TEXAS LAWYER

EXPERT OPINION

Exactly when does attorney-client privilege attach?

Elisa Reiter and Daniel Pollack | February 28, 2022

You're on a long overseas flight. Word gets out that you are an attorney. In the course of the flight, several passengers stop at your aisle seat, introduce themselves, noting that, "I heard you are a good lawyer." They then proceed to present personal issues about which they seek your legal advice. Does the attorney-client privilege attach to such informal

exchanges? Do you owe confidentiality regarding such informal exchanges with individuals who might be prospective clients rather than casual interlocutors?

A casual exchange does not form an attorney-client relationship. Why? A person who casually and unilaterally conveys information to a lawyer, via a website or in person, does not form a formal attorney-client relationship. However, prudent lawyers should include a notice on their webpage that provides something along the following lines, as recommended in Texas Center for Legal Ethics Opinion ("TCLE") 651, issued in November, 2015:

Warning: Do not send or include any information in any email generated through this web site if you consider the information confidential or privileged. By submitting information by email or other communication in response to this web site, you agree that the communication does not create a lawyer-client relationship between you and the law firm and its lawyers and that any information submitted is not confidential and is not privileged. You further acknowledge that, unless the law firm subsequently enters into a lawyer-client relationship with you, any information you provide will not be treated as confidential and any such information may be used adversely to you and for the benefit of current or future clients of the law firm.

In assessing when the attorney-client privilege attaches, one must consider Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct ("TDRPC"), which defines confidential information, and which prohibits an attorney from knowingly betraying client confidences to the peril of the client unless the client consents to such disclosures after a

consultation. Paragraph 12 of the Preamble to the TDRPC warns that the duty of confidentiality may arise before the formation of the attorney-client relationship:

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties, such as that of confidentiality, that may attach before a client-lawyer relationship has been established.

Rule 1.05(a) provides the following definitions:

"Confidential information' includes both 'privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates.

In the context of a consultation, it is important for the attorney to communicate to the potential client that the attorney will not be rendering legal advice, nor does the attorney want the prospective client to provide confidential information to the attorney in the context of, nor prior to, the consultation. Why? The attorney-client relationship is not created through a consultation. Your engagement letter is a contract. That contract is based on consideration, or a retainer, being tendered.

Attorney-client privilege attaches after a legal services agreement is signed by both the attorney and the (prospective) client, **and** the retainer has been remitted. Simply conveying information via a website, prior to the attorney being formally retained, gives no guarantee to the person remitting the information of being protected by the attorney-client privilege, particularly when the attorney's webpage includes the type of disclaimer warning noted above. The disclaimer could also be presented to the prospective client to read and sign at the outset of the consultation, or via email prior to the consultation, provided that the prospective client acknowledges receipt and understanding of the warning.

It is noteworthy that the American Bar Association's *Model Rules of Professional Conduct* addresses this directly. Rule 1.18: Duties to Prospective Client states:

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is

disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

There are, of course, exceptions to the duty to maintain lawyer-client privilege, as set out in TDRPC Rule 1.02 (d)-(f):

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

The Texas Center for Legal Ethics addressed a slightly different issue in its recent Opinion 691:

Under the Texas Rules of Professional Conduct, when may a lawyer represent a client adverse to a former prospective client of the lawyer or another lawyer in the lawyer's firm?

Said differently, are there times that an attorney might advise a potential client to consult with many lawyers in the area in order to try to create a conflict of interest? Potentially.

In Opinion 691, TCLE discusses a situation involving a woman who consults with one lawyer ("Lawyer A") five years previously regarding a potential divorce. No contract is signed. No retainer is paid. Fast forward.

The woman's husband wishes to retain Lawyer A's long-time partner, Lawyer B, to represent him in his divorce. Before an engagement letter is executed, Lawyer B learns that his partner (Lawyer A) consulted with the wife for 45 minutes five years previously, retained no notes, and further, claims to have no independent recollection of the meeting. Nonetheless, the wife refuses to consent to Lawyer B undertaking her husband's representation. In Opinion 691, TCLE concludes that:

1. **Consultation with a prospective client does not create a "former client" conflict under Rule 1.09** (which is distinguished as applying only when a lawyer formerly represented a client);
2. **Consultation with a prospective client does not create an opposing party representation conflict under Rule 106(a)** (which applies only when a lawyer represents opposing parties in a case);
3. **Consultation with a prospective client may create an adverse limitation conflict under Rule 1.06(b)(2)** (where "…The Committee concludes that Lawyer A's duty of confidentiality to Wife reasonable appears to adversely limit his ability to represent the Husband in divorcing his wife and that Rule 1.06(b)(2) therefore prohibits that representation."
4. **Vicarious disqualification** (TCLE looks to Rule 1.06(f), in concluding that because Lawyer A would be prohibited from undertaking Husband's representation in light of that lawyer previously consulting with Wife, that Lawyer B is disqualified from undertaking Husband's representation as well).
5. **Effective consent** is key (Had Wife provided the partnership of A&B with a written consent waiving any potential conflict of interest, Lawyer B could be engaged to represent Husband. In Opinion 691, there was an express understanding that Wife refused to supply written consent to Lawyer B to allow Lawyer B to undertake her Husband's representation).

