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Aff Analysis

The current resolution, **Resolved: In the United States criminal justice system, truth-seeking ought to take precedence over attorney-client privilege**, invites debaters to tackle a number of significant questions about the justice system as well as ethics more broadly.

In this analysis, we'll be tackling the affirmative side of things. The affirmative is required to defend that, when they are in conflict, accessing information ("truth") is more important than the protection of attorney-client privilege (ACP). There are a number of important things to consider as you build your case on this topic. This guide will serve as an introduction to some of these considerations from a strategic standpoint, but you are encouraged to get creative and think for yourself!

First, if you have not already, I encourage you to research *what exactly attorney-client privilege (ACP) is and when it applies*. Contrary to what you might think, **there are plenty of factors that go into whether or not a specific piece of communication between and attorney and client falls under ACP**. Although this requires you to do a bit of heavy legal reading, there are plenty of good primers available online. The smartest thing you can do for yourself on both sides of this debate (indeed, any debate) is to familiarize yourself with what exactly you are talking about.

Did that? Good! Now, let's dive in to a discussion of debate strategy.

Truth is obviously the paramount concern for the judicial system. Most people's conceptualizations of legal **justice** rely on truth: to punish someone who is not *truly* guilty in an injustice, as is a guilty person going free.

To quote John Rawls,

> *[John Rawls, moral & political philosopher and professor at Harvard, The Theory of Justice, 1974]*
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> "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."

If we understand "truth" as accuracy and fairness in thought, then we can also understand "justice" as accuracy and fairness in law and social institutions. You can thus argue that truth-seeking is foundational to justice, and therefore the courts system as a whole. Of course, you must be prepared to have a debate about what constitutes accuracy and fairness!

Some negatives may choose to build cases around the idea that it is impossible for us to access "objective truth." The argument here is generally that we are limited in our perspective and biases and therefore it is impossible to determine what is "capital-T 'True.'" However, it is not difficult for you to respond that *you do not have to win that "objective truth" is possible to win that having more information improves decision-making ability*. For a simplistic example, when choosing what to order for dinner between two options you have never tasted before, you might not be able to determine with flawless accuracy which dish you would prefer prior to tasting them, but knowing information such as what ingredients they contain will doubtlessly improve your chances of making a good choice. Similarly, the courts system will always be fallible, but increasing the quantity and quality of testimony reduces the chances of mistakes.

You must also be prepared to answer the common negative argument that truth and justice themselves depend upon a person's ability to seek legal counsel. This argument generally suggests that people will not hire an attorney, or will not be fully honest with their attorney, absent the protections of ACP. This ensures people fail to correctly navigate the complexity of the legal system, resulting in injustice and the violation of their rights. This argument might also take the form of a constitutional objection, specifically involving the **5th and 6th amendments**. There are plenty ways you can approach this part of the debate.

First, you could seek out evidence indicating that people will still retain attorneys, even absent the protections of ACP. Second, you could point out that innocent people have nothing to fear from the truth. Third, you could argue that the 5th and 6th amendments are designed to ensure that justice is served, and thus the "ends" of truth and justice are more important than the "means" of the constitution. Perhaps the most strategic option, though, is to side-step this debate altogether.

How is that possible? It relies on the interpretation that **the resolution does not require affirmatives to defend that ACP is always bad**. It only requires them to prove that when the two values are in contention, truth-seeking should be privileged. This will help defend against negative attacks premised in the idea that ACP is generally good, including arguments about constitutionality. You can explain that, while ACP is usually good practice, there are some instances where it is only used to obscure the truth and evade justice. In these narrow circumstances, then, the criminal justice system ought to consider truth-seeking to be of a higher priority. Examples of such situations follow below.

You might think it is difficult to be aff on this topic because the American legal system has already made up its mind on the issue. While it's true that ACP is generally considered to be an important legal right, there is plenty of precedent and scholarship in favor of disregarding it in certain circumstances. The aff side of the debate is not as at odds with legal history as you might think! You can use these to bolster your claim that occasional suspension of ACP doesn't necessitate eliminating it overall.

Here are some examples of compelling, specific concerns you may want to bring up in your case:

Child abuse: If a client discloses information to his or her attorney that indicate that he/she is abusing a child, can we in good conscience allow the attorney to conceal that information? To do so might ensure the child continues to suffer abuse. Many would argue that the concern for the wellbeing of the child should trump ACP.

