

Ethics- City Attorneys and the Attorney-Client Privilege

**Texas Municipal League 98th Annual Conference and
Exhibition**

October 26-29, 2010

American Bank Center

Corpus Christi, Texas

TCAA October 28, 2010

By Leonard Schneider

Partner Liles Parker PLLC

lschneider@lilesparker.com

FEAR THE AG

PIA Section 552.007

- Sec. 552.007. VOLUNTARY DISCLOSURE OF CERTAIN INFORMATION WHEN DISCLOSURE NOT REQUIRED. (a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or **the information is confidential under law.**

AG rulings

Letter Ruling OR2009-15185

In this instance, the City received the request for information on August 5, 2009 but did not request a ruling from our office until August 20, 2009. Consequently,the city failed to comply with the procedural requirements of section 552.301 Although you raise sections 552.107 and 552.111 of the Government Code and rule 503 of the Texas Rules of Evidence as exceptions to disclosure....., these exceptions and rule are discretionary in nature.they do not constitute compelling reasons to withhold information for purposes of section 552.302. See Open Records Decisions Nos. 676 at 12 (2002)Accordingly, the City may not withhold the information at issue pursuant to sections 552.107..... or Rule 503 of the Texas Rules of Evidence.

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Table of Contents

Preamble: A Lawyer's Responsibilities item 3

- 3. In all professional functions, a lawyer should zealously pursue client's interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

Preamble: A Lawyer's Responsibilities
items 4, part of 10 and 16

- 10. The Texas Disciplinary Rules of Professional Conduct are rules of reason.
- 16. **Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege.** The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be **judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.**

Disciplinary Rules

- **Rule 1.05 Confidentiality of Information**
 - (a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

Comments to Rule 1.05

3. The principle of confidentiality is given effect not only in the Texas Disciplinary Rules of Professional Conduct but also in the law of evidence regarding the attorney-client privilege and in the law of agency. **The attorney-client privilege, developed through many decades, provides the client a right to prevent certain confidential communications from being revealed by compulsion of law.** Several sound exceptions to confidentiality have been developed in the evidence law of privilege.
4. **Rule 1.05 reinforces the principles of evidence law** relating to the attorney-client privilege. Rule 1.05 also furnishes considerable protection to other information falling outside the scope of the privilege Rule 1.05 extends ethical protection generally to unprivileged information relating to the client or furnished by the client during the course of or by reason of the representation of the client. In this respect Rule 1.05 accords with general

Tx Rule of Evidence 503 (other law)

b) Rules of Privilege.

- (1) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
 - (B) between the lawyer and the lawyer's representative;
 - (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
 - (D) between representatives of the client or between the client and a representative of the client; or
 - (E) among lawyers and their representatives representing the same client.

What the Courts say

- The system of justice relies on a client's privilege to speak frankly and candidly with his or her attorney. [In re Hicks \(App. 14 Dist. 2008\) 252 S.W.3d 790](#), rehearing overruled, rehearing en banc denied [267 S.W.3d 555](#) , mandamus denied.
- The aspirational purpose of the attorney-client privilege is the promotion of communication between attorney and client unrestrained by fear that these confidences may later be revealed. [Sanford v. State \(App. 8 Dist. 2000\) 21 S.W.3d 337](#).

Rule 193.3(d) Privilege not waived by production

- **SNAP-BACK Provision**

4. [Rule 193.3\(d\)](#) is a new provision that allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege. The provision is commonly used in complex cases to reduce costs and risks in large document productions. The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege. This rule is thus broader than [Tex.R. Evid. 511](#) and overturns [Granada Corp. v. First Court of Appeals, 844 S.W.2d 223 \(Tex. 1992\)](#), to the extent the two conflict. The ten-day period (which may be shortened by the court) allowed for an amended response does not run from the production of the material or information but from the party's first awareness of the mistake. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under this rule.

Summary

- Forget about preamble to Rules of Professional Conduct
- Forget about the attorney-client privilege, developed through many decades,
- Forget about Rule 1.05
- Forget about Evidence Rule 503
- Forget that only the legislative body can vote to waive attorney/client privilege

Attorney General
and
Attorney Client Communications



NO MERCY

304 S.W.3d 380
Supreme Court of Texas.
CITY OF DALLAS, Petitioner,

v.

Greg ABBOTT, Attorney General of Texas, Respondent.
No. 07-0931.

Argued Oct. 15, 2008. Decided Feb. 19, 2010.

- While the Attorney General's interpretation of the Act may be persuasive, it is not controlling. [Holmes v. Morales, 924 S.W.2d 920, 924 \(Tex.1996\)](#).
- Because we conclude that the ten-day period in this case ran from the date of Hill's clarification, **we do not reach the City's** argument that Hill's response asked for "additional items" that were not included in his original request, or its **alternative argument that the attorney-client privilege is itself sufficiently compelling to overcome the public-information presumption that inheres when an attorney general's opinion is not timely requested.**

Letter Ruling No. OR2010-15140

October 5, 2010

- The county received the request for information on July 29, 2010; however, the envelope in which the county asked for a decision from this office is postmarked August 13, 2010.Thus, the county failed to comply with the procedural requirements mandated by [section 552.301](#)(b).
- Pursuant to [section 552.302 of the Government Code](#), a governmental body's failure to comply with the procedural requirements of [section 552.301](#) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure.)..... [Section 552.107](#) is a discretionary exception to disclosure that protects a governmental body's interests..... Thus, the county's claim under [section 552.107](#) is not a compelling reason to overcome the presumption of openness. ORD 676 at 11-12; [City of Dallas v. Abbott, 279 S.W.3d 806, 811 \(Tex. App.--Amarillo 2007\)](#), *rev'd on other grounds, 304 SW.3d 380 (Tex. 2010)*. Therefore, the county

Disciplinary Rule 1.03

- **Rule 1.03 Communication**
 - (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
 - (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- **Comment 1**
 - For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party.
- **Comment 2**
 - In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail.

Disciplinary Rule 1.03

- **Comment 3**

..... . When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization

Disciplinary Rule 1.06 Conflict of Interest

- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 - (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or
 - (2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.

Disciplinary Rule 1.06 Conflict of Interest

- **Comment –Loyalty to a Client**

1. Loyalty is an essential element in the lawyer's relationship to a client

- **Comment 4-** Conflict with Lawyers own interest

Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(l) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

See Comment 13- Duration and intimacy of lawyer's relationship with other party

Rule 1.10 Successive Government and Private Employment

- (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.
- **Comment 1-** This rule prevents a lawyer from exploiting public office for the advantage of a private client.
- **Comment 4-**A lawyer who has been a public officer or employee of one body politic and who becomes a public officer or employee of another body politic is subject to above paragraph (a) and paragraphs (c) and (e).

II. Counselor

- Rule 2.01 Advisor- In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment.
- **Comment 1**.....However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Rule 3.07 Trial Publicity

- (a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

Preamble: A Lawyer's Responsibilities

4. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. **A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.** A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. **While it is a lawyer's duty, when necessary, to challenge the rectitude [correctness] of official action, it is also a lawyer's duty to uphold legal process.**