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Assessing the Status of the Attorney–Client Privilege in the Age of Twitter

By Allison Standish Miller

"Attorney–client privilege is dead!" It may be hard to believe, but President Donald Trump tweeted this declaration only a short time ago, on April 10, 2018. It received over 104,000 likes and over 26,000 retweets. The FBI and other members of law enforcement had conducted an early-morning raid of the President's personal attorney's office and residence, and the President, apparently believing that anything communicated to or through a lawyer was untouchable, took to Twitter to express his displeasure.

Although the non-lawyer public quickly turned its attention to other matters, the tweet sent a shockwave, albeit a minor one, rippling through the legal community. Lawyers across the country discussed it over coffee, on various op-ed pages and blogs, and even at law schools, wondering: Is something so fundamental to our system of justice *really* a thing of the past? Logically, and practically, we know that is not true. But—especially for those of us who practice in the professional liability world—those five words raise various questions not just about the current status of the privilege, but also about why it exists in the first place, how much the privilege really does protect, and why the public has certain misconceptions regarding what so many of us take for granted as part of our professional lives.

A quick reminder of the actual text of Rule 503(b)(1), the "General Rule" on attorney–client privilege, is instructive here:

> **General Rule**. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) Between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) Between the client's lawyer and the lawyer's representative;

(C) By the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) Between the client's representatives or between the client and the client's representative; or

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(E) Among lawyers and their representatives representing the same client.[1]

The client, the client's guardian or conservator, the personal representative of a deceased client, or "the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence" may claim the privilege.[2] Lawyers may claim the privilege on their clients' behalf, and are presumed to have the authority to do so.[3]

Even though the privilege is not one of our enumerated constitutional rights, it is without question an integral part of our legal system. Indeed, many, almost as a knee-jerk reaction, describe the privilege as "sacrosanct." For instance, Fourteenth Court of Appeals Justice Ken Wise, who also served a number of years as a Harris County District Court judge, remarked that it is "critical to the process that the sides in an adversarial proceeding need a place where they can *not* be adversaries."

Some attorneys have expressed their views on the privilege as being foundational to the practice of law. "The privilege is vital to virtually every conversation I have with a client and often with other defendants," said Erica Harris, a Houston-based partner at Susman Godfrey. "No one could speak freely if there was not a promise that questions asked and words spoken could not be used against you later." According to solo practitioner Shelly Durham, the attorney-client privilege "plays a very frequent role" in family law cases as well. "Whether we are dealing with clients admitting to having had affairs, issues regarding parentage of children, drug use by a client, discipline of children, etc., there are a lot of secrets in familial relationships, and it is crucial that the attorney be made aware of the facts in order to properly address them or not address them within the case."

Attorneys (should) know that merely copying a lawyer on an email does not magically make the communication privileged. This practice is nevertheless routine. As reflected in the Rule, communications must be made "to facilitate the rendition of professional legal services to the client" in order to be privileged.[4] If they are not, the communications are subject to discovery.

Likewise, the privilege does not apply to communications made to a lawyer who has been hired in a non-legal capacity.[5] To that point, "[a] client's dirty laundry isn't privileged just because he asks his lawyer to wash it," appellate lawyer Peter Kelly of Kelly Durham & Pittard said. "The privilege is supposed to protect the communication of legal advice, not everything the lawyer does with his client in mind." It is for this reason, among others, that the crime-fraud exception exists.[6]

In a similar vein, not all communications and documents related to internal corporate investigations are protected by the attorney–client privilege or its companion, the attorney work product exemption.[7] Likewise, drafts of documents may not necessarily be protected if they are not made, prepared, or developed "in anticipation of litigation or for trial."[8] Corporations and their counsel must therefore proceed with tremendous caution.

Interestingly enough, not every country enjoys the protections of the attorney–client privilege. Lawyers are statutorily duty-bound to keep client communications confidential in many countries whose law is code-based rather than founded on common-law, but the communications themselves may not be privileged.[9] It is thus crucial for in-house and outside counsel alike to be aware of the rules and regulations in the various jurisdictions in which they practice.

