

The Iowa Basics of Attorney-Client Privilege and Attorney Work Product

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Agenda

- I. Attorney-Client Privilege (“ACP”) in current events
- II. Basics of ACP
- III. ACP for In-House Counsel
- IV. Waiver of ACP
- V. Basics of Attorney Work Product

What is Attorney-Client Privilege?

The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. U.S.

United States Supreme Court

1981

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. The privilege is also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.

Geoffrey C. Hazard, Jr.
Sterling Professor Emeritus
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ACP in Current Events

#INTEL SEPTEMBER 18, 2017 / 4:31 PM / 22 DAYS AGO

Can White House counsel McGahn claim client privilege in Mueller probe?

Alison Frankel

12 MIN READ



(Reuters) - In an extraordinary article on Monday, The New York Times disclosed tension between two White House lawyers, White House counsel **Donald McGahn** and **Ty Cobb**, whom President Trump brought into the West Wing to handle independent counsel Robert Mueller's investigation of alleged Russian interference in the 2016 elections.

According to the Times, which overheard Cobb's lunchtime conversation last week with Trump counsel **John Dowd**, McGahn is worried about Cobb's tell-all approach toward turning over documents to Mueller. McGahn's own lawyer, **William Burck of Quinn Emanuel Urquhart & Sullivan** has supposedly asked Cobb to tell him whether the president intends to claim executive or attorney-client privilege over any of the documents Mueller wants to see.

Government Attorneys

- Executive Privilege: United States v. Nixon
- Circuit split regarding ACP between federal government lawyers and their clients
- ACP not upheld in Whitewater/Paula Jones investigation cases:
 - In Re Grand Jury Duces Tecum, 112 F.3d 910
 - In re Bruce R. Lindsey, 158 F.3d 1263
- ACP upheld in In re Grandy Jury Investigation, 399 F.3d 527

8th Circuit Whitewater Decision

“We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its inhouse attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.”

D.C. Circuit Whitewater Decision

“As we have established, government officials have responsibilities not to withhold evidence relating to criminal offenses from the grand jury. The President cannot bring Lindsey within his personal attorney-client privilege as he could a private citizen, for Lindsey is in a fundamentally different position. Unlike in his role as an intermediary, Lindsey necessarily acts as a government attorney functioning in his official capacity as Deputy White House Counsel in those instances when the common interest doctrine might apply, just as in those instances when the government attorney-client privilege might apply. His obligation not to withhold relevant information acquired as a government attorney remains the same regardless of whether he acquired the information directly from the President or from the President's personal counsel. Thus, his status before the federal grand jury does not allow him to withhold evidence obtained in his official role under either the government attorney-client privilege or the President's personal attorney-client privilege applied through the common interest doctrine.”

Second Circuit Connecticut Governor Decision

“To be sure, it is in the public interest for the grand jury to collect all the relevant evidence it can. However, it is also in the public interest for high state officials to receive and act upon the best possible legal advice . . . We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.”

Current State of ACP in Government Context

- Circuit split among the 8th Circuit, D.C. Circuit, and 2nd Circuits
- Clinton White House petitioned for certiorari, but the petition was denied
- Denial was before the 2nd Circuit decision. Mueller investigation may lead to another petition for certiorari

INVESTIGATIVE GROUP



Imran Awan 'Very Strongly' Wants To Block Review Of Hard Drive, Was Using Alias



LUKE ROSIAK
Investigative Reporter

3:19 PM 10/06/2017

2031
 1911

Lawyers for Imran Awan, an ex-aide who ran information technology (IT) for Democratic Rep. Debbie Wasserman Schultz, "feel very strongly" that data recovered from a hard drive on Capitol Hill should not be valid as evidence because he put a note that said "attorney client privilege" near it before leaving it in a phone booth, they said in federal court Friday. A police report shows that the backpack contained a laptop with the username "RepDWS," copy of Imran Awan's ID, and the notebook.



