Attorney-Client Privilege

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I. Introduction

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *United States v. Zolin*, 491 U.S. 554, 562, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989), *quoted in In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012). It is recognized by every state and by federal common-law. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995). In Texas, the scope of the privilege is defined by Rule 503 of the Texas Rules of Evidence. *State v. DeAngelis*, 116 S.W.3d 396, 403–04 (Tex. App.—El Paso 2003, no pet.). The privilege exists to encourage full and frank communication by a client to his attorney, to promote the effective provision of legal services. *In re Hicks*, 252 S.W.3d 790, 794 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (citing *Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759, 762 (Tex. 1995) and *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex. 1993)). "This in turn promotes the broader societal interest of the effective administration of justice." *Republic Ins. Co.*, 856 S.W.2d at 160 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L.Ed.2d 584 (1981)).

Although originally applied to individuals,[1] the privilege now applies to clients that are entities such as corporations. Tex. R. Evid. 503(a)(1). Representing an entity—and particularly a governmental entity—can present unique challenges for an attorney.

[1] *See Radiant Burners, Inc. v. Am. Gas Ass'n*, 207 F. Supp. 771, 772–73 (N.D. Ill. 1962) *adhered to*, 209 F. Supp. 321 (N.D. Ill. 1962) and *rev'd*, 320 F.2d 314 (7th Cir. 1963) (examining traditional purpose of privilege and noting "that a corporation's right to assert the privilege has somewhat generally been taken for granted by the judiciary … without a proper reliance on stare decisis or the promulgation anywhere of record of a clear legal analysis of the issue involved").

This paper provides a brief overview of the attorney-client privilege and identifies related concepts and issues of which an attorney representing a governmental entity should be aware.

II. Attorney-Client Privilege: The Rule

In Texas, the privilege is codified in Rule 503 of the Texas Rules of Evidence, and is called the "Lawyer-Client Privilege," although cases discussing the privilege often refer to it as the "Attorney-Client Privilege." *See, e.g., In re XL Specialty Ins. Co.*, 373 S.W.3d at 49.

A. Texas Rule of Evidence 503

Texas Rule of Evidence 503, "Lawyer-Client Privilege," provides:

> **(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;
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> > (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.

Tex. R. Evid. 503(b)(1). The Privilege consists of three elements: (1) a confidential communication (2) made for the purpose of facilitating the rendition of professional legal services to the client (3) between the client or a representative of the client and the client's lawyer or a representative of the lawyer.

1. Element 1: Confidential Communications

"*A communication is 'confidential' if not intended to be disclosed to third persons* other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Tex. R. Evid. 503(a)(5) (emphasis added). Thus, the intent of the parties is the key to confidentiality. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.) ("The issue of confidentiality focuses on the intent of the parties at the time the communications are made."). If the communication is made to persons who are not the client, lawyer, or representatives of the client or lawyer, the communication is not confidential. *See id.* at 190 (upholding trial court's determination that correspondence was not privileged; correspondence was "cc'ed" to persons who were not shown to be "representatives of the client"); *Cameron County v. Hinojosa*, 760 S.W.2d 742, 746 (Tex. App.—Corpus Christi 1988, no writ) (upholding trial court's determination that correspondence seeking and containing legal advice between county attorney and head of county computer department was not privileged; "copies were

routinely sent by both [the department head] and the county attorney to the county personnel office, the county auditor's office, and the county judge's office").

2. Element 2: For the purpose of facilitating the rendition of professional legal services

The privilege extends to "confidential communications *made for the purpose of facilitating the rendition of professional legal services to the client*." Tex R. Evid. 503(b)(1) (emphasis added). If the privilege attaches to a communication—that is, if the communication relates to the purpose for which the advice is sought—it attaches to the entire communication. *DeAngelis*, 116 S.W.3d at 404. The privilege is not limited to only the portion of the communication that constitutes legal advice or opinions; rather, factual information is also protected. *GAF Corp. v. Caldwell*, 839 S.W.2d 149, 151 (Tex. App.—Houston [14th Dist.] 1992, no writ); *cf. Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) ("While the privilege extends to the entire communication, including facts contained therein, . . . , a person cannot cloak a material fact with the privilege merely by communicating it to an attorney." (Citations omitted.)). Thus, courts have stated, "The subject matter of the information contained in the communication is irrelevant when determining whether the privilege applies." *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 921–22 (Tex. App.—Dallas 2006, orig. proceeding); *DeAngelis*, 116 S.W.3d at 404.