Yet rules regarding the privilege vary even within the continental United States. "I find it interesting that the scope of privilege among defendants and potential defendants is more limited under Texas law than that under federal or other states' laws," Harris said, warning that this can be "a likely trap for the unwary."

As we learned soon after the April 10 FBI raid on President Trump's attorney, Michael Cohen, the government *has* built specific protections and precautions into its seizure of potentially privileged information from attorneys like Cohen.[10] These protections and precautions—in no doubt due to the power and importance of the privilege—require special levels of permission to obtain such a warrant, and special levels of protection to review seized information and materials.[11]

Joel Androphy, who practices both criminal and civil law at the Houston boutique firm Berg & Androphy, spends a large portion of his time on the prosecution of *qui tam* private whistleblower cases, many of which involve complex and delicate issues surrounding the privilege. "The government is sensitive to privilege," Androphy said. "When [the United States Attorneys for the Southern District of] New York did what they did [in Mr. Cohen's case], they had a very valuable reason for doing it." The public is certain to hear more of these issues in the coming months, not only as details of Special Counsel Robert Mueller's and the Southern District of New York's investigations are made public, but also as the civil litigation relating to the nondisclosure agreement drafted by Cohen progresses.

Given the circumstances surrounding it, the President's tweet indicates that not just he, but many people in the United States, may carry various misconceptions about the scope of information that the attorney–client privilege is designed to protect. Although these individuals may believe that *any* communication made to a lawyer is privileged and therefore protected, certain other clients are reluctant to accept that the

privilege truly protects them at all. "In my practice, it can be difficult to get clients to open up and realize communications are confidential," said Fred Dahr, a solo criminal practitioner. "They think I might pass on to the DA something negative or inculpatory. Another difficult issue is when a parent or a grandparent pays the fee for a child/grandchild client and the client feels pressure not to be honest with me[,] fearing the story will make them look bad to their relative."

Rest assured, however, recent case law confirms that the privilege is alive and well in states such as Texas. For example, in February of 2018, the Texas Supreme Court confronted the issue of "who may qualify as a lawyer for purposes of the privilege," deciding whether Rule 503 protects communications between patent agents and clients.[12] In the case, Andrew Silver, an inventor, sued Tabletop Media LLC, claiming that Tabletop had failed to pay him for his invention. Tabletop then sought production of communications between Silver and his patent agent, in response to which Silver asserted the attorney–client privilege. Even though patent agents and patent attorneys alike must be licensed to practice before the United States Patent and Trademark Office (USPTO), Tabletop asserted that patent agents are not attorneys, and the Rule's protections do not apply. After trial court and a divided panel of the Dallas Court of Appeals agreed, Silver sought review in the Supreme Court, where a number of amici weighed in. In performing its analysis, the Court examined Rule 503's definition of "lawyer" and the role of the patent agents, stating that "the issue is not the creation of a new patent–agent privilege but rather whether the existing lawyer–client privilege extends to communications between a registered patent agent and the agent's client."[13] The Supreme Court reversed, holding that "because patent agents are authorized to practice law before the USPTO, they fall within Rule 503's definition of 'lawyer,' and, as such, their clients may invoke the lawyer-client privilege to protect communications that fall within the privilege's scope."[14]

In December of 2017, the El Paso Court of Appeals clarified the related issue of who qualifies as a *client* for purposes of the rule.[15] In the case, Yvette Delgado sued her employer, DISH Network, claiming discrimination and retaliation. During discovery, Delgado sought production of documents and communications regarding various employment-related lawsuits against DISH, which included communications between DISH's outside counsel and Delgado in her role as human resources manager. Delgado was not personally named a party to any of the proceedings. The employer asserted the attorney-client privilege, claiming that even though Delgado was a party to the communications, no attorney–client relationship between Delgado and DISH's outside counsel existed. Accordingly, the communications belonged to DISH and were thus protected under the Rule. The Court of Appeals reversed the trial court's order granting Delgado's motion to compel production, finding that neither an express nor an implied attorney–client relationship existed between Delgado and DISH's outside counsel. The Court also found that the joint client exception to the Rule, which protects communications "offered in an action between clients who retained or consulted a lawyer in common" did not apply given that Delgado's involvement "solely as a representative of DISH in the course and scope of her employment" did not render her a client for purposes of the Rule.[16]

