9th Circuit Extends Attorney-Client Privilege To Internet Communications

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It happens everyday: an attorney gets a call or visit from a potential new client. The attorney makes sure the client knows the attorney is not yet representing the client. The client shares enough information to allow the attorney to make a decision on representation, and the potential new client hangs up the phone or leaves the attorney s office while the attorney evaluates the case, checks conflicts and whatever else.

Is that preliminary communication with the potential client protected from disclosure to an opponent if the attorney later becomes the attorney for that client?

Would your answer be any different if these preliminary communications took place on the Internet?

One federal district court recently decided that preliminary e-mail communications with a law firm completing a questionnaire on the law firm s web site must be disclosed to an opponent. Fortunately, the Ninth Circuit U.S. Court of Appeals disagreed in its June 9, 2005, ruling in Barton v. U.S. District Court for the Central District of California (2005 U.S. App. LEXIS 10701 9th Cir.).

Questionnaire s Purpose

In Barton, the plaintiffs claimed they suffered withdrawal symptoms as a result of using the Paxil, an antidepressant manufactured by SmithKline Beecham Corporation, doing business as GlaxoSmithKline. The individual plaintiff s first contact with counsel was on the Internet, in response to a questionnaire on the law firm s Web site seeking information about potential class members for a class action the law firm contemplated. (Id.. at p. 1.) The questionnaire is entitled: PAXIL WITHDRAWAL LITIGATION INITIAL CONTACT. (Ibid.) In boldface type, the form says its purpose is to gather information. (Id. at p. 2.) Responses were from potential class members as well as loved ones. (Ibid.)

The questionnaire asks for extensive information about use of Paxil and symptoms. (Ibid.) I n order to cause the filled-out questionnaire to be e-mailed to the law firm, the person filling it out

has to check a yes box. The yes box acknowledges that the questionnaire does not constitute a request for legal advice and that I am not forming an attorney-client relationship by submitting this information. (Ibid, emphasis added.)

In discovery, the manufacturer sought the questionnaires of four of the five plaintiffs set to go to trial first in the consolidated Multidistrict litigation. The questionnaires were sought so defendants could juxtapose the questionnaires against what they are now claiming in discovery to determine whether or not the two fit and whether there s any information that provides for fertile cross-examination at trial. (Id. at 3.) Plaintiffs opposed, asserting the attorney-client privilege as to the preliminary communications.

U.S. Judge Mariana Pfaelzer of the Central District of California allowed the discovery in a Jan. 28, 2005, order, deciding the attorney-privilege did not apply because the disclaimer established that the communications were not confidential and that checking the yes box waived the privilege. (Id. at 3.)

The district court first determined that the questionnaires were substantial and were submitted in the course of an attorney-client relationship and thus ordinarily protected under California attorney-client privilege. (Id. at p. 4.) Indeed, the Court noted the four plaintiffs who completed the questionnaires did so only because they were seeking legal representation with regard to the same matter. Indeed, by filling out the questionnaire, these four plaintiffs did, in fact, obtain legal representation. (Ibid.)

Disclaimer Waived Privilege

Next, the district court considered whether the disclaimer at the bottom of the questionnaire acted as a waiver of the protections afforded under the attorney-client privilege. (Id. at p. 4.) The district court found defendants met their burden of proving the communication was not confidential based on the disclaimer at the bottom of the questionnaire which disclaimed any formation of an attorney-client relationship. (Id. at p. 5.) Somehow, the district court concluded that acknowledging the disclaimer equated to a waiver of confidentiality as to the communications.

Plaintiffs filed a petition for writ of mandamus with the Ninth Circuit; perhaps one writ petition is granted per year. And this may be it for 2005.

The Ninth Circuit was interested in this dispute because the district court s order raises new and important problems, or issues of law of first impression. (Id. at p. 4.) As the Court put it, w hat is new about it is attorneys trolling for clients on the Internet and obtaining there the kind of detailed information from large numbers of people that used to be provided only when a potential client physically came into a lawyer s office. (Id. at p. 4.) The Court explained that t wo things had to happen to bring this about: the change in law in the 1970s that permitted attorney advertising, and the sufficiently widespread use of the Internet, within the past five or ten years, that makes Internet advertising worthwhile. (Ibid.)

