

Confidential Matters

A look at attorney-client privilege in transactional practice.

BY **KATHERINE KUNZ**

Keeping privileged material confidential is often wrongly perceived as more of a litigator's "issue" when it comes to accurately classifying materials as "privileged" or "work product" during the discovery process. However, a transactional attorney's proactive steps in safeguarding attorney-client confidentiality are critical should a dispute arise out of a transaction at a later date. Solo and small-firm transactional practitioners, who often don multiple hats over the course of a deal as commercial and legal counsel, must take particular care to keep their clients' legal privileges secure.

Who Is the Client?

First, transactional attorneys must keep a clear understanding of who their client is in order to maintain that client's privilege, particularly if the client is a corporate entity. Corporate privilege will generally belong to the corporation itself and not to its employees. A corporation must act through its representative. Corporate attorney-client privilege therefore applies to representatives with authority to obtain or act on legal advice, as well as to any other employee who makes or receives a confidential communication for the purpose of obtaining legal advice while acting in the scope of employment.¹

Furthermore, if the transaction involves simultaneous representation of different corporate entities, be aware of the possibility of conflict of interest and secure appropriate waivers—or, possibly, separate counsel for each entity—if needed. Corporate parents and subsidiaries are generally viewed as

separate legal entities. When a parent corporation and its subsidiary differ over whether to invoke attorney-client privilege, a court may be asked to determine which entity may assert the privilege. This analysis turns in part on whether the parent and subsidiary are joint clients of their legal counsel or merely one client.

What Material Is Privileged?

Transactional attorneys may find themselves grappling with a client who expects every non-public piece of information about a deal to be "privileged" simply by virtue of an attorney's involvement. While attorney-client privilege protects facts contained in attorney communications, a client cannot protect a material fact with privilege merely by communicating it to an attorney. Furthermore, if the purpose of a communication is commercial rather than legal advice, that communication may not be privileged under the Texas Rules of Evidence Rule 503(a)(2).

In practice, determining whether a communication amounts to "business" versus "legal" advice can be challenging, particularly where a transactional attorney may be acting in a dual role as business adviser and lawyer. However, recent Texas appellate decisions have found that where a communication is made "to facilitate the rendition of legal services," that communication will likely be privileged notwithstanding whether its "primary" purpose is legal or commercial.²

When Is Privilege Waived?

Texas Disciplinary Rules of Professional

Conduct Rule 1.05 states that an attorney must not knowingly reveal confidential information of a client or former client to a third party without the client's consent.

"Confidential information" includes privileged information, as well as unprivileged client information acquired by the attorney during the course of the representation.

Within a corporate structure, multiple employees may take different views toward maintaining a privilege. Typically, the corporation itself (rather than any individual employee or officer) will hold the privilege and the entity's board of directors or other governing body would determine waiver, rather than any individual officer or director.

Solos and small-firm transactional attorneys are often called upon to act as both commercial and legal counselors during a deal. Being mindful of privilege pitfalls that may transpire while doing so is not simply a matter of good lawyering but will also keep your client in the best strategic position possible with regard to privileged material should any future litigation arise. **TBJ**

Notes

1. Tex. R. Evid. 503(a)(2).
2. *In re Rescue Concepts*, No. 01-16-00564-CV, 2017 WL 4127839, at *10 (Tex. App.—Houston [1st Dist.] Sept. 19, 2017, no pet.), *reh'g denied* (Feb. 6, 2018); *In re Fairway Methanol*, 515 S.W.3d 480, 489 (Tex. App.—Houston [14th Dist.] 2017, no pet.).



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