In-house counsel, and counsel representing corporations, should be wary when an individual within a corporation seeks legal advice. In United States v. Graf (2010), the Ninth Circuit recognized a five-part test which a corporate officer or employee must fulfill in order to establish a personal

attorney-client relationship. The Graf case was an appeal in which the Ninth Circuit addressed:

…the complex relationship between corporate employees and corporate counsel-a delicate issue that can become particularly problematic when the latter are called to testify in opposition to the former during a criminal trial against the corporation's former officers.

The Ninth Circuit summarized the underlying facts in Graf:

In the fall of 2000, Graf, William Kokott, and Graf's then-girlfriend, Kari Hanson, formed Employers Mutual and sixteen related trade associations (the "Trade Associations"). Although the companies were organized under the laws of Nevada, Kokott, Graf, and Hanson all lived in California, and Graf originally operated Employers Mutual out of his home in Canyon Lake, California. Kokott filed all of the paperwork to incorporate the various entities; Graf was not listed as an employee, officer, or director of any of the companies. This is likely because Graf had previously been banned from insurance work in the state of California for misconduct in violation of state insurance laws. . .

Graf was indicted for his involvement in the fraudulent operation of Employers Mutual. The district court held an evidentiary hearing on Graf's motion in limine to exclude the attorneys' testimony and, after evaluating the briefing, written declarations, and oral testimony presented, issued an order allowing several attorneys who had represented Employers Mutual to testify against Graf at his criminal trial. The court found as fact that the attorneys represented only Employers Mutual and that Graf had no individual attorney-client relationship to establish a privilege that would be violated by the proffered testimony.

After being convicted of "conspiracy, mail fraud, misappropriation, conducting unlawful monetary transactions, and obstruction of justice," Graf appealed, in part based on his contention that (corporate) counsel should not have been allowed to testify against him at the criminal trial. The Ninth Circuit held:

An eight-part test determines whether information is covered by the attorney-client privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

The Ninth Circuit pays particular heed to how to define "client" in the context of corporate counsel, and when and if corporate counsel's communications with an individual is protected by attorney-client privilege. The Ninth Circuit notes that:

The government asserts that any attorney-client privilege in this case belonged to Employers Mutual and was properly waived by the independent fiduciary. See United States v. Plache, 913 F.2d 1375, 1381 (9th Cir.1990) (stating that when a corporation is placed in receivership the power to waive the attorney-client privilege on behalf of the corporation passes to the receiver). The district court agreed. It first found that Graf had not sought personal legal advice from the corporate attorneys. See In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir.1986). The court then determined that Graf did not have a reasonable subjective belief, communicated to the named

attorneys, that he was represented by the attorneys in his individual capacity.

As a "functional employee" of Employers Mutual, did Graf have an attorney-client privilege over any or all of his communications with the named attorneys? The Ninth Circuit applies the five-prong test established in Bevill, (the "Bevill test"):

1. Graf approached counsel for the purpose of seeking legal advice.
2. When Graf approached counsel, he made it clear that he was seeking legal advice in his individual rather than in their representative capacities.
3. The attorney saw fit to communicate with him in his individual capacities, knowing that a possible conflict could arise.
4. His conversations with counsel were confidential.
5. The substance of his conversations with counsel did not concern matters within the company or the general affairs of the company.

The Ninth Circuit comments that despite not having an official title at Employers Mutual, Graf communicated with third parties on behalf of the company, engaged in marketing the company's services, managed staff, and was the company's voice in communicating with counsel, finding that:

We decline to define his relationship with Employers Mutual based on his own self-serving, fraudulent representations made to evade his legal restrictions and to avoid discovery by the California Insurance Commissioner. Because the record establishes that Graf was a functional employee, not an independent outside consultant to Employers Mutual, we reject his claim of entitlement to a jointly held attorney-client privilege with the company's attorneys.

When and how does the attorney-client privilege attach? Whether you find yourself engaged in conversation in the air, on the web or in person: *Caveat Jurista!*

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