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You Don't Say!

Legal Privileges and Smart Communications in Litigious Times

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Southern Section

Chattanooga, Tennessee

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Airline Industry Litigation

Internal Company E-mails

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"This is a joke. This airplane is ridiculous."

"We are having issues with every update we do."

"It seems like they'll never get it right. Fix one thing, break 3 others."

"The FAA were neither thorough nor demanding and failed to write up many issues. And the lies, the damn lies."

"This airplane is designed by clowns, who in turn are supervised by monkeys."

"No one wants to fix anything."

"They expect to do only two sets of one weeks airplane testing!!! Normally the FMC [flight management computer] is tested during an entire flight test program … Jesus, it's doomed. I said we must do much more than that."

Internal Company E-mails

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"I don't know how to refer to the very very few of us on the program who are interested only in truth…"

"Would you put your family on a MAX simulator trained aircraft? I wouldn't."

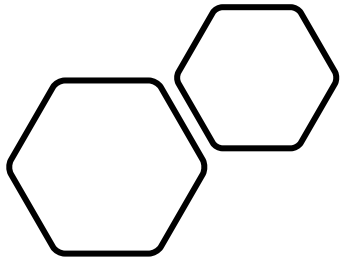
"Not sure I will be returning in April given this - am not lying to the FAA. Will leave that to the people who have no integrity".

"I still haven't been forgiven by god for the covering up I did last year… Can't do it one more time. The Pearly gates will be closed."

"I'll be shocked if the FAA passes this turd."

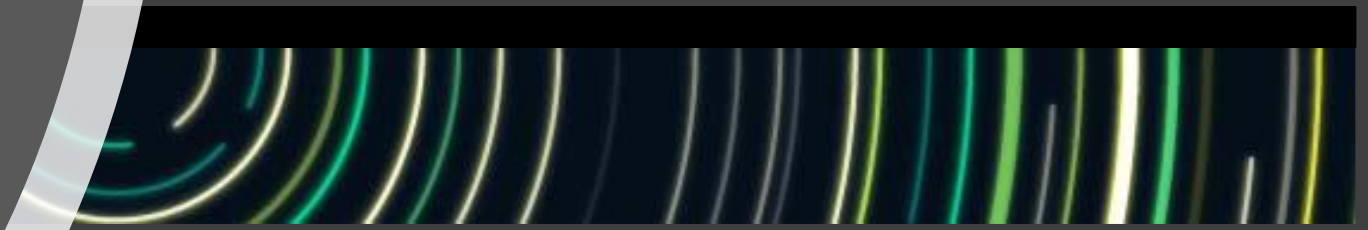
"I have used the words 'misleading' and 'mischaracterization' a lot over the last two years in relation to this program."

Privileged & Confidential



Or, how to avoid your emails showing up in a lawsuit

What is "privileged" information?



Not admissible in evidence.

In general, for a communication or document to be privileged, ***it must be either:***

1. **attorney-client communication**; or
2. **work product**.

Special note for Mississippi

Mississippi Code § 49-2-71

Self-evaluation report privilege and exceptions

- "(1) An ***environmental self-evaluation report*** . . . is ***privileged*** and is ***not admissible*** in any legal or investigative action in any civil or administrative proceeding . . . ***unless***. . . ."

Consult a ***Mississippi*** attorney to take advantage of this process.

Attorney-Client Communication

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Protects ***communications***

- between ***attorney*** and ***client***
- seeking or rendering legal advice

These can be tricky questions:

- Who is the “Client”?
- Who is the “Attorney”?
- Is legal advice sought?

Attorney Work Product

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Protects **documents and tangible things**

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

The privilege ***can be set aside*** based on—

- substantial need of opposing party, and
- inability to obtain the substantial equivalent by other means without undue hardship

Waiver destroys the legal privilege.

