

Records Involving Attorney-Client Communications and Work Product

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2012 Public Records Law Webinar Series



General Records Law (Thursday, March 29, 1pm to 3pm)
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2

Today's Topics

- What are the basics of the attorney-client privilege and the work product doctrine?
- What parts of the privilege are preserved in the public records law?
 - Records containing communications from the attorney to the board
 - Trial preparation (work product) records
 - Minutes of closed sessions involving matters within the attorney-client privilege
- What ethical obligations do attorneys have regarding privileged information?
- What is the status of attorney contracts, billing records, and settlement agreements?

3

Overview of the Attorney Client Privilege and the Work Product Doctrine



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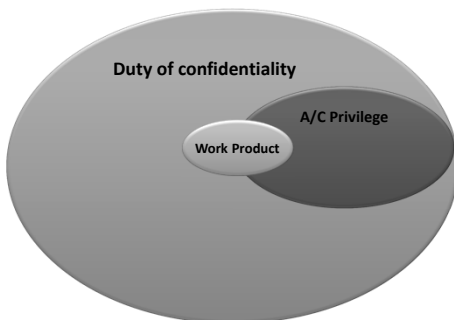
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Three Related Concepts

- Duty of Confidentiality
- Attorney Client Privilege
- Work Product Doctrine

5

Three Related Concepts



6

Duty of Confidentiality

- Extremely broad: covers any information obtained by attorney during representation
- Professional Responsibility issue (Rule 1.6)
- Can't talk about client matters without permission

7

Attorney–Client Privilege

- Much more limited in scope
- **Evidentiary issue:** excludes others from obtaining details of legal representation and using those details in litigation
- Common law – not a statutory privilege
 - In re: Investigation of Death of Eric Miller, 357 NC 316 (2003)

8

Common Law

Attorney–Client Privilege

- Communication made in confidence
- Relating to a matter about which the attorney is being professionally consulted
- While seeking/giving legal advice for proper purpose

9

Attorney-Client Privilege for Entities in North Carolina

- Little guidance from courts
- Two key questions:
 - Who controls the ACP? (waiver)
 - Whom does it cover? (scope)

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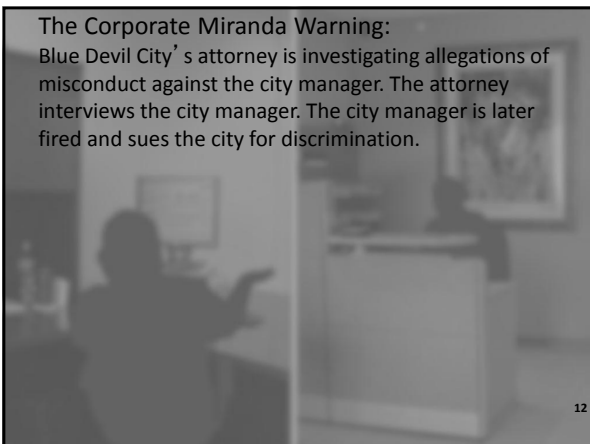
Who controls the ACP for entities?

- Control = authority to waive ACP
- Governing board of client
 - Corporate board of directors
 - County board of commissioners
 - City council

11

The Corporate Miranda Warning:
Blue Devil City's attorney is investigating allegations of misconduct against the city manager. The attorney interviews the city manager. The city manager is later fired and sues the city for discrimination.

12



The Corporate Miranda Warning

- Remind employees whom you represent
- Key for local government to retain control of confidentiality/ACP rather than employee

13

Whom does entity ACP cover? (scope)

- Upjohn (SCOTUS 1981)
 - Rejected “control group” for **federal** ACP
- Other tests:
 - Subject matter of conversation
 - Scope of Employment