Existing laws vary state-by-state regarding whether or not attorneys are legally required to report known or suspected child abuse. This indicates that child abuse is one circumstance that is already considered to be a possible exception to ACP, depending on location and interpretation.

Here is a piece of **evidence** on this question:

> *[Robert P. Mosteller, professor of law at Duke University, "Child abuse reporting laws and attorney-client confidences: the reality and the specter of lawyer as informant," Duke Law Journal, vol. 42, no. 2, Nov. 1992]*
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> Reporting child abuse by lawyers involves the interaction of three types of legal rules. First, statutes have been enacted in twenty-two states that require attorney reporting of child abuse. Typically, these statutes establish mandatory duties to report known or suspected child abuse and are applicable to the entire public, including lawyers—only a few statutes specifically identify attorneys as a professional group required to report abuse. The reporting duties are enforced by criminal penalties and supplemented by immunity from civil suit for the act of reporting suspected abuse.
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> Second, the attorney-client privilege, which excludes from evidence statements made by an individual in confidence to an attorney for the purpose of obtaining legal advice, potentially conflicts with the reporting requirements as applied to lawyers. The interaction between the attorney-client privilege and reporting laws is, however, uncertain. The reporting laws may have the intent of the effect of abrogating the attorney-client privilege and therefore mandate that

> attorneys report information about their clients' abusive conduct even when gained through conversations that would normally be protected by the privilege. Although I argue against such an interpretation, abrogation of the privilege would appear to be the reasonable interpretation of the statutory language in some states. A fundamental change of this type in the scope of the attorney-client privilege raises questions about the extent to which the privilege has a constitutional basis and whether it can be radically modified by simple legislative action.

Corporate misdeeds: Sometimes, a corporation may deliberately manipulate ACP to hide evidence it considers damaging to its interests. They may put attorneys in charge of products for the purpose of being able to withhold them from the courts later and obscure the truth.

An excellent example of this is tobacco corporations, who engaged in this practice during ongoing proceedings charging them with racketeering. The charges alleged they had knowingly misled the public about the dangers of smoking. In order to evade these charges, tobacco companies put lawyers in charge of health research projects, so they could restrict negative findings from the public and the courts.

This kind of action has been determined to be illegal and unethical, indicating that the reach of ACP is not absolute.

Here is **evidence** about this:

> *[Edward J. Cleary, Director of the Minnesota office of lawyers professional responsibility, "the use and abuse of the attorney client privilege," Bench & Bar of Minnesota, September 1998]*

> One of the more neglected revelations from the recently completed tobacco litigation was the apparent misuse of the attorney-client privilege by lawyers on behalf of the tobacco industry, as evidenced in recently released documents and files.
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> The solution adopted by the tobacco companies was to have their "scientific" research conducted under the close consultation, and sometimes under the management, of their lawyers. The idea was that bad findings could be held back as lawyer-client confidences, whereas good findings could be described as the product of scientific inquiry.
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> Obviously, our first loyalty as attorneys must be to our clients. It is unusual for attorneys to be sanctioned for abusing the attorney-client privilege. Further, as noted earlier, we have obligations under both the attorney-client privilege and under MRPC 1.6 to keep certain matters confidential. Yet a lawyer, who intentionally conceals documents that should be disclosed, withholds evidence or acquiesces to perjured testimony, or who helps to commit or conceal a continuing wrongful act, will be subject to disciplinary proceedings.

Other examples of corporate misuse of ACP exist, so if you're interested in this kind of argument be sure to do your research!

Preventing an imminent crime from occurring: Although ACP protects against disclosure of facts pertaining to an already-committed crime, it does not prevent an attorney from reporting a future crime which they have reasonable cause to believe will be committed.

The decision of whether or not to report a probable future crime is permitted, but not required. It is thus left up to the attorney in question to decide whether or not to sidestep ACP.

Evidence about this:

[Helen Hierschbiel, general counsel for the Oregon State Bar, "When doing the 'right' thing may be the wrong thing to do,' Oregon State Bar Bulletin, August/September 2011]

Notwithstanding the fundamental importance of the duty of confidentiality, exceptions do exist, in part to reconcile conflicting obligations of the lawyer and also to serve other competing and compelling public interests. Two of the more challenging exceptions to understand in practice are found in RPC 1.6(b)(1) & (2):

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> 1) To disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
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> 2) To prevent reasonably certain death or substantial bodily harm.

