



# Attorneys & Nonprofit Consultants: Keep Their Communications Confidential

*Use these tips to assure attorney-client privilege between your consultants and attorneys.*

BY CARL PACINI AND WILLIAM J. RITCHIE

In response to the demand for improved accountability, nonprofit organizations are increasingly using the services of attorneys and business consultants, including accountants and fraud examiners, to improve operations and reduce liability exposure. Nonprofits often hire these business consultants on the advice of attorneys. Competent legal advice involving fundraising (especially on the Internet), fund accounting, fraud, board liability, protection of volunteers, and the like often requires the use of experts or consultants in accounting, fraud examination, information systems, marketing, and finance.

Effective performance by a consultant, particularly in financial matters, requires open communication between the nonprofit organization and the expert. Some of these communications contain information that the nonprofit organization would prefer to remain secret. In the context of litigation or government investigations, however, the content of the nonprofit-expert communications may require disclosure to an adversary or government agency. Such disclosure may result in undesirable costs and consequences for nonprofits and their consultants.

Thus, it's important to ask: Are communications between nonprofits and their consultants protected under the attorney-client privilege? If so, under what conditions? How can a nonprofit executive assure that such communications remain confidential? To answer these questions, let's look first at the laws that govern attorney-client privilege.

### Overview of Attorney-Client Privilege

The attorney-client privilege is the oldest privilege established by law. It evolved in the early 1600s as an extension of the individual's right to avoid self-incrimination. The privilege developed to preclude attorneys from having to testify against their clients. Originally, the privilege belonged to the attorney but today is considered to belong to the client. The attorney can, however, raise the privilege on the client's behalf.<sup>1</sup>

Uniform Rules of Evidence 501 and 502 set the parameters for the scope of the privilege: A client has a right to refuse to disclose (and to prevent others from disclosing) confidential communications made for the purpose of providing legal services to the client. The communications can be:

- between the client or client's representative and the attorney or the attorney's representative
- between the client's lawyer and that lawyer's representative
- by the client or the lawyer to a lawyer representing another in a matter of common interest
- between representatives of the client
- between lawyers representing the client.

Significantly, these rules define a "client" as a person, *corporation, association, or other organization or entity, either public or private*, who is rendered professional legal services. This means that the attorney-client privilege applies to both governmental and nonprofit entities.

The privilege must be claimed with regard to a particular communication and extends only to a communication and not to facts. For example, clients can't refuse to disclose relevant facts merely because they incorporated these facts into communications with their attorneys.



Similarly, an attorney's communication to a client reporting facts learned by the attorney from a third party isn't within the attorney-client privilege unless the information is included in legal analysis or advice communicated to the client. Moreover, the attorney-client privilege does not attach in the context of an attorney providing non-legal advice.

Courts have set forth various tests to decide whether the attorney-client privilege applies to a particular case. Each test requires that the party claiming the privilege prove the existence of all the following elements:

- **The holder of the privilege** is the attorney's client.
- **The person to whom a communication is made** is a licensed attorney or the attorney's agent.
- **The attorney is acting as the client's lawyer** with regard to the communication.

- **The communication relates to a matter** of which the attorney was informed by the client, without the presence of third parties, for the purpose of securing legal services and not for the purpose of committing a crime.

Although each element above must be supported by facts, deciding whether the attorney-client privilege exists is done on a case-by-case basis by applying common sense.

### Attorney-Client Privilege Extended to Third-Party Consultants

A lawyer may cloak a non-testifying expert or consultant with the protection of the attorney-client privilege. The landmark decision in *U.S. v. Kovel* (296 F.2nd 918, 2nd Cir.) extended the attorney-client privilege to communications

between a client and a third party an attorney retained to provide accounting services (the "Kovel Rule"). In this case, the Second Circuit Court of Appeals ruled that the presence of an accountant as an attorney's agent doesn't negate the attorney-client privilege. The court noted that because of the "complexities of modern existence" few lawyers could operate without the aid of secretaries, law clerks, and others. No reason could be found to exclude accountants from the list of those who assist lawyers in providing legal services. The court ruled that the privilege shields communications with an accountant hired to help provide legal services to the attorney's client.<sup>2</sup>

The appeals court defined the boundaries of the *Kovel* privilege. The court acknowledged that an arbitrary line was being drawn between a case in which the client communicates first to his own accountant and then later consults with his lawyer (no privilege) and one in which the client initially retains an attorney who then hires an accountant or the client first consults with both the lawyer and accountant simultaneously (privilege exists). In *U.S. v. Cote* (456 F.2nd 142, 8th Cir.), the court made clear that communications from client to accountant before the accountant was hired by an attorney are not privileged. The court held that this distinction is necessary to prevent the privilege from being unduly expanded.