100

Sure Looks Like Lisa Bloom Broke Attorney-Client Privilege to Trash Kathy Griffin

by Colin Kalmbacher | 3:57 pm, October 23rd, 2017

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Noted women's rights attorney **Lisa Bloom** may have revealed confidential information in violation of the attorney-client privilege as it related to former client **Kathy Griffin** in a Twitter post yesterday afternoon.

At 3:42 pm, Bloom tweeted out the following message:

Kathy Griffin reached out to me after her Trump mask photo posted a few months ago and a few days later I had a press conference with her. Her entire team (entertainment lawyer, criminal lawyer, and several others) approved in advance the statements she and I were going to make. Yet Kathy then during the press conference spontaneously chose to put aside the notes we had worked so hard on together. She said on camera "my notes are by the wayside and it's all off the cuff" and then ad libbed. I was sorry she made that choice but I respected her right to speak as she saw fit. She was, as she says, then widely panned for her comments. Now she blames me. She's the only client I've ever had who chose to extemporize at a press conference rather than read from notes we prepared in advance.

I got a lot of death and rape threats afterward and still do. I know Kathy has as well and I'm sure it's unnerving.

Kathy has now made a video about how women should stand together, and yet she's attacked me, a lifetime women's rights attorney, and not the rest of her team, all of whom were men. This is sad, but I still believe that Kathy Griffin is one of the funniest comics alive, that she meant no ill will with the photo, and I wish her the best.

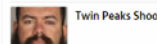
Lisa Bloom @LisaBloom

My statement re Kathy Griffin.

2:42 PM - Oct 22, 2017

772 306 707

UNINTERRUPTED TRIAL FEEDS



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The Basics of ACP

First things first...

- The key word in “Attorney Client Privilege” is privilege
- The privilege belongs to the client
- If the client does not waive privilege, the communication cannot be produced

Elements of ACP in Iowa

A communication is subject to ACP when:

1. It is made between an attorney and his or her client;
2. In confidence;
3. For the purpose of seeking, obtaining, or providing legal assistance or advice.¹

First Element: Attorney-Client Relationship

1. A person sought advice from an attorney;
2. The advice sought was within the attorney's professional competence; and
3. The attorney expressly or impliedly gave the desired advice.²



Second Element: In Confidence

General Rule

Communication is not privileged if a third-party is present.

Second Element: In Confidence

Exceptions

- Essential for the rendition of a legal opinion (e.g. an accountant for financial planner).³
- Independent contractors for the client who provided “advice and guidance” on the issue at stake in the matter.⁴

Second Element: In Confidence

Exceptions for Family Members of Clients

Family Member	Does Privilege Exist?
Spouse	Yes. Spousal privilege will apply and protect any communications between the attorney and client-spouse.
Minor Child	Yes. The presence of a child under the age of 18 will not generally destroy privilege. However, this is not absolute. ⁵
Adult Child	Maybe. Where the client-parent requires the child's assistance to communicate effectively with his or her attorney, then the child's presence is not broken. ⁶
Any other family member	Most likely not. ⁷

Second Element: In Confidence

Joint Representation

Privilege intact when joint clients or two or more employees of a corporate client are:

- Discussing ACP communication; or
- Other legal advice that was sought or rendered.

However, if their conversation is simply "factual in nature," then the communication is not covered by ACP.⁸

Documents and ACP

- ACP does not cover a client's documents that he or she simply forwards to his or her attorney as a means to prevent disclosing them.⁹

Remember the third element: The communication must be to *obtain legal advice* in order for it to be privileged.

Crime-Fraud Exception

- [Lincoln Lawyer Example](#)
- Was Lewis correct?
- “[A]ttorney-client privilege ‘does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.’” *In re Green Grand Jury Proceedings*, 492 F.3d 976 (8th Cir. 2007) (quoting *United States v. Zolin*, 491 U.S. 554, 563 (1989)).

