PLDF "Field Trippers" at the 2016 Annual Meeting!

"Attorneys … must take affirmative steps … to safeguard their clients' data and avoid possible claims of malpractice."

TRIBE'S TRUMP TWEET: A-C PRIVILEGE AND CONFIDENTIALITY,

BY: DONALD PATRICK ECKLER, ESQ. AND ALICE M. SHERREN, ESQ.

In August 2016, Harvard Law School professor and prominent constitutional scholar, Laurence Tribe, sparked a legal ethics controversy when he tweeted, "I have notes of when [GOP presidential nominee Donald] Trump phoned me for legal advice in 1996. I'm now figuring out whether our talk was privileged." http://blogs.wsj.com/law/2016/08/17/laurence-tribe-tweet-about-trump-sparks-controversy/

Nearly everyone agrees that Tribe's tweet was unnecessary at best, but some believe he has exposed himself to possible disciplinary action, pointing out that the concern is not whether the notes are "privileged" as an attorney-client communication but rather whether Tribe violated the "confidentiality" that attaches to the notes and even the fact Trump sought his legal advice. This protection is available under ABA Model Rule 1.6, even though it seems that Trump never actually engaged Tribe.[1]

Without getting into political debate, this situation highlights the often missed distinction between attorney-client privilege and confidentiality. If a lawyer of Tribe's stature can miss this distinction, then there is much the rest of us can learn from this situation.

Basics of the Privilege and Confidentiality

Confidentiality and attorney-client privilege are similar, but are not the same. Both the "evidence concept" of attorney-client privilege and the "ethical concept" of confidentiality are meant to reassure clients that they can trust their lawyers. As the United States Supreme Court said in *Upjohn v. United*

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States, 449 U.S. 383, 389 (1981), the purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Though the Court was speaking of the privilege the purpose expressed applies to both privilege and confidentiality.

As observed by the Court in *Lugosch v. Congel*, 219 F.R.D. 220, 234 (N.D.N.Y. 2003) "[t]he free-flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without their consent." Lawyers must create that "zone of safety."

"Privilege" is an evidentiary issue based on common law and developed in case law, while "confidentiality" is an ethical issue based on ABA Model Rules of Professional Conduct Rule 1.6. The goal of both concepts is to encourage the client to tell his or her lawyer all of the facts – even facts that might embarrass the client or paint the client in a bad light – without fear of the lawyer exposing their secrets voluntarily (confidentiality) or being forced to expose their secrets in litigation (privilege). The elements of what cloaks a communication with privilege are well know: The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983).

Confidentiality is an ethical duty that prevents a lawyer from voluntarily disclosing a client's confidences while the attorney-client privilege is an evidentiary "privilege" a lawyer can assert if a person or litigant or court demands he disclose his client's confidences. The duty to maintain a client's confidences is a creature of the rules of professional conduct in most, if not all, states. The Model Rules define that duty as follows: "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." The exceptions in Paragraph (b) of Rule 1.6 fall into two categories: crimes or frauds by the client or disclosure necessary to protect the lawyer. In other words, these are very narrow exceptions.

Not all confidential information enjoys the attorney-client privilege from disclosure in litigation, although arguably all attorney-client privileged information is also confidential. This means that a client, or his lawyer, could be compelled to disclose confidential information that is not also protected by the attorney-client privilege. The key here is compelled. A lawyer should never voluntarily disclose any information about a client (confidentiality) or communications with the client (privilege).

Both the confidentiality and privilege exist from the moment the lawyer speaks with the client, whether the lawyer is engaged by the client or not, and the protections survive the termination of the relationship, including the death of the client. Generally, the protection can only be waived by the client.

The ethical duty of confidentiality applies to the lawyer, who is obligated to protect the confidences of his clients and may be disciplined if he or she does not. Generally speaking, Rule 1.6 requires the lawyer to not voluntarily share his client's secrets with anyone else. However, under Rule 1.6, a client may give "informed consent" to a voluntary disclosure of otherwise confidential information. Rule 1.6 also allows voluntary disclosures that are "impliedly authorized in order to carry out the representation." For example, a client represented by a lawyer practicing in a firm with other lawyers is generally considered to have "impliedly authorized" her lawyer to share confidential information with other lawyers in the firm.

