This article is the second in a series of four articles discussing various issues relating to the attorney-client privilege. The first article, entitled “An Overview of the Attorney-Client Privilege & Common Privilege Issues”, appeared in the Fall 2012 Edition of the Corporate Counsel Section Newsletter, State Bar of Texas.

It is well recognized that the attorney-client privilege only applies to confidential communications between a client and its lawyers. If a third party is present during the communication - or the communication is later disclosed to a third party, the privilege does not apply. Often, however, it is necessary for the lawyers and clients to rely on the experience of a third party to help provide the legal advice: an accountant, banker, interpreter or other expert. Can a client and lawyer include such a third party in their discussions and still maintain the confidential nature of the communication?

The issue of whether the attorney-client privilege should extend to third-party consultants is still developing. There is very little Texas case law on the topic, but this article provides an overview of the existing law and possible arguments to extend the privilege to include a third-party consultant in an otherwise privileged conversation. It is also important to remember that, like all privilege issues, whether the privilege applies to a consultant will be very fact-specific and will be made on a communication-by-communication basis.

I. Texas Rule of Evidence 503

Under Texas Rule of Evidence 503, which governs the attorney-client privilege in Texas, a communication is privileged if it is confidential, made for the purpose of facilitating the rendition of professional legal services, and is made between a (1) lawyer; (2) client; (3) representative of the lawyer; or (4) representative of the client, or any combination of the four.1

The analysis of whether a particular consultant is within the privileged relationship and thus does not waive privilege begins with the definitions of representative of the client and representative of the lawyer. Rule 503 defines a representative of the client as “a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client” (known as the “control group test”) or as “any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client” (known as the “subject matter test”). TEX. R. EVID. 503(a)(2)(A)-(B).

A representative of the lawyer is defined as “one employed by the lawyer to assist the lawyer in the rendition of professional services” or “an accountant who is reasonably necessary for the lawyer’s rendition of professional legal services”. TEX. R. EVID. 503(a)(4)(A)-(B).
II. No Privilege if Communication Made in Presence of Third Party or if Communication Is Later Shared with a Third Party

A key component of the attorney-client privilege is that the communication be confidential. This requirement means that the communication is not privileged if it is made in the presence of a third party outside of the privileged relationship, and an otherwise privileged communication loses its privileged status if it is disclosed to a third party.

However, certain exceptions to this general waiver rule have developed to protect communications with third parties as privileged. One such long-recognized exception is for an interpreter assisting an attorney in communicating with a foreign client. Over time, and discussed in more detail below, this exception has been expanded to encompass other third-party consultants that are necessary to the attorney in rendering legal advice.

There are other exceptions to the general waiver rule that are not discussed in this article. One example is the “functional equivalents” test, which examines whether the third party in question is the functional equivalent of the client. An analysis under this exception usually looks at whether the third party is able to act on the legal advice provided by the attorney on behalf of the client.

III. The Kovel Doctrine

The leading case applying the attorney-client privilege to third-party consultants assisting attorneys is a case out of the Second Circuit styled United States v. Kovel. In Kovel, an accountant was held in contempt for refusing to answer questions he claimed would divulge privileged information. The Second Circuit held that the privilege should be extended to necessary third parties such as accountants, just as the privilege is extended to third parties like interpreters.

In finding that communications between an attorney, client, and an accountant could be privileged, the court stated that “[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer”. However, to draw a line between privileged communications with a third party and non-privileged communications with a third party, the court stated that where the client communicates first to his own accountant or if the advice sought is the accountant’s rather than the lawyer’s, then no privilege exists.

IV. Texas Courts Have Adopted the Kovel Doctrine

First, it is important to note that the current Texas Rule of Evidence 503 explicitly includes “an accountant who is reasonably necessary for the lawyer’s rendition of professional legal services” as a representative of the lawyer. TEX. R. EVID.
503(a)(4)(B). Thus, if the accountant is reasonably necessary for the lawyer’s rendition of legal services, the accountant’s communications with the lawyer, the client, or the client’s representative can be privileged. TEX. R. EVID. 503(b)(1).

