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The Attorney-Client Privilege: Three's A Crowd?

Mitch McDeere, the young, idealist protagonist of "The Firm" [1] plans his escape from a corrupt legal practice, while never forgetting that "[t]he attorney-client privilege is one of the oldest recognized privileges for confidential communications." [2]

The attorney-client privilege provides the client with the power to refuse to disclose, and to prevent others from disclosing, confidential communications made between the attorney and client in the course of seeking or rendering legal advice. [3] But the privilege generally only attaches to those communications between an attorney and a client.

Who is the client? Is it only the individual that a lawyer has a written or oral agreement to represent? Or could it extend to the client's spouse, neighbor, or friend? Many lawyers have been in situations where clients bring their trusted confidants and loved ones to meetings, but does the privilege attach to all in the room in those situations? What about meetings where the client sends their friend and/or trusted confidant to communicate directly with the retained lawyer? When does the attorney-client privilege attach to these communications and when is the privilege waived by the presence of a third-party? This article will examine best practices to ensure attachment of the attorney-client privilege in instances where a client identifies an "agent" to act on their behalf.

Nearly 150 years ago, the Supreme Court of Ohio held that "[i]t is well established that the [attorney-client] privilege extends as well to communications to or through an agent, as to those made directly to the attorney by the client in person." [4] Following this holding, in *Shipley*, the Fifth District Court of Appeals held that the "presence of appellant's brother did not operate as a waiver of appellant's privileged communications." [5] The Court in *Shipley* concluded that the client's communications to his attorney were privileged and that the privilege was not waived by his brother's presence for some of the communications. [6] However, the Court in *Shipley* did not address communications made by the third-party to the attorney, but merely whether the third-party's presence waived the privilege. In 2016, the Third District Court of Appeals addressed this exact issue: whether communications between a third-party agent and an attorney are privileged.

***Zimpfer v. Roach*: A cautionary tale where a self-identified agent was not, in fact, held to be the client's agent.**

In *Zimpfer v. Roach*, the Shelby County Probate Court, and, eventually, the Third District Court of Appeals, attempted to determine whether the agent, who was more involved in litigation strategy than the named parties, could qualify as a client for purposes of attaching the attorney-client privilege. In *Zimpfer*, the plaintiffs—Blake Zimpfer and Jody Keith—filed a will contest alleging that: (1) the will failed to comply with the formal requirements of a will; (2) the decedent lacked testamentary capacity to make a will; and (3) the will was a product of undue influence. The plaintiffs were out of state, in the Navy and away at college respectively, and neither of the plaintiffs were readily available for participation in litigation strategy or preparation discussions. As a result, Dr. Kreg Huffer, the plaintiffs' uncle, served as the conduit between the plaintiffs and their attorneys. Plaintiffs' counsel advised defense counsel that Dr. Huffer had assumed the role of agent and representative for the plaintiffs in the will contest action. As part of his responsibilities as agent, Dr. Huffer attended a mediation in lieu of the named plaintiffs.

As the litigation proceeded, the defense issued a subpoena to Dr. Huffer seeking all communication with plaintiffs' counsel. Accordingly, Dr. Huffer and plaintiffs filed a motion to quash the subpoena based on attorney-client privilege and work product doctrine. In support of the motion to quash, plaintiffs and Dr. Huffer argued that Dr. Huffer was the "agent" of the plaintiffs pursuant to R.C. 2317.021(A), and therefore, his communications with counsel were protected. In support of this assertion, Dr. Huffer executed an affidavit whereby he stated that he is the uncle of the plaintiffs and that he had formally "assumed the role of representative and agent for [plaintiffs] for purposes of this litigation." The defendants opposed the motion to quash citing Snyder v. Fleetwood RV, Inc., 303 F.R.D. 502 (S.D. Ohio 2014) for the proposition that communications in which the "agent" acts as a consultant with the attorney, rather than a conveyor of client communications, are not afforded privilege, and that whether Dr. Huffer is, in fact, the agent of the plaintiffs is a legal conclusion, thus his affirmative representation in the affidavit is not dispositive. Plaintiffs disputed these assertions in their reply brief. However, the trial court held that communication between Dr. Huffer and plaintiffs' counsel was discoverable as it was "not subject to any privilege or work product exception" and ordered Dr. Huffer to produce his communication with plaintiffs' counsel.

Dr. Huffer and plaintiffs filed an appeal at the Third District. The Third District affirmed the trial court order and held that there was "no evidence from which one could conclude that [plaintiffs] designated, appointed, or otherwise requested Dr. Huffer to act as their agent and representative for purposes of this litigation." [7] In other words, the Third District took issue with the fact that the actual clients (i.e., the plaintiffs) did not formally authorize Dr. Huffer to speak on their behalf with their counsel. In addition, the Third District frowned upon the fact that the plaintiffs did not seek an "evidentiary hearing during which they could have presented additional evidence supporting the existence of an attorney-client relationship between Dr. Huffer and [plaintiffs'] counsel." [8] Simply put, the Third District desired to see evidence of the existence of the agency relationship between Dr. Huffer and plaintiffs, suggesting that if such evidence had been presented, the Court may have sustained the claim of attorney-client privilege.