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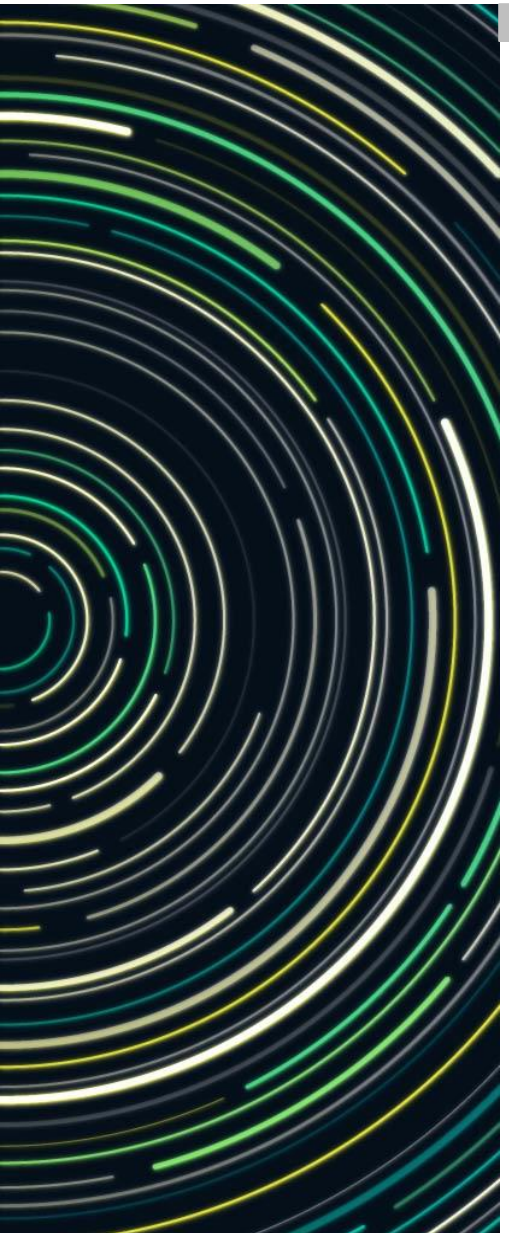


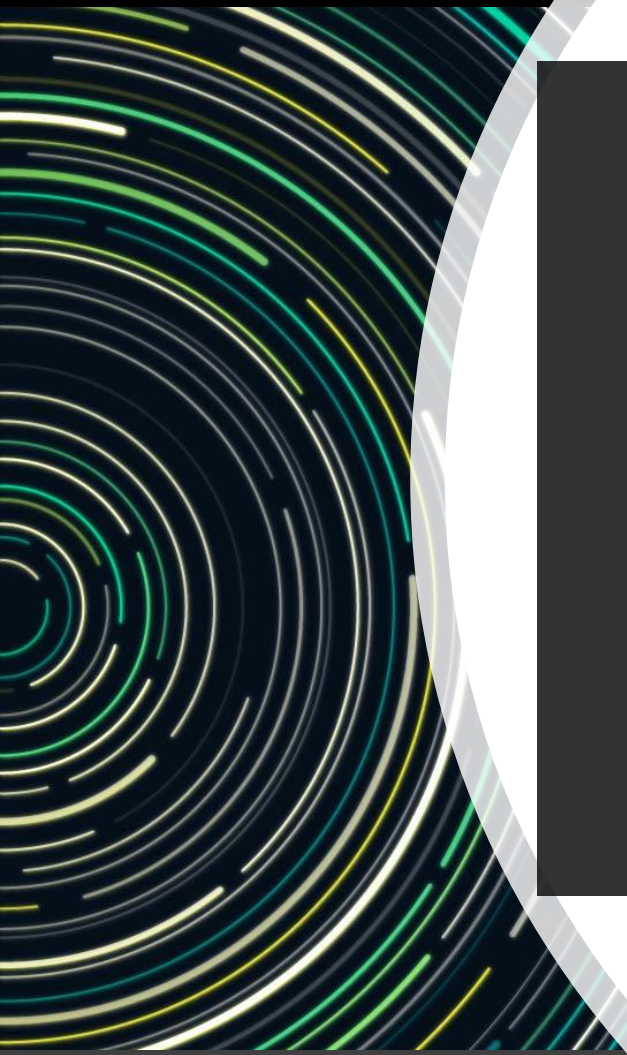
Waiver may happen if there is a ***disclosure*** to a third party—anyone outside the attorney-client relationship:

- Regulatory agency
- Contractor
- Employees who don't need to know
- Friends and family

If privilege is waived, it is **lost** and the information is ***not protected***.