Crime-Fraud Exception

Iowa R. Prof'l Responsibility 32:1.6(b) states

A lawyer may reveal information “to the extent the lawyer reasonably believes necessary to **prevent** the client **from committing** a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”

ACP For In-House Counsel

ACP For In-House Counsel

Again, the realities of corporate structure are such that an in-house attorney may be charged *both* with assessing the legal aspects of a transaction and implementing that transaction. Because, in this way, in-house counsel operate in both a legal and a business capacity, it is our view that an in-house attorney may act as the “attorney” for purposes of one communication and as the “client” for purposes of another. *U.S. v. Chevron Texaco Corp.*, 241 F.Supp.2d 1065, 1077 (N.D. Cal. 2002).

ACP For In-House Counsel

The Evolution of ACP for In-House Counsel

The Corporate Control Test

ACP only applies to those conversations between in-house lawyers and those employees who are controlling executives and managers of the corporation.

Example:

City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D.P. 1962)

ACP For In-House Counsel

Subject Matter Test

Inquiry whether communication was subject to ACP is based on the *subject matter* of the communication. The focus is on whether the employee communicated with the attorney at the direction of the employer and on its behalf, and the communication was “germane to the duties of his employment.”

Example:

Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970)

ACP For In-House Counsel

Upjohn Test

The Supreme Court rejected the “Corporate Control” test and held that communications between employees and in-house counsel are protected by ACP when:

1. The employee is providing information in order for the lawyer to provide legal advice to the company;
2. The substance of the information falls within the scope of the employee’s official duties;
3. The employee is aware that their statements are being provided for the purpose of obtaining legal advice; and
4. The communication is confidential.

Upjohn Co. v. U.S., 449 U.S. 383 (1981)

ACP For In-House Counsel

Iowa Law

Keefe v. Bernard, 774 N.W.2d 663 (Iowa 2009)

We agree with the United States Supreme Court that the corporate attorney-client privilege should not be limited to those in the “control group.” Instead, the test must focus on the **substance** and **purpose** of the communication. If an employee of a corporation or entity discusses his or her own actions relating to potential liability of the corporation, such communications are protected by the attorney-client privilege. If, on the other hand, a corporate employee is interviewed as a “witness” to the actions of others, the communication should not be protected by the corporation's attorney-client privilege.

ACP For In-House Counsel

Iowa Rules of Professional Responsibility

Rule 32:1.6(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

Rule 32:1.13 Cmt. 2: When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 32:1.6

Rule 32:1.13 Cmt. 1: “Constituents” include “officers, directors, employees, and shareholders.”

Practice Pointers for In-House Counsel

- In the written communication, establish that legal advice is being provided. Try not intermingle business and legal advice in communications
- Express that you are acting in your legal, rather than business, capacity, when you provide legal advice.
- When in-house counsel needs something from an employee, speak with the employee directly to make the communication privileged
- Remind employees that communication between themselves about a legal matter, but that is not about advice provided by in-house counsel, is likely not privileged

Again...

- The key word in “Attorney Client Privilege” is privilege
- The privilege belongs to the client
- If the client does not waive privilege, the communication cannot be produced

Waiver of Attorney-Client Privilege

Waiver of ACP When Disclosure Made in Court

Iowa Rule of Evidence 5.502. Attorney-client privilege and work product; limitations on waiver.

a. *Disclosure made in a court or agency proceeding; scope of a waiver.* When the disclosure is made in a court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

- (1) The waiver is intentional;
- (2) The disclosed and undisclosed communications or information concern **the same subject matter**; and
- (3) They ought in fairness to be considered together.

Note: Waiver applies only to documents and subjects sufficiently linked to the subject matter to which the waiver occurred. *Engineered Products Co. v. Donaldson Co. Inc.*, 313 F. Supp. 2d 951, 1020 (N.D. Iowa 2004).

Inadvertent Disclosures Made in Court

- b. *Inadvertent disclosure.* When made in a court or agency proceeding, the disclosure does not operate as a waiver if:
- (1) The disclosure is inadvertent;
 - (2) The holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - (3) The holder promptly took reasonable steps to rectify the error, including (if applicable) following Iowa Rule of Civil Procedure 1.503(5)(b).