While these two exceptions are not identical, they do have similarities. First and most importantly, they only *permit* disclosure; they do not *require* it. A requirement to disclose may stem from other sources (such as a court order), but it does not arise out of RPC 1.6(b).

As you can see, there is plenty of existing support for a limited notion of ACP. Don't let sneaky negatives trick you into believing it's an all-or-nothing issue! Remember, your burden is only to prove that *when the two values are in conflict* we ought to privilege truth-seeking.

If a negative tries to claim that these situations do not apply to the debate because they are already considered to be outside of the scope of ACP, you should not be alarmed. Each of them remains unsettled in terms of where the lines of ACP are drawn. These questions are up for debate—which is why we are debating them! They simply serve as illustrations of instances in which ACP is recognized by legal scholars to be not absolute due to compelling other interests.

However, you may also be interested in developing arguments about situations in which ACP definitely does apply, but where this application could reasonably be considered to be harmful. Here are a few examples:

Attorney as whistleblower: Recently, in the case of United States vs. Quest Diagnostics Incorporated, the second circuit court of appeals ruled that ACP trumps attorneys serving as whistleblowers (those who report ongoing corruption in a business or organization). In order words, attorneys may not report witnessed ongoing corruption inside an organization whom they represent.

Here is **evidence** about this:

> *[Christopher A. Meyers and Michelle T. Hess, attorneys, Holland & Knight, "Second circuit holds in-house lawyer precluded from blowing whistle on former employer," Nov. 12 2013]*
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> While the federal government clearly has a significant interest in encouraging people to come forward to report fraud and abuse without fear of retaliation, the Second Circuit held that such an interest does not trump the government's strong intent to preserve the attorney-client privilege. Both the Second Circuit and the Southern District judge discussed striking a balance between those interests, which were squarely at odds in this case. In conducting that analysis, both courts rejected the plaintiffs' arguments that the False Claims Act pre-empted the rules of New York state that govern the disclosure of client confidences. Writing for the Second Circuit, Judge Cabranes said, "Nothing in the False Claims Act evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences."

Why might this be a bad thing? Whistleblowing is largely regarded to be an important check against corruption and malpractice. In-house counsellors often have a broader awareness of what goes on inside an organization than nearly anyone else, especially when it comes to areas of trouble. If something truly horrible is going on, do we want to force someone to stay silent on the matter?

Preventing innocents from receiving punishment: ACP mandates that attorneys keep quiet, even if that means an innocent person is convicted of a crime. If Mary is on trial for robbery, and an attorney learns from his client Bob that Bob actually committed that crime, the attorney would be required to not intervene as Mary is tried and sentenced. He or she is thus required to be complicit with punishing an innocent person. This is the case even if information revealed by the client does not implicate the client in the crime. In other words, if Bob tells his attorney that his friend Stan committed the robbery, the attorney is still required to remain mum.

It is not difficult to extrapolate on why this is problematic. Knowingly allowing an innocent person to serve punishment for a crime they did not commit is a major injustice. The harm to this person might be great, such as time in prison or even a death sentence. Allowing a guilty person to evade punishment is also a form of injustice. In either of these outcomes, the courts system has failed to serve its function.

Here's some **evidence**:

> *[Daniel R. Fischel, professor of law and business at the University of Chicago Law School, "Lawyers and Confidentiality ," 65 University of Chicago Law Review 1, Winter 1998]*
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> Confidentiality is the bedrock principle of legal ethics.' According to representatives of the legal profession, the duty is nearly absolute. Lawyers who learn information while representing a client are required to maintain secrecy (absent client consent to disclosure), except in the most unusual and extraordinary circumstances.2 If an attorney obtains information from a client that, if disclosed, would prevent another person from being falsely convicted of murder and sentenced to death, he or she must remain silent, even if the disclosure would not implicate the client in the crime.' The same duty of silence remains if the attorney learns of kidnapping plans in a contested child custody case.4 Attorneys who violate the confidentiality norm are subject to sanctions, including, potentially, disbarment and malpractice suits.

For all of the considerations discussed above, further research will yield examples in history of these problems playing themselves out. You may find these helpful in articulating your arguments. You could also make up hypothetical scenarios to explain your points. Either way, be sure to always connect the concept to an impact and explain to the judge exactly *why* they should care about the concerns you are raising.

Now you should be ready to go craft an excellent case and win all of your affirmative debates! As always, you can email completed cases to **Rachel.Stevens@NCPA.org** for a free case critique. Don't forget to also join the discussion in the comments below. Good luck!