



## Environmental Newsletter

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### Attorney-Client Privilege Applies to Environmental Consultants

By [Shata Stucky](#)

The Ninth Circuit recently held that a corporation's attorney-client privilege extends to communications between corporate counsel and outside consultants who are "functional employees." See [United States v. Graf](#), No. 07-50100, slip op. at 9605, 9622 (9th Cir. July 7, 2010). This ruling provides new protections for companies addressing sensitive environmental matters.

The court's decision helps to clarify that an outside consultant can qualify as an agent of the corporate client for the purpose of applying the privilege. More importantly, the court in *Graf* provides much-needed guidance regarding the extent to which the attorney-client privilege will apply to protect work performed by an environmental consultant.

#### Environmental Consultants as Agents of the Corporation

The attorney-client privilege protects certain communications between an attorney and her client and keeps those communications confidential. Courts have had difficulty applying the privilege to corporations because "[a]s an inanimate entity, a corporation must act through agents" and "cannot speak directly to its lawyers." *Id.* at 9618 (quotations omitted). The Supreme Court has held that an employee is an agent covered by the corporation's privilege when the employee speaks with the corporation's attorneys "at the direction of the management . . . regarding conduct or proposed conduct within the scope of employment." [Upjohn Co. v. United States](#), 449 U.S. 383, 403 (1981). But, until now, it had been unclear in the Ninth Circuit whether an outside consultant could qualify as an agent of the corporate client for the purpose of applying the privilege.

As noted above, the *Graf* decision holds that the attorney-client privilege applies to communications between a corporation's attorneys and an outside consultant when the consultant is a "functional employee." *Graf*, slip op. at 9622. The consultant in *Graf* was considered to be a "functional employee" because "he regularly communicated with insurance brokers and others on behalf of [the company], marketed the company's insurance plans, managed its employees, and was the company's voice in its communications with counsel." *Id.* at 9620. The *Graf* court also noted that the consultant was the attorneys' "primary contact" at the company. *Id.*

#### Best Practices

The Ninth Circuit does not expressly define "functional employee" or set forth a specific test. It is therefore difficult to predict exactly how *Graf* will be applied. For example, environmental consultants frequently communicate with third parties on behalf of corporations and act as a voice for corporations in communications with counsel, but they usually do not provide any marketing services or manage employees. It remains to be seen whether consultants that fall into this category will be considered "functional employees" under *Graf*. Corporations should, therefore, continue to implement best practices for preserving the attorney-client privilege until courts provide more certainty. See H. Grant and C. Seim, [Working with Environmental Consultants: Best Practices for Preserving Attorney-Client Privilege](#), Riddell Newsletter (March 23, 2010).

On a related topic, the *Graf* decision clarifies that a consultant's communications with the corporation's attorneys may be protected by a personal attorney-client privilege, in addition to a corporate attorney-client privilege. The personal privilege applies if the consultant can demonstrate, among other things, that the substance of her conversation with counsel did not concern matters within the company or the general affairs of the company and that the attorney saw fit to communicate with the consultant in her individual capacity, knowing that a possible conflict could arise. *Graf*, slip op. at 9626.

When the consultant has a personal privilege, she has independent authority to protect the privileged communication. And, absent a joint waiver, the corporation cannot disclose the privileged communication when disclosure is in the corporation's best interest. To avoid conflicts that could arise from a consultant having independent authority to protect privileged information, an attorney who represents a corporation should always clarify that she represents the corporation and does not represent the consultant in the consultant's personal capacity.

If you have any questions about this Newsletter, please contact the author listed above or the Riddell attorney with whom you normally consult.

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