



September 27, 2023

Legal Tips for Environmental Professionals

BALCH
& BINGHAM LLP

Air & Waste Management Association
Southern Section 2023 Annual Meeting & Technical Conference

THE BIG PICTURE:

Competence

and

Integrity

go a long way.

Avoid flagrant violations!

The San Diego Union-Tribune

WATCHDOG

Portable toilet executive sent to prison in illegal dumping scheme

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COURT BULLETIN

Business Director fined \$6,000 for Environmental Protection Act violation

August 15, 2023

[Environment, Conservation and Parks](#)

HOME / NEWS

Cedar Falls man sentenced for storing hazardous waste without permit



Trish Mehaffey

Jan. 23, 2017 12:15 pm

PRESS RELEASE

Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests

  88° 

WATCH: Three arrested for illegal dumping in Bexar County after being caught on camera

by Jordan Elder | Mon, June 27th 2022, 5:45 PM CDT

Former President of Environmental Services Business Sentenced for Falsifying Document and Illegally Storing Hazardous Waste

Publication date: Friday, June 17, 2022

WASHINGTON – Michelle M. Rousseff-Kemp, of Fort Wayne, Indiana, was sentenced Thursday in federal court in Fort Wayne after previously pleading guilty to falsifying a document and illegally storing hazardous waste. U.S. District Court Judge Holly A. Brady sentenced Rousseff-Kemp to 24 months' of probation and ordered her to pay a \$5,500 fine.

IN ALL SERIOUSNESS

- Generally, the difference between a civil and criminal violation goes to INTENT
- “Knowing”
- Key: You knew what you were doing
 - *Regardless of whether you knew it was illegal*

LEGAL PRIVILEGES

- Intended to facilitate seeking and receiving legal advice
- Lawyers **must** be involved
- Generally, legal advice is privileged BUT facts are not

FUNDAMENTALS OF “DISCOVERY”

- Generally, your opponent in litigation is entitled to all your communications, documents, etc., that are relevant to the case unless they are within a *legal privilege*
- Attorneys will send broad requests for emails and docs
 - Emails, texts, mobile phones, photos, logs, notes, documents, reports, etc. etc. etc.
 - Relevant, non-privileged information will be provided
 - “Privilege log” for everything under a claim of privilege

ATTORNEY-CLIENT COMMUNICATION

Protects **communications**

- between an attorney and the client
- in order to seek or render **legal advice**

Can be **waived** if shared outside the attorney-client relationship

ATTORNEY WORK PRODUCT

Protects documents and tangible things

- Prepared by or for the client through its employees, lawyers, or experts
- *In anticipation of litigation*

COMPARE AND CONTRAST

ATTORNEY-CLIENT COMMUNICATION

Narrow:

- Applies only to “communications”

But very strong:

- Virtually foolproof (unless intended to further a crime)

ATTORNEY WORK PRODUCT

Broad:

- Can apply to a broad range of documents and analysis

But not as foolproof:

- Anticipation of litigation
- Can be waived upon a showing of substantial need

IMPORTANT

- Claims of privilege are overused – courts are skeptical
- Overbroad claims unlikely to prevail
 - Don't get too cute with it
 - Should not be used just to shield unfavorable or embarrassing information
- If the situation is sensitive or involves legal risk, consult an attorney

STRATEGY TO REDUCE RISK IN YOUR COMMUNICATIONS:

AGAIN, COMPETENCE AND INTEGRITY.

- “Stay in your lane” of competence
- Communicate facts and objective information honestly and clearly
 - *Facts not likely to be privileged no matter how sensitive*
- Better to take your lumps with bad information up front
 - **“Spoliation”** (destruction of evidence) is bad
 - Follow [document retention policy](#) and observe any [“litigation hold”](#)
- Avoid speculation, guessing, sarcasm, etc.
- Do not admit fault, corporate responsibility, etc.

PRIVILEGE FOR SELF-AUDIT OR EVALUATION?

- Generally, no
- But in Mississippi: Consult the statute

2020 Mississippi Code Title 49 - Conservation and Ecology Chapter 2 - Department of Environmental Quality Environmental Self-Evaluation Reports

- § 49-2-71. Discovery and admissibility in evidence of environmental self-evaluation reports; divulgence or dissemination of information in reports; exemption from Public Records Act

REGULATORY INSPECTIONS

- State and federal *environmental* agencies are entitled to *some* information
 - *Not necessarily everything*
- **COMPETENCE:**
 - Understand what you must provide in an inspection and where to keep it
 - Research and confirm if necessary
 - Maintain current copies in a specific location for that purpose

REGULATORY INSPECTIONS

BEST PRACTICES FOR THE INSPECTION:

- Follow predetermined route to the defined subject of inspection
 - IMPORTANT: *Different rules for OSHA*
- **Competence and integrity:** Provide *required* information (quickly!) and respond truthfully to basic factual questions
 - Anything complicated or uncertain: Take the question and promise to follow up
- **EXIT MEETING (!)**
 - *Confirm outstanding questions* and ask if there are any preliminary findings

COMMUNICATIONS WITH REGULATORS

- **Freedom of Information Act**
- **State Open Records Laws**
- Assume all written communications (including emails) with regulators may be discoverable and shape content accordingly
- **STATE UNIVERSITIES** are typically covered by state open records laws

WITNESSES IN LITIGATION

- Fact witnesses: Firsthand knowledge
- Expert witnesses: Qualified to speak as expert on an issue
 - Typically produces an expert report
- Both subject to depositions, testimony, cross-examination
- “Consulting” witnesses work behind the scenes

WITNESSES IN LITIGATION

FACT WITNESS

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally **based on the witness's perception**;
- (b) **helpful** to clearly understanding the witness's testimony or to **determining a fact in issue**; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

EXPERT WITNESS

Rule 702. Testimony by Expert Witnesses

A witness who is **qualified** as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will **help the trier of fact to understand the evidence or to determine a fact in issue**;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of **reliable principles and methods**; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Questions?

Thank you!



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