Disclosure Made in Other Jurisdictions

- c. *Disclosure made in a federal or state proceeding.* When a disclosure is made in a federal or state proceeding and is not the subject of a federal or state court order concerning waiver, the disclosure does not operate as a waiver in an Iowa proceeding if the disclosure:
- (1) Would not be a waiver under this rule if it had been made in an Iowa proceeding; or
 - (2) Is not a waiver under the law of the jurisdiction where the disclosure occurred.

Court Order and Agreements Pertaining to Disclosure

- d. *Controlling effect of a court order.* A court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court— which event the disclosure is also not a waiver in any other proceeding.

- e. *Controlling effect of a party agreement.* An agreement on the effect of disclosure in a state proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

Attorney Work Product

What is Attorney Work Product?

Iowa R. Civ. P. 1.503(3) states:

. . . documents and tangible things otherwise discoverable under rule 1.503(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) . . .

2 Layers of Protection

1. A party seeking information contained in attorney-work product must show “substantial need” and “undue hardship.”¹⁰
2. Mental impressions or opinions of the lawyer is, for all practical purposes, absolutely immune from discovery.¹¹

“Prepared in Anticipation of Litigation”

“The overarching inquiry in determining whether a document was prepared in anticipation of litigation is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation . . . If documents would have been created in essentially similar form irrespective of the litigation, it cannot fairly be said that they were created because of actual or impending litigation.” *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 48 (Iowa 2004).

General Rules of “Prepared in Anticipation of Litigation”

- Must have been prepared in light of litigation or credible prospect of litigation
- Specific litigation, not litigation, generally¹²
- Party asserting attorney work product must provide a detailed privilege log stating the basis for the privilege¹³
- Burden is first on the party seeking the information:
 - Party seeking the information must show “substantial need” and “undue hardship”¹⁴
 - This means that the party must a) make an independent discovery effort to obtain the same information; and b) show that the information was not obtainable through discovery already produced, depositions, or any other source¹⁵

Waiver of Attorney Work Product

Governed by Iowa Rule of Evidence 5.502.

References

¹ *Keefe v. Bernard*, 774 N.W.2d 663, 669 (Iowa 2009).

² *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008).

³ *Tausz v. Clarion-Goldfield Community School Dist.*, 569 N.W.2d 125 (Iowa 1997).

⁴ *In re Bieter Co.*, 16 F.3d 929, 937 (8th Cir. 1994).

⁵ Epstein, Edna, *The Attorney-Client Privilege*, at 266.

⁶ *Id.*

⁷ *Id.*

⁸ *Invesco Holdings, LLC v. Prof'l Veterinary Products, Ltd.*, No. C09-0052, 2010 WL 273155, *5 (N.D. Iowa Jan. 22, 2010).

⁹ *Radiant Burners v. Am. Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963).

¹⁰ *Keefe*, 774 N.W.2d at 674.

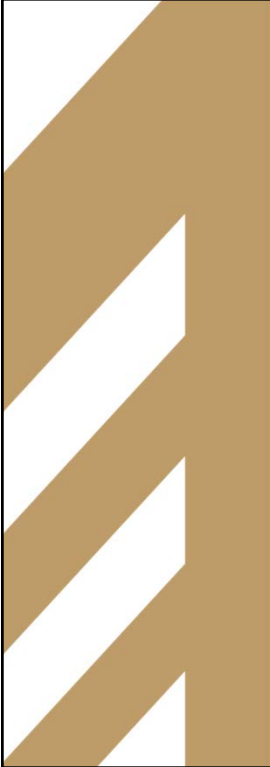
¹¹ *Id.*

¹² *Bodeans Cone Co., L.L.C. v. Norse Dairy Sys., L.L.C.*, 678 F. Supp. 2d 883 (N.D. Iowa 2009).

¹³ *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 197 F.R.D. 620 (N.D. Iowa 2000).

¹⁴ *Id.*

¹⁵ *Exotica Botanicals, Inc. v. E.I. Du Pont de Nemours & Co.*, 612 N.W.2d 801 (Iowa 2000).




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