Second, Texas state and federal courts have adopted the Kovel Doctrine in the context of accountants, and have held that in certain circumstances communications with accountants can be protected by the attorney-client privilege. In the two Texas state court cases to address the Kovel Doctrine, both placed the primary emphasis on whether the consultant was assisting counsel. If the consultant acts completely separate from and independently of counsel, then the attorney-client privilege does not apply to communications with that consultant.7

Based on the few cases on the subject, the key components for determining whether the attorney-client privilege applies to a communication with an accountant can be stated as:

- The communication is made for the purpose of obtaining legal advice from the lawyer;
- The consultant’s services enabled the giving of legal advice; and
- The communication was not made for the sole purpose of seeking the consultant’s advice.8

Importantly, the mere fact that an attorney places an accountant on its payroll will not render communications with that consultant privileged.9 In order for the communication to be privileged, the attorney must prove that the accountant was hired for the specific purpose that makes up a significant part of the disputed communications.10

The courts that have considered this issue have focused on whether the communication was made for the purpose of obtaining legal advice from the lawyer, not whether the attorney or the client employed the consultant.11 However, when practicable, it may strengthen the argument that the privilege applies if the attorney retains the consultant and makes clear in the engagement letter that the consultant is being hired to assist the attorney in rendering legal advice.

V. Application of the Kovel Doctrine to Non-Accountant Consultants

Although Kovel and its progeny deal mostly with accountants, the same principles have been held to apply in limited circumstances to other consultants as well. For example, if the general requirements for the attorney-client privilege are met and the communication is made for the purpose of assisting the attorney in rendering legal advice, in certain circumstances communications with the following consultants have been found to be privileged: (1) investment bankers;12 (2) appraisers;13 (3) public relations consultants;14 and (4) insurance brokers.15
Courts are often quick to find that there is no privilege or that the privilege is waived. It is vital that the communication be made for the purpose of rendering legal advice. Courts are especially quick to find ways around the attorney-client privilege when third-party consultants are involved. For example, if the client communicates directly with the consultant and the communication does not directly relate to the provision of legal advice, the communications will likely not be deemed privileged. The consultant must be translating information or facilitating the communication. Furthermore, simply adding an attorney to a discussion or e-mail string that does not involve the provision of legal advice will not transform the communication into a privileged one.

VI. The Discovery Rules for Experts Still Apply

It is important to remember that the discovery rules for testifying and consulting experts still apply. So, for example, if an accountant is hired as an expert in connection with a lawsuit, the communications with that expert may not necessarily be protected by the attorney-client privilege. The rules vary based on whether the person is a testifying expert or a consulting-only expert.

If a third-party consultant is retained as a testifying expert, that consultant will be subject to discovery. Under Texas Rule of Civil Procedure 192.3(e), 192.5(c)(1), and 194.2(f), full discovery of retained testifying experts is allowed. Parties can discover the following information about or provided to a testifying expert: (1) identity; (2) subject of testimony; (3) facts; (4) opinions; (5) evidence of bias, including a list of the expert’s other cases and personal records; (6) materials used by the expert, including otherwise privileged materials; (7) expert’s report; and (8) résumé and bibliography.

If the third-party consultant is hired as a consulting-only expert, then no discovery of that expert is allowed under the work-product privilege. However, if a consulting-only expert’s work is reviewed by a testifying expert, the consulting-only expert becomes a testifying expert and full discovery is allowed.

VII. Conclusion

In sum, courts have expanded the traditional attorney-client privilege and waiver rules to encompass some communications with third-party consultants. Most notable is the Kovel Doctrine, which expands the privilege to cover communications with third-party consultants that are necessary for the rendition of legal advice. Although there is very little case law on the subject, based upon the cases discussed throughout this article, courts seem to focus on whether the communication was necessary to the attorney’s rendition of legal advice. If the consultant’s presence was merely helpful or supportive, the communication will likely not be privileged. Although this article serves as a helpful guideline in protecting communications with consultants, it is still important to analyze each consultant relationship and each communication separately to make an informed decision as to whether a particular communication will be privileged.

There will be two more articles in this series on the attorney-client privilege. The next article will discuss how to maintain privilege in a merger and other business transactions,
and the final article will discuss how to avoid waiver of otherwise privileged communications.

ENDNOTES

1 TEX. R. EVID. 503.
2 United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).
3 Id.
4 Id.
5 Id. at 922.
7 Sims, 1988 WL 62294 at *5.
9 Id.
10 Id.
12 Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d 207 (S.D.N.Y. 2000) (communications between the client, its attorney, and its investment banker were held to be privileged because the investment banker’s role was to provide advice to the attorney in rendering his legal opinion).
14 In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003) (communications with public relations consultants for the purpose of providing legal advice are protected by the privilege).
15 Allianz Underwriters, Inc. v. Rusty Jones, Inc., No. 84 C 10860, 1986 WL 6950 (N.D. Ill. June 12, 1986) (communications between attorney, client, and insurance broker were found to be privileged where the communications were sent to the broker for the purpose of the broker communicating necessary facts to the attorney).
17 United States v. Ackert, 169 F.3d 136, 139-40 (2d Cir. 1999) (a communication with an investment banker is not privileged merely because it is important).
18 Tex. R. Civ. P. 192.3(e), 192.5(c)(1), 194.2(f).
19 United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

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