A similar question in the First Court of Appeals's *In re Rescue Concepts, Inc.* decision regarded the application of the Rule in light of the capacity in which a lawyer functioned, *i.e.*, whether the lawyer acted as a lawyer or in some other role in making the communications at issue.[17] In the case, a buyer of real estate brought a breach of contract action against the seller; the seller then brought claims against the buyer's real estate broker. The broker eventually sought communications between the seller and the seller's attorney during contract negotiations, claiming that because the attorney functioned solely as a real estate agent or broker, and not in a legal capacity, the communications were not privileged. After conducting the required *in camera* review, the trial court agreed. The Court of Appeals conducted its own *in camera* review and reversed, holding: (1) that the lawyer-agent provided legal services; and (2) that the communications at issue were made "for the purpose of facilitating the rendition of professional legal services."[18] The broker has sought *mandamus* relief of the First Court of Appeals's ruling in the Texas Supreme Court.[19] The case should be closely watched not only by attorneys who wear multiple hats in the real estate context, but in any field in which they may assume dual roles.

If nothing else, the president's tweet raised the public awareness of the privilege and, one hopes, has increased its understanding of what it means and who it protects. "Now more than ever, when everything is public, litigants need a place where they can feel that their communications truly are protected," Judge said. Although the world often feels like it moves at the speed of Twitter, lawyers and non-lawyers alike can take comfort knowing that the attorney–client privilege, one of the most important elements in the foundation of our profession, holds firm.

Notes

1. Tex. R. Evid. 503(b)(1).
2. Tex. R. Evid. 503(c).
3. *Id.*

4. Tex. R. Evid. 503(b)(1).
5. *See, e.g.*, *In re Bivins*, 162 S.W.3d 415, 419–420 (Tex. App.—Waco 2005, orig. proceeding); *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 332 (Tex. App.—Austin 2000, pet. denied).
6. *See* Tex. R. Evid. 503(d)(1).
7. *See* Tex. R. Civ. P. 192.5; *In re Fairway Methanol*, 515 S.W.3d 480, 494 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).
8. *See* Tex. R. Civ. P. 192.5; *see also, e.g.*, *In re Tex. Windstorm Ins. Ass'n*, No. 14–16–00677–CV, 2016 WL 7234466, *3 (Tex. App.—Houston [14th Dist.] Dec. 13, 2016, orig. proceeding) (mem. op).
9. *See, e.g., Privilege: a world tour*, Practical Law UK Articles 2-103-2508, by Diana Good, Patrick Boylan, Jane Larner and Stephen Lacey, Nov. 18, 2004.
10. *See, e.g.*, Ryan Lucas, "Does FBI Raid on Trump Lawyer Cohen Mean Attorney-Client Privilege Is 'Dead'?," NPR, *https://www.npr.org/2018/04/10/601153729/does-fbi-raid-on-trump-lawyer-cohen-mean-attorney-client-privilege-is-dead (last visited June 27, 2018).*
11. *See id.*
12. *In re Silver*, 540 S.W.3d 530, 533 (Tex. 2018).
13. *Id.*
14. *Id.* at 538.
15. *In re DISH Network, LLC*, 528 S.W.3d 177, 180–184 (Tex. App.—El Paso 2017, orig. proceeding).
16. Tex. R. Evid. 503(d)(5); *In re DISH Network*, 528 S.W.3d at 186–187.
17. *In re Rescue Concepts, Inc.*, ---S.W.3d---, No. 01–06–00564–CV, *1 (Tex. App.—Houston [1st Dist.] Sept. 19, 2017, pet. filed) (orig. proceeding).
18. *Id.* at *3–4, 10–11.
19. *See* No. 18–0480, *In re Jones Lang LaSalle-Texas, Inc.*, in the Supreme Court of Texas.

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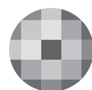
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