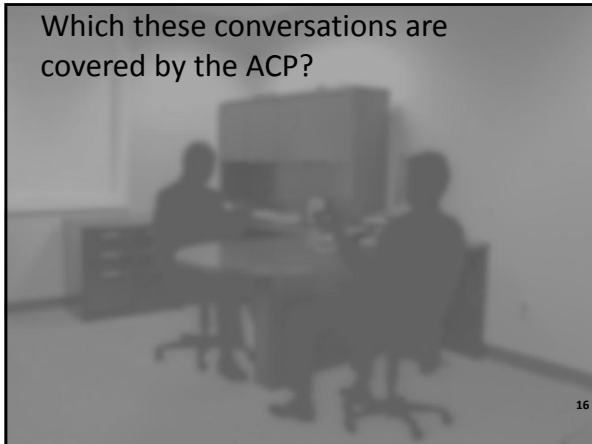
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Whom does entity ACP cover? (scope)

- You are attorney for Blue Devil City and have been asked to investigate potential theft in the tax office.
- You first meet with the city tax collector. The next day you meet with the manager of the bank branch where the city makes its daily cash deposits.

15

Which these conversations are covered by the ACP?



16

Work Product Doctrine

- Statutory exception to discovery rules
- NC Rule of Civ. Proc. 26(b)(3):
 - documents and tangible things . . . prepared in anticipation of litigation or for trial by or for [a] party or by or for that party's consultant, surety, indemnitor, insurer, or agent

17

Work Product Doctrine

- As city attorney, you are representing the city in a lawsuit brought by two individuals who were hurt when the elevator in City Hall malfunctioned last month.

18

Work Product Doctrine

- The city's elevators are inspected annually by Mike's Mechanical Engineering, Inc. The last regular inspection report was from 3 months before the accident.
- Immediately after the accident, you hired Eddie Engineer to inspect the elevator in question and produce a report.

19

Are the inspection reports covered by the work product doctrine?



20

Attorneys' Ethical Obligations re: Privileges

- Your client's privilege:
 - Duty to raise all non-frivolous claims of privilege
 - Comment 13 to ABA Rule 1.6 (confidentiality)
- Opposing party's privilege:
 - Duty not to knowingly interfere
 - Rule 8.4 (prejudicial to administration of justice)
 - Blog post re: employee email

21

Questions?



22

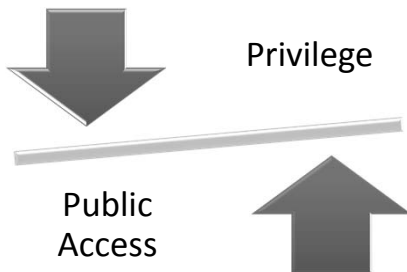
Public Records Exceptions



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23

Duty of Confidentiality in Public Agencies



24

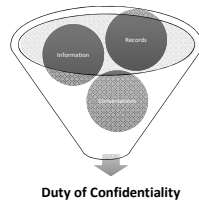
NC Supreme Court says:

- Records that are privileged under the common law or statutes are public records unless the public records law specifically exempts them. *N&O v. Poole*, 330 N.C. 465 (1992)
- Statutory Exemptions
 - Written communications between attorney and board
 - Trial preparation materials (as defined in state discovery law)
 - Closed session minutes

25

Attorney Confidentiality and Public Records

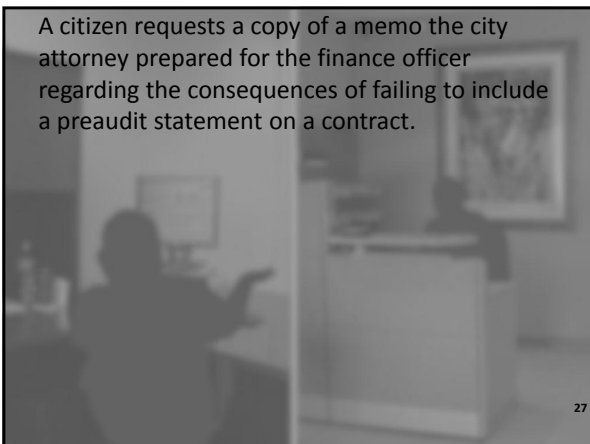
- Obligation of confidentiality applies to **all types of communications and information** the attorney has.