Six Rules of Smart Communication

- Fix the Problem
- Know the Limits
- Is a Message Necessary?
- Communicate Facts **Objectively** and **Clearly**
- ***All*** Communications
- Need to Know Basis



Interest Rate Fixing

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$325 Million Penalty

Internal Messages

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Yen Trader 1: **where would you like it[,] libor that is[,] same as yesterday is call**

Yen Trader 4: haha, glad you clarified ! mixed feelings but **mostly I'd like it all lower** so the world starts to make a little more sense.

Senior Yen Trader: **the whole HF [hedge fund] world will be kissing you instead of calling me if libor move lower**

Yen Trader 1: **ok, i will move the curve down[,] 1bp[,] maybe more[,] if I can**

* * *

Senior Yen Trader: yes[,] he always led usd in my mkt[,] **the jpy libor is a cartel now** […]

Senior Yen Trader: **its just amazing how libor fixing can make you that much money**

** LIBOR = The London Inter-Bank Offered Rate, an average of the rates banks charge to borrow from other banks*

Former Sterling Cash Trader: u see 3m jpy libor going anywhere btween now and imm?

Primary Submitter: looks fairly static to be honest , poss more pressure on upside , but not alot

Former Sterling Cash Trader: **oh[,] we hve a mutual friend who'd love to see it go down, no chance at all**?

Primary Submitter: **haha [former UBS Yen Trader at Bank C] by chance**

Former Sterling Cash Trader: shhh

Primary Submitter: hehehe , mine should remain flat , always suits me if anything to go lower as i rcve funds

Former Sterling Cash Trader: gotcha, thanks, and, **if u cud see ur way to a small drop there might be a steak in it for ya, haha**

Primary Submitter: noted ;-)

Former Sterling Cash Trader: 8-)

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Some communications are not protected.

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- If it is not related to legal advice, do not attempt to claim privilege.

Especially when working with outside parties, ask:

- Is the content something that should be shared with third parties?
- Should an attorney (instead of the company) hire consultants?
- Is the consultant hired for litigation support?

Assume the communication may not be privileged.

Fix the problem

Fix the problem!

Safety FIRST

In all cases, do your job safely

If there are operational or safety issues— ***fix them***

Don’t let fear of communicating incorrectly make a problem worse

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2.
Know the limits

Assume facts are not privileged.

Company conducts groundwater sampling as part of an investigation ordered by counsel:

- Lab results might not be privileged
  - Might have to produce if in litigation
  - May choose to produce for other reasons
- Videos and photos of site and equipment might not be privileged

Confidential Information

Confidential ≠ Privileged

- CBI, CEII, PII, etc.

Examples of confidential but ***not privileged***:

- Contracts
- Non-disclosure agreement
- Health and human resources records

But:

- To be *privileged*, it **must** be confidential

To: Manager

From: Engineer

Date: 8/24/2022

Re: Inspection follow-up

As you know, when excavating the upland area, we encountered an unpermitted asbestos disposal. Who knows what they buried or threw in the river back in the day here. Remember those drums we found last year? Anyhow, we are working on a removal estimate. This could be a BIG issue.

"*Limits can only be defined by exceeding them*." Famous General

Sample e-mail

Privileged???

To: Manager, Lawyer

From: Engineer

Date: 8/24/2022

Re: Inspection follow-up

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Sample e-mail

Now???

Myths of legal privilege

A. Copying a lawyer on the e-mail makes it privileged.

B. Copying in-house counsel makes it privileged.

C. Marking it "Privileged and Confidential" makes it privileged.
   - ***But*** if a lawyer is present or part of communication, then include this language.
   - Helps establish intent and identify documents

3. Is a Message Necessary?

Be Savvy

At the first indication of a sensitive issue, ask:

- ***Could this issue create problems?***
- If yes, request legal advice before you write something.
- General advice: USE THE PHONE

4. Communicate *facts* objectively and clearly

.

Ask Yourself:

- Does this communication overstate my personal knowledge?
- Does it speculate?
- How can I do my job and make sure I communicate honestly and accurately?

Provide *factual* statements in memos, e-mails, etc.

