



Environmental Newsletter

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Working with Environmental Consultants: *Best Practices for Preserving Attorney-Client Privilege and Work Product Protection*

By Harry E. Grant and Courtney Seim

One issue often confronted by clients and their lawyers is whether the attorney-client privilege and work-product doctrine will apply to work performed by an environmental consultant hired on behalf of a client. The issue stems from a general rule that voluntary disclosure of privileged information to a third party acts as a waiver of the privilege.

Attorney-Client Privilege

The key to determining whether the privilege applies in situations involving communications with consultants is whether the communications are intended to be confidential and whether the primary purpose of the communication is to provide legal advice to the client.

In general, the best practice for communications involving consultants is to assume that there is no privilege, unless it can be clearly demonstrated that the communication was made in connection with the client's request for legal advice. Therefore, it is very important for both the attorney and client to identify bases for the privilege to apply. For example, one court has opined that the privilege can apply in a situation where the consultant provides a report to counsel for the specific purpose of explaining or interpreting technical data to allow counsel to then give legal advice to the client. However, this is often a highly fact-specific determination. In a borderline case, courts will likely find no privilege, so it is important to document that purpose for the consultant's work.

In *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994), the court emphasized that the consultants were not hired to put information into a useable form so that the attorneys could provide legal advice. Therefore, the consultants were not agents encompassed by the privilege and the privilege did not apply to documents or communications between the consultant and the client.

In contrast, in *Olson v. Accessory Controls & Equip. Corp.*, 254 Conn. 145, 757 A.2d 14 (2000), the Connecticut Supreme Court held that communications between outside counsel and an environmental consultant hired by outside counsel were privileged. The court found it persuasive that counsel included in her retention letter to the consultant, a number of admonitions regarding not disclosing any information related to the investigation or the subsequent report and stating that all communications were to be confidential and made solely to aid outside counsel in providing legal advice.

Work Product Doctrine

The work product doctrine may provide broader protection for documents created by consultants. In general, work product protection can extend to materials prepared by a party or its "representative," who can include, among other people, a consultant. The key to determining whether the work product applies to documents created by consultants is whether the documents were prepared in the ordinary course of business or in anticipation of litigation. *Bituminous Casualty Corp. v. Tonka Corp.*, 140 F.R.D. 381 (D. Minn. 1992). Documents created in the ordinary course of business are not protected as work product.

It is not always easy to determine when a document has been prepared "in anticipation of litigation." In the *Bituminous Casualty* case, the federal district court in Minnesota found that documents created after a corporation has been designated a responsible party were made under the strong prospect of future litigation over issues such as the propriety of the designation and the scope and adequacy of the cleanup.

In *Metro Wastewater Reclamation Dist. v. Continental Casualty Co.*, 142 F.R.D. 471 (D. Colo. 1992), however, the federal district court in Colorado refused to grant work-product protection to documents generated after an EPA consent order was entered. There the court found that, "[o]nce a settlement was reached with the EPA, activities undertaken to comply with the settlement terms did not relate to existing or anticipated litigation." *Id.* at 477-78. Courts have also held that reports and compilations by a consultant for a remedial plan, to be submitted to regulatory authorities are not protected from disclosure as work product.

While the work product doctrine may protect some documents prepared by consultants, it's important to keep in mind that courts vary in their interpretation and application of the "in anticipation of litigation" concept. Even more important, however, is that the protection provided by the work product doctrine is not absolute - an adversary may still be able to obtain work product in discovery if they can demonstrate substantial need and undue hardship.

Practical Tips

1. Carefully define the scope of work in an engagement/retainer letter with the consultant.
2. The prospect of litigation should be identified in writing at the outset of a matter.
3. Resist the urge to use an attorney-client privilege or work product label on all communications and documents.
4. Generally speaking, counsel should retain an environmental consultant on behalf of the client. However, it's important to remember that this fact alone will likely not be sufficient for the privilege to attach.
5. Do not have environmental consultants "sit in" on otherwise privileged discussions between the client and counsel, unless it is absolutely necessary and worth the risk of waiving the privilege that would protect the communication.

If you have any questions about this newsletter, please contact one of the authors listed above or the Riddell Williams attorney with whom you normally consult.

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Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1192

Telephone: 206.624.3600
Facsimile: 206.389.1708
www.riddellwilliams.com