- Public Records Act applies to **records** and in some cases like personnel records, **information that exists in records**

26

A citizen requests a copy of a memo the city attorney prepared for the finance officer regarding the consequences of failing to include a preaudit statement on a contract.



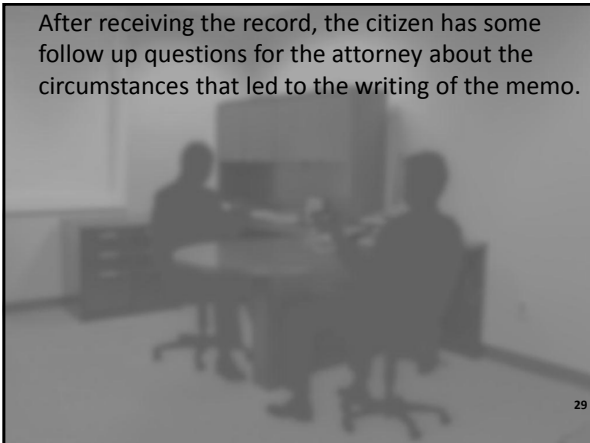
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Attorney Memo

- Clearly, this memo would be privileged under the common law attorney-client privilege.
- The public records law overrides the common law. The record must be provided

28

After receiving the record, the citizen has some follow up questions for the attorney about the circumstances that led to the writing of the memo.



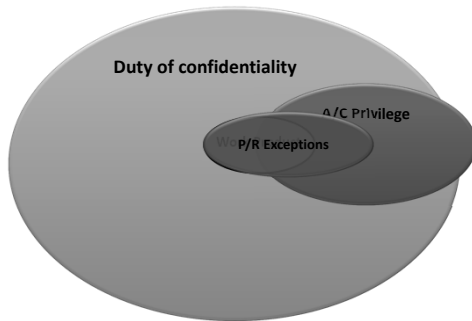
29

Follow Up Questions

- Clearly, this information would be privileged under the common law attorney-client privilege.
- The public records law doesn't override the privilege as to this information because the public records law applies only to records.

30

Public Records and the Duty of Confidentiality



31

A city has received a massive request for emails to or from the manager, any department head, and each member of the governing board for the past six months. The city has identified numerous emails to and from the city attorney. Any email to or from the city attorney is privileged and may be withheld.

32

Confidential Communications (G.S. 132-1.1(a))

- Protects written communications to the governing body, made within the attorney client privilege.
- Must be from attorney to client
- Must relate to claim or litigation; judicial or administrative action
- Does not protect all communications involving the attorney; only those that fall within the statute.

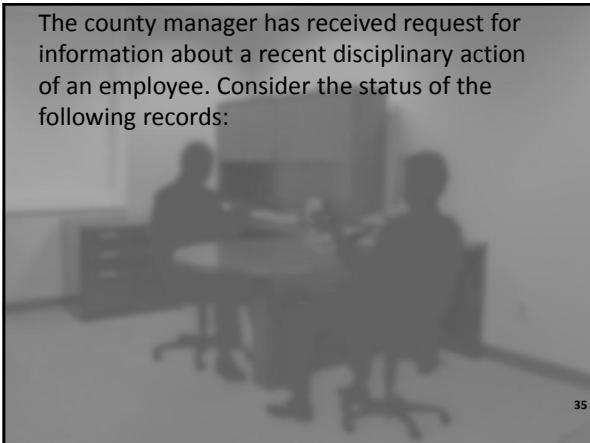
33

Three-year limit

- Records become public three years from the date the communication was received by the entity
 - This limit applies even if the matter was resolved before three years, or is ongoing at the three-year mark.
 - Records covered by a different exception may still be exempt (such as, personnel records)
- Records are not public records, but release is not prohibited

34

The county manager has received request for information about a recent disciplinary action of an employee. Consider the status of the following records:



35

Questions?



