



Attorney-Client Privilege for Transactional Attorneys

Attorney-client privilege is a particularly tricky issue for attorneys who handle [business transactions in Phoenix](#), as they so often have clients for both legal and non-legal services. A client who requires legal services is protected by quite strict attorney-client privilege ethics rules. However, a client who is provided strictly non-legal services cannot be protected by attorney-client privilege. The ambiguous part comes when a client uses both legal and non-legal services. Transactional attorneys repeatedly face this situation.

The Rules

- A lawyer may not act unfavorably to a current client.
- A lawyer may act unfavorably to a former client only if the new issue is clearly unrelated to the issue the lawyer previously handled.
- A conflict that affects one member of the firm affects all members in the firm.
- A client may waive conflicts if provided proper disclosure and consent. The court usually takes the client's expected level of sophistication and understanding into account when judging the validity of waivers.

Legal vs. Non-Legal Services

If a lawyer advises on both legal and non-legal matters, it is important to establish what communications will be covered under attorney client privilege and what will not. Attorneys

should discuss with the clients the nature of advice they are seeking and warn clients when discussions are not protected. Additionally, transactional attorneys should acquaint themselves with the particular provisions of privilege in their state, as these may differ.

For courts to consider communications privileged the “dominant purpose” of discussion must be about legal matters—and unable to be provided by a non-legal agent. As an example, advice on business strategies is not protected but questions on what structure to form that business would.

Accidental Clients

Transactional attorneys are much more likely to acquire “accidental” clients, who will also be covered by attorney-client privilege, making attorney-client privilege much more difficult to navigate.

The clients of transactional attorneys often represent not simply people but entities—corporations, trade associations and syndicates. Therefore, more than the single individual in contact with the lawyer may be harmed by a breach of attorney-client privilege. It is crucial for a transactional attorney to establish who is actually a client, and if they receive legal or non-legal services.

Please note: attorney-client relationship can be established without the presence of an engagement letter or a fee-paying arrangement. Simply providing legal advice, receiving confidential information or otherwise treating the entity as a client can establish that relationship.

To avoid accidental clients, a letter of engagement from the client stating both who is a client and who is excluded (such as affiliates, parents, subsidiaries etc.) limits the chance of a lawsuit. However, such a letter should be sent to the non-client entities to ensure their consent.

Joint Representation

Another grey area that transactional attorneys often find themselves in is the issue of joint representation. Transactional attorneys may represent multiple clients in the same legal matter. Each client is owed zealous representation so problems may arise where there is significant disagreement. While frank discussions may be expressed, where there is “fundamental antagonism” between clients, a lawyer must withdraw representation. It is the responsibility of the attorney to validate that the partners are in agreement of their goals.

When times are good, clients rarely worry about violations of attorney-client privilege. However, when investors lose money, they are quick to blame their transactional attorney whether the financial loss was related with any ethical missteps on the part of the attorney or not. Taking the time to establish conflicts ahead will save transactional attorneys much heartache and financial problems.

This article brought to you courtesy of the [Phoenix business law firm](#) of The Law Offices of Donald W. Hudspeth. To contact the [Phoenix business transactions](#) attorneys, call 866-696-2033

SYNOPSIS

Attorney-Client privilege can be an issue for attorneys in [business transactions in Phoenix](#). [Business firms in Phoenix](#) explain the ambiguity between both legal and non-legal services.

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