In contrast, the attorney-client privilege belongs to the client and protects confidential information from being compelled to be disclosed. This means that even if a litigant seeks or a court orders disclosure of information, the client or lawyer can raise the attorney-client privilege and if the court agrees the privilege applies, the information is protected from compelled disclosure. Simply asserting that the information sought is confidential, or even that other protections such as work product privilege apply, would not afford the same protection. While the work product privilege can be overcome by a showing of substantial need for the material and undue hardship in accessing the equivalent through other means, such exceptions are not available to avoid the attorney-client privilege, which is absolute if it is determined to apply.

It is important to understand, however, that while information obtained in any manner may be considered confidential, the attorney-client privilege applies only to communications between the client and his lawyer. For example, if a lawyer, with his client's consent, talks to the client's relative about the subject of the representation the lawyer's notes from such communication may be protected by the work product

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doctrine, and confidentiality would attach to the information shared. However, the notes would not be protected by the attorney-client privilege (because the client was not the one communicating with the lawyer) and could be compelled to be produced.

In addition, facts may be considered confidential, but facts do not become privileged simply because they have been communicated to an attorney. The *communication* from the client to his or her lawyer is privileged, but the *underlying information* is not. For example, a lawyer would appropriately object to a question about whether a client told his lawyer Fact A, but if the client was simply asked whether Fact A is true the fact that he had told his lawyer Fact A would not mean the privilege would apply to Fact A. However, any facts learned about the client or related to the representation are protected by confidentiality, even if not learned in communications from the client.

General business or management advice is also not protected – only legal advice. Presence of an attorney on an email chain or at a meeting does not automatically make the contents of the email or meeting privileged unless the purpose is for obtaining legal advice.

So back to Tribe's Trump Tweet. Arguably the initial question posed by Tribe – whether the notes are privileged – is not the proper question to be asking because at this point no person or litigant or court has demanded he produce the notes. Instead, the question Tribe should have asked himself is whether the notes, and the fact Trump came to him for legal advice at all, even if it was 20 years ago, is confidential information that he had a duty to protect and certainly should not have voluntarily disclosed. It seems clear that an individual who seeks advice from an attorney does so with the expectation that the fact communication occurred is confidential. This extends to circumstances in which the individual did not ultimately engage the lawyer, which seems to be the circumstance between Tribe and Trump. It is further clear that in a situation in which no one sought information from Tribe regarding Trump, or that they had ever even spoken, the disclosure of the existence of the conversation was a violation of the confidentiality rule.

Conclusion

More than even zealous representation and competence in that representation, the most basic tenet of the practice of law is the protection of client confidences. Representation of attorneys can force confrontation with these issues on a more regular basis than lawyers in other areas of practice. While the communications between the defendant lawyer and the plaintiff client have likely been put at issue, the use of subsequent counsel by the plaintiff can force navigation of these protections, and the exceptions thereto, during the course of discovery in defense of the lawyer alleged to have committed malpractice. It is also particularly acute in the representations of professionals to maintain their confidences because terrible damage can be done to their reputations should facts related to the representation become public. This can be especially so with respect to whether a claim that has been made pre-suit against a professional.

Endnote

1. This article will focus on the ABA Model Rules. The Rules of a particular jurisdiction may vary and should be consulted.

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PRESIDENT'S MESSAGE

It is my honor and privilege to serve as the President of the PLDF this year. The PLDF currently has a membership of 495, including 162 industry members. The size gives us all some unique opportunities to get actively involved in its many committees, have articles published in the Quarterly and participate in CLE programing at the annual meeting. I encourage you all to take advantage of these opportunities.

Planning for the 2017 annual meeting is already underway. The meeting will be back in Chicago and will run September 27-29, 2017. Please get those dates on your calendar now and plan to attend. A call for programming suggestions will be out around February 1.

Your Board of Directors will begin meeting monthly this month. Any ideas or suggestions you might have as to improving how the PLDF can better serve your needs are welcome. Feel free to contact me or any of the Board members with your thoughts.

Attorney members…please encourage your industry clients that are involved in the professional liability lines to take a look at the PLDF. Industry members… please encourage the attorneys you retain to do the same. The benefits and opportunities the PLDF offers far outweigh the cost of membership!

Timothy J. Gephart, C.P.C.U. is President of PLDF and Vice President—Claims at **Minnesota Lawyers Mutual Insurance Company**. He may be reached at **tjg@mlmins.com**.

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PLDF Amicus Program

Please let us know of appeals in your jurisdictions implicating important professional liability issues that might have national significance.