It is vital to the privilege that the communication be made in confidence for the purpose of obtaining legal advice from the attorney. If the consultant's business advice, rather than legal advice, is sought, there is no privilege. Even legal advice is unprivileged if it is merely incidental to business advice.

In one case with important implications for third-party experts such as non-profit consultants, a federal appellate court granted attorney-client privilege to communications between a law firm and a real estate consultant engaged by the client. In this case (*Bieter Co.*, 16 F.3d 929, 8th Cir.), the consultant was hired as an independent contractor. The issue of attorney-client privilege was complicated

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by the fact that the consultant wasn't an employee of the client (a real estate developer). In upholding the attorney-client privilege, the court identified four factors in concluding that it is inappropriate to distinguish between those on the client's payroll and those employed as independent contractors:

- **The communications were made** for the purpose of seeking legal advice.
- **The third-party expert was involved in the communications** at the direction of the client.
- **The subject matter of the communication** was within the scope of the consultant's duties.
- **The communications were not disseminated** beyond those parties who needed to know.

## Five Tips to Keep Information Confidential

Based on the preceding cases and examples, here are five practical ways to protect the attorney-client privilege from challenge when you use consultants on the advice of your attorney:

**1. Don't hire the consultant yourself.** Have your attorney hire the consultant. Otherwise, it will be difficult to show that the consultant was hired to help provide legal services rather than as a business advisor with regard to a particular communication.

**2. Have the attorney draft an agreement** defining the consultant's role.<sup>3</sup> This agreement should document the legal purpose of the consulting services and the following facts:

- The main purpose of hiring the consultant is to assist the attorney in providing legal services.
- Any communications between the consultant and nonprofit employees or board members have occurred at the direction of senior management.
- The consultant is being hired in anticipation of litigation (if appropriate).

- All communications among the attorney, client, and consultant are incidental to rendering legal services and are intended to remain confidential.
- All documents, including work-papers, are the property of the lawyer.

### 3. Be sure consultants bill your law firm, not your organization.

Neither invoices nor copies of any invoices should be sent to you. The law firm should pay the consultant and then send you invoices which itemize the consultant's fees as expenses.<sup>4</sup>

### 4. Don't communicate with the consultant except in the presence or under the direction of the attorney.

Also take care not to communicate confidential information to your lawyer in the presence of a third party who isn't an agent of the lawyer. This would include discussing a matter in a restaurant, elevator, or other public place.

**5. Use caution with communication technologies such as e-mails, faxes, and cell phones** to prevent inadvertent loss of the protection offered by the attorney-client privilege. Inadvertent disclosure can take many forms, ranging from unintentionally faxing a document to an opposing attorney to deliberate spying by adversarial parties. Although this is a very unsettled area of the law, inadvertent disclosure can lead to the waiver of the attorney-client privilege.<sup>5</sup> Use the following guidelines, and document them in your employee manuals:

- **Make sure e-mail is encrypted,** and use only internal e-mail or secured external systems. One legal commentator has suggested that failure to encrypt an e-mail message may constitute professional negligence on the part of counsel due to a court's finding of waiver of the attorney-client privilege.<sup>6</sup>
- **Use hard-wire phones, not cell phones,** for confidential matters. Some courts have held there is no

reasonable expectation of privacy when using mobile communications.<sup>7</sup> Although it is a federal crime to intercept cellular telephone calls under the Electronic Communications Privacy Act of 1986, such a prohibition may not be enough to protect privileged material intercepted by a hacker.

- **Use cover sheets with confidential legends** for faxes containing privileged information. Such a practice will increase the likelihood that a court will uphold the attorney-client privilege in the event of inadvertent disclosure of confidential material. ■

### Footnotes

<sup>1</sup>The cases and applications of attorney-client privilege to nonprofit organizations in this article are intended to illuminate effective means of management rather than offer specific legal advice. We recommend that nonprofit managers contact their legal counsel for clarification of these issues in practice.

<sup>2</sup>Tigue, J., B. Skarlatos, and L. Lacewell, "The Kovel Accountant Privilege," *New York Law Journal*, May 1994.

<sup>3</sup>Segal, M., "Accountants and the Attorney-Client Privilege," *Journal of Accountancy*, April 1997.

<sup>4</sup>Twardy, S. and M. Considine, "Procedures to Protect Attorney-Client Privilege," *New York Law Journal*, February 1996.

<sup>5</sup>Freeman, E., "Attorney-Client Privilege and Electronic Data Transmission," *Information Systems Security*, Winter 1999.

<sup>6</sup>Froomkin, M., "The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution," *University of Pennsylvania Law Review*, 143, 1995.

<sup>7</sup>Gruber, H., "E-mail: The Attorney-Client Privilege," *George Washington Law Review*, 66, March 1998.

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