The Court first determined the district court s order was clearly erroneous, in part: The district court clearly erred in treating the disclaimer as a waiver of confidentiality. (Id. at p. 5.) The Ninth Circuit pointed out two reasons for the clear error.

F irst, the district court based its conclusion on a misunderstanding that the law firm had made a disclaimer of confidentiality. It did not. (Id. at p. 5.) Those simple words appear nowhere on

the form. And the words just do not say what the district court thought they said, that confidentiality was waived. (Ibid.)

Second, the Court explained that California law protects communications even though the plaintiffs filled out the questionnaires before the law firm represented them and with no assurance that it would. (Id. at p. 5.) This is so because preliminary consultations, or p rospective clients communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain a lawyer. (Id. at p. 5.)

The Court highlighted the importance of applying the privilege to preliminary consultations or communications. Without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained. (Ibid.) The Court stressed the rationale for this rule is compelling because no person could ever safely consult an attorney for the first time without view to his employment if the privilege depended on the chance of whether the attorney after hearing his statements of the facts decided to accept the employment or decide it. (Ibid.)

Ethics Support Privilege

The Court admitted it was influenced by how fundamental the lawyer-client privilege is to the operation of an adversarial legal system. Potential clients must be able to tell their lawyers their private business without fear of disclosure, in order for their lawyers to obtain honest accounts on which they may base sound advice and skillful advocacy. (Id. at p. 6.)

Stressing the technological advances necessitating its analysis, the Court conceded, t here would be no room for confusion had the communication been in the traditional context of a potential client going into a lawyer s office and talking to the lawyer. (Ibid.) While the technology impacts the analysis, the Court concluded the changes in law and technology that allow lawyers to solicit clients on the Internet and receive communications from thousands of potential clients cheaply and quickly do not change the applicable principles. (Ibid.)

Acknowledging defendants concerns that plaintiffs not say one thing in preliminary communications and another at a deposition, the Court concluded that a lawyer s ethical duties check this fear. These restraints of honor and ethics, rather than court-ordered disclosure of confidential communications, are the means that our system uses to deal with the risk of clients saying one thing to their lawyers and another to opposing counsel, the judge, or the jury. (Id. at p. 6.) That said, the Court granted a writ of mandamus, vacating the district court s order.

Importance Of The Ruling

The Barton opinion has for the first time made clear that Internet communications with attorneys should be protected just like other preliminary attorney-client communications. While many attorneys have assumed this will be so, until now, it was not clear. Now attorneys can continue to safely advise potential clients that an attorney-client relationship does not exist without jeopardizing all pre-engagement communications to disclosure. Now attorneys can be reassured that they can advise potential clients that no attorney-client relationship exists.

The Ninth Circuit not only brought current California law about attorney-client communication on the Internet, it offered invaluable advice along the way. The Court pointed out the questionnaire here drafted years earlier is ambiguous. (Id. at p. 5.)

The Court teaches that the law firm should have spoken clearly to the laymen to whom its website was addressed what commitments it did and did not make. A risky and expensive trip to this Court could have been avoided by a plain English explanation on the website. (Ibid.)

In other words, lawyers would be wise to specifically point out that an e-mail communication is tantamount to a preliminary consultation and not a waiver of the responding party s confidentiality rights, nor does it create an attorney-client relationship. And a lawyer using an Internet questionnaire should make express a general disclaimer is not a waiver of any confidentiality rights. Otherwise, expensive litigation can ensue, as in this case.

While the Barton opinion has been seemingly unnoticed by most, its protection for an attorney s day-to-day Internet communications cannot be taken for granted. By protecting Internet communications just like other forms of communications, the Ninth Circuit has ensured that lawyers and their potential clients can solicit and exchange the information that each requires to determine whether there should be an attorney-client relationship.

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