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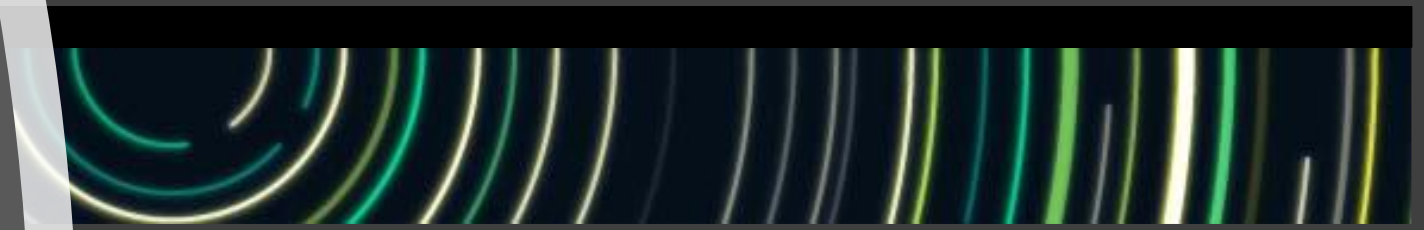
If you ***know***, provide facts.

If not, defer to someone who can provide facts.

For example:

- "The work plan has us starting with the grubbing on Tuesday. We expect to grade in two weeks. Our contractor is Acme Contracting Inc."
- Specific, factual, accurate
  - *Not opinion or guesswork*

Consider how harmless, loose language could look



- It was only a matter of time . . .
- If we had all the money in the world . . .
- This really looks like operator error. . .
- I'm concerned about liability . . .
- I told Susie Q. to fix this problem . . .
- EPA is full of idiots . . .
- Our leadership lives in the dark ages . . .
- I had a beer with George from ADEM / GEPD / MDEQ / TDEC . . .

Avoid vague terms

Probably

Could

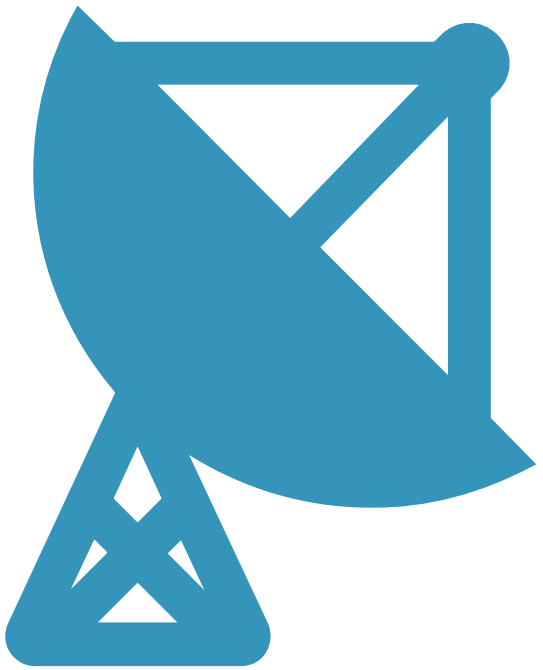
Maybe

Best guess

Estimate

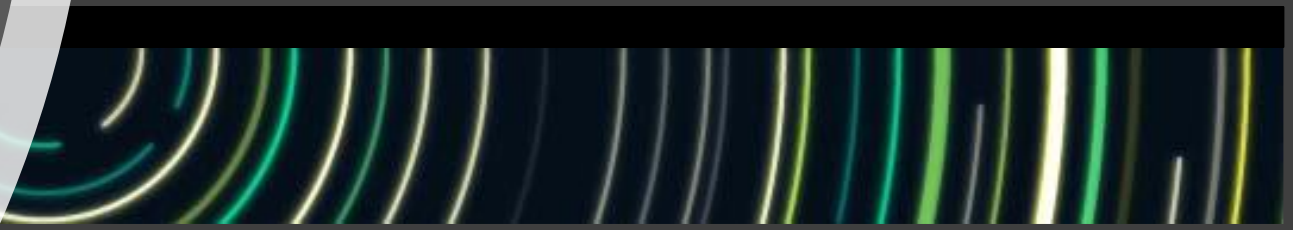
Are you sure this is what you mean?

Release	Reportable	Discharge	Violation
Legally required	Violation	Exceedance	Negligent
Wrong	Mistake	Disclosure	Concern
Contamination	Spill	Unsafe	Problem



5. All Communications

Where do communications happen?



Anywhere, any medium, any device

- Emails
- Texts
- Social media
- Project software
- “Private” notes and journals
- *Anywhere you type words*

6. Need to know basis

- *Who really needs to see this communication?*

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1. Fix the Problem

Questions???

Thank you!

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