Ohio has a broad definition of who qualifies as a "client."

R.C. 2317.021(A) defines "client" as:

> "[A] person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from the attorney in the attorney's professional capacity, or consults an attorney employee for legal service or advice, and who communicates, either directly or through an agent, employee, or other representative, with such attorney; and includes an incompetent person whose guardian so consults the attorney in behalf of the incompetent person."

The statute protects communications between an attorney and client "directly or through a representative," and communications "directly or through an agent, employee or other representative." In other words, on occasion, attorney-client privilege may attach where an individual is acting on behalf of the client to communicate with the attorney. In case there was any doubt as to the definition of "agent," in *Biddle v. Warren Gen. Hosp*., the Supreme Court of Ohio held that "the 'agent' to whom R.C. 2317.021 refers is someone who communicates to the attorney on behalf of the client, that is, someone other than the attorney." [9]

Best practices for including a third-party agent in sensitive communications.

What can attorneys do to ensure that communication with a client's agent or representative is protected and encompassed under R.C. 2317.021(A)? Based on the result in *Zimpfer*, it would be prudent to have the actual client that engaged the attorney to affirmatively indicate that said individual is their agent for purposes of the attorney-client relationship and that communications with said individual are to remain privileged from third parties. In my own practice, in situations where clients would like their

spouse, adult child, business advisor, or trusted confidant to be included in conversations and to have the authority to relay information to me, I instruct the clients to sign off on the following letter:

> Please accept this letter as my authorization that _____ may act as my agent with respect to [insert the scope of the engagement]. It is my intention that any communications that your office has with _____ will remain privileged. To the extent your office is unable to contact me directly, _____ has the authority to transmit and receive communications regarding _____ on my behalf, all of which will be protected under the attorney-client privilege.

In that "the [attorney-client] privilege is founded on the premise that confidences [10] shared in the attorney-client relationship are to remain confidential," [11] attorneys should inform both the client and the third-party agent that communications unrelated to the representation and otherwise not intended to remain confidential are discoverable.

The agency designation can always be revoked by the client. Though the client and third-party agent may initially have a common interest (i.e. the drafting of a trust or employment agreement), it is not uncommon that a conflict may occur between the client and third-party agent. One example would be an adult child who assisted the elderly parent with engaging and communicating with counsel to execute a financial or health care power of attorney, only for that child to later dispute that the parent had the mental capacity to execute the POA. In those situations, unlike concurrent representation conflicts, there is no bar to the attorney continuing to represent the parent.

In sum, at your introductory meeting with the client, explain to each client that in order to protect from discovery communications which are intended to be privileged, each person in the meeting is bound by attorney-client privilege. And to ensure that your communications with third parties acting on behalf of the client retain the attorney-client privilege, get the client's wish to that effect memorialized in writing before you proceed to communicate with the third-party agent.

Footnotes

a0 Schneider Smeltz Spieth Bell LLP
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1 THE FIRM (Paramount Pictures 1993).

2 Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 127 Ohio St. 3d 161, 165, 2010-Ohio-4469, ???16, 937 N.E.2d 533, 537, 71 A.L.R.6th 717 (2010).

3 State ex rel. Thomas v. Ohio State Univ., 71 Ohio St. 3d 245, 1994-Ohio-261, 643 N.E.2d 126, 96 Ed. Law Rep. 237 (1994).

4 Bowers v. State, 29 Ohio St. 542, 546, 1876 WL 123 (1876).

5 State v. Shipley, 94 Ohio App. 3d 771, 776, 641 N.E.2d 822, 825 (5th Dist. Licking County 1994).

6 In State v. Whitaker, 1998 WL 704348 (Ohio Ct. App. 12th Dist. Warren County 1998), the Twelfth District interpreted the *Bowers* decision more narrowly, declining to treat a mother as her son's agent for purposes of confidentiality when the son was not a minor.

7 *Zimpfer v. Roach*, 2016-Ohio-5176, ¶ 31, 2016 WL 4080692, at *5 (Ohio Ct. App. 3d Dist. Shelby County 2016).

8 *Zimpfer v. Roach*, 2016-Ohio-5176, ¶ 33, 2016 WL 4080692, at *5 (Ohio Ct. App. 3d Dist. Shelby County 2016).

9 Biddle v. Warren Gen. Hosp., 86 Ohio St. 3d 395, 1999-Ohio-115, 715 N.E.2d 518, 526 (1999).

10 When determining what communications are protected by attorney-client privilege, the following must be present: (1) [w]here 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 insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. Moskovitz v. Mt. Sinai Med. Ctr., 69 Ohio St. 3d 638, 660, 1994-Ohio-324, 635 N.E.2d 331, 35 A.L.R.5th 841 (1994).

11 Moskovitz v. Mt. Sinai Med. Ctr., 69 Ohio St. 3d 638, 660, 1994-Ohio-324, 635 N.E.2d 331, 35 A.L.R.5th 841 (1994).

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