36

Trial Preparation Materials



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37

Trial Preparation Materials

- Before 2005, the public records statutes did not contain an exception for trial preparation materials or work product.
 - *McCormick v. Henson Aggregates Southeast, Inc* (2004 N.C. COA) – held no work product privilege in public records requests
- So, in 2005, we get G.S. §132-1.9 which permits governments to deny access to otherwise public records *that are trial preparation materials*.

38

Trial Preparation Materials

- Protection can be asserted for active cases or proceedings that have not yet commenced
- Can be asserted for litigation, or for administrative or quasi-judicial proceedings
- Materials protected are defined as those also protected by Civil Procedure Rule 26(b)(3) and comparable materials.

39

Trial Preparation Materials

■ Practice Pointers:

- Make sure that you protect only the materials that you can legitimately protect – narrow down and don't try to protect marginal documents
 - You can protect documents containing mental impressions, legal theories, conclusions or opinions of attorneys or their agents
- Lay out a compelling justification in the 132-1.9(b) letter for why the records should be protected
 - May keep you out of attorneys fees land under 132-9.

40

Questions?



41

Closed Session Minutes

- Closed sessions to protect the attorney client privilege. G.S. 143-318(a)(3)
 - Includes any consultation with the attorney, including consultation about litigation.
 - Authorizes the board to instruct the attorney about the handling or settlement of a claim, settlement, judicial action, mediation, arbitration, or administrative procedure.

42

Status Under as Public Records G.S. 143-318.10(e)

- Minutes and accounts of closed sessions may be withheld from public inspection so long as public inspection would frustrate the purpose of the closed session.
- Blog Post: [Closed Session Minutes and General Accounts Under the Public Records Law](#)

43

Questions to Consider in Applying the Exception

1. Was the closed session validly held?
2. What is the nature of the matter that was the subject of the session and what is its status at the time of the request for or decision to release?
3. What specific information is included in the minutes/account and what is its status at the time of the request for or decision to release?

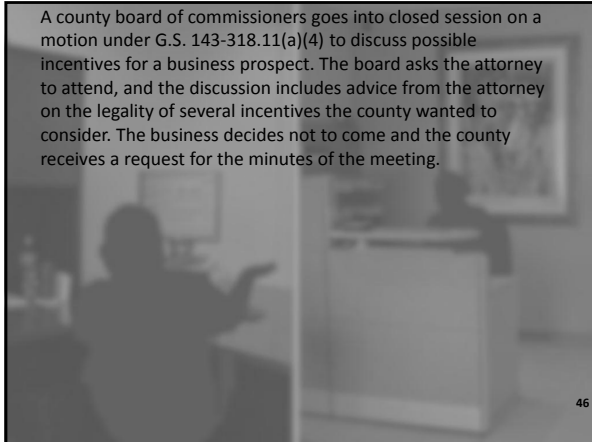
44

What Frustrates the Purpose?

- Probably must release when action is taken or matter is resolved.
- Open question on meetings to preserve attorney-client privilege:
 - When matter is complete?
 - Co-extensive with duration of privilege: forever?

45

A county board of commissioners goes into closed session on a motion under G.S. 143-318.11(a)(4) to discuss possible incentives for a business prospect. The board asks the attorney to attend, and the discussion includes advice from the attorney on the legality of several incentives the county wanted to consider. The business decides not to come and the county receives a request for the minutes of the meeting.



46

Word of Advice

- Make sure to include preservation of attorney-client privilege as a reason for a closed session if you want to protect that part of the minutes from disclosure.

47

Attorney Billing and Time Records

- Billing statements are financial records; not privileged and not work product
- Some information may fall within the client communication or work product exceptions
- Confidential information on records may be redacted (personnel, trial preparation)

48

Settlement Records

G.S. 132-1.3

- Would already be public under the basic public records definition.
- Applies to public records in actions against the public entity, and allows them to be sealed in certain circumstances.
- Includes drafts and other documents that are made or used in connection with the settlement.
- Does not include confidential communications under G.S. 132-1.1, and possibly records covered by other exceptions (personnel, trial preparation)

49

Questions and Evaluation

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50

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51
