree with Frank but want to see what Martha has to say.*
 - Yes, because Tom is providing legal advice and seeking input from another attorney.
- What if Cindy replies all and includes Jeff, the Corporate EHS manager and says *Jeff, can you weigh in here; we have a possible reporting situation and I'd like to be careful.*
 - Is this attorney-client privileged?



ACP Quiz: Scenario 6

- What if Tom (in-house counsel) replies to all and says *I've taken a look at the permit and agree with Frank but want to see what Martha has to say.*
 - Yes, because Tom is providing legal advice and seeking input from another attorney.
- What if Cindy replies all and includes Jeff, the Corporate EHS manager and says *Jeff, can you weigh in here; we have a possible reporting situation and I'd like to be careful.*
 - Yes, because Jeff is contributing to a legal and strategic conversation including attorneys and is employed by ABC (the client).



ACP Quiz: Scenario 7

- The plant's NPDES permit is up for renewal. The permit is important, and the company would like to avoid any new, more stringent limits. ABC retains Acme Environmental to assist them in developing the permit renewal application. Acme develops a draft application and sends it to Andy, Cindy and Jeff.
 - Is the draft application covered by attorney-client privilege?



ACP Quiz: Scenario 7

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 - Not privileged, because a lawyer is not involved in the review.



ACP Quiz: Scenario 8

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 - Not privileged, because a lawyer is not involved in the review.
- Andy sends the draft to Tom and Martha and asks for their review and comment.
 - Is the email and attachment covered by the ACP?
 - What if Frank cc's ACME on the email?



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 - Not privileged, because a lawyer is not involved in the review.
- Andy sends the draft to Tom and Martha and asks for their review and comment.
 - Email and attachment are covered – Andy is seeking legal advice and attorney work product.
 - If Frank cc's ACME – likely still privileged.



ACP Bonus Question

- What effect does this label have on attorney-client privilege?

CONFIDENTIAL – ATTORNEY-CLIENT PRIVILEGED

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- Less than you think! The other elements of ACP still need to be present in order to truly privilege a document.
- However, this label can be useful in a later document review setting for flagging truly confidential communications and work-product.



In summary:

- Be aware of when ACP does (or does not) apply.
- Be thoughtful about all communications, especially written or email communications, and evaluate the risk of putting sensitive information in writing.
- Don't assume that copying your attorney on an email will protect and privilege that email.
- Don't be paralyzed, and ask your attorney for advice if something is unclear to you.



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