Because the privilege covers communications made for the purpose of facilitating the rendition of professional legal services to the client, it "does not apply to communications between a client and an attorney where the attorney is employed in a

non-legal capacity, for instance as an accountant, escrow agency, negotiator, or notary public." *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 332 (Tex. App.—Austin 2000, pet. denied) (citing *Clayton v. Canida*, 223 S.W.2d 264, 266 (Tex. Civ. App.—Texarkana 1949, no writ); *Pondrum v. Gray*, 298 S.W. 409, 412 (Tex. Comm'n App. 1927, holding approved)). In the *Harlandale ISD* case, the school district hired outside counsel to investigate allegations of assault and sexual harassment and to provide her legal analysis. *Id.* at 330. Because the retention letter requested an independent investigation and a legal analysis, and because witnesses testified the attorney was retained to offer a legal opinion based on her investigation, the Austin Court of Appeals held that the attorney was hired to act, and did act, in her capacity as an attorney. *Id.* at 335. The attorney's report was therefore covered by the attorney-client privilege. *Id.*

3. Element 3: Between client or representative of the client and attorney or representative of the attorney

Rule 503 also defines the parties *who may make privileged communications*.

> (1) A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.
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> (2) A "representative of the client" is (i) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.
>
> (3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.
>
> (4) A "representative of the lawyer" is:

> (A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or
>
> (B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

Tex. R. Evid. 503(a)(1)–(4).

a. <u>Representative of the client</u>

In Texas, a "representative of the client" originally included only those identified in Rule 503(a)(2)(i) above, called the "control group test." *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 198 (Tex. 1993). The Rule was amended to expand the application of the privilege to those persons acting within the scope of their employment, sometimes referred to as the "subject matter test." *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 225 n.3 (Tex. 2004) (citing *Nat'l Tank*, 851 S.W.2d at 198). The subject matter test can be satisfied by a showing that "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." *Id.* (citing *Nat'l Tank*, 851 S.W.2d at 198).

b. <u>Representative of the attorney</u>

For a representative of the attorney, the Rule specifically identifies an accountant who is reasonably necessary for the representation, but also includes anyone "employed by the lawyer" to assist with the representation. This is potentially a broad category. *See In re Houseman*, 66 S.W.3d 368, 371 (Tex. App.—Beaumont 2001, no pet.) (holding

psychiatrist hired to assess client's mental competency was a "representative of the lawyer"; trial court erred by overruling assertion of attorney-client privilege); *cf. Toyota Motor Sales, U.S.A., Inc. v. Heard*, 774 S.W.2d 316, 317–18 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd) (stating work product privilege "extends to materials prepared in anticipation of litigation, by an attorney's agent, be that person a secretary, paralegal, or investigator").

B. Federal Attorney-Client Privilege

The Federal Rules of Evidence do not codify the attorney-client privilege. Instead, the Federal Rules provide:

> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
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> • the United States Constitution;
>
> • a federal statute; or
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> • rules prescribed by the Supreme Court.
>
> *But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision*.

Fed. R. Evid. 501 (emphasis added). That is, in federal court, when adjudicating a federal right, the federal common-law attorney-client privilege applies. *Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005) (quoting *United States v. Zolin*, 491 U.S. 554, 562, 109 S. Ct. 2619, 105 L.Ed.2d 469 (1989)).

Although not incorporated into the Federal Rules of Evidence, the United States Supreme Court promulgated Standard 503, as a proposed rule covering the attorney-client

privilege. Federal Courts have considered it an accurate statement of the common-law governing the privilege. *See In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994). Standard 503 is worded very similarly to Rule 503 of the Texas Rules of Evidence. *See id.* (quoting Standard 503(b)).[2] As applied by the Fifth Circuit, a party asserting the privilege must show "(1) a confidential communication; (2) to a lawyer or subordinate; (3) for the primary purpose of securing a legal opinion, legal services, or assistance in the legal proceeding." *United States v. Nelson*, 732 F.3d 504, 518 (5th Cir. 2013); *see also In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) ("A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice.").

[2] The court in *In re Bieter* quoted Standard 50(b):

> 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, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

In re Bieter Co., 16 F.3d at 935.

III. Practical Considerations

A. Waiver of Privilege

> The Texas Rules of Evidence provide for waiver of the privilege.
>
> A person upon whom these rules confer a privilege against disclosure waives the privilege if:
>
> (1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
>
> (2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

Tex. R. Evid. 511. A client waives the privilege by voluntarily disclosing the substance of the communication. *See In re Pequeno,* 126 Fed. Appx. 158, 164 (5th Cir. 2005) (holding debtor in bankruptcy proceeding waived any attorney-client privilege when he disclosed substance of the conversation with his attorney in letter to trustee and motion to amend judgment); *cf. In re W.E.C.*, 110 S.W.3d 231, 248 (Tex. App.—Fort Worth 2003, no pet.) (finding waiver of privileged mental health information (Rule 510) when patient "disclosed the majority of this information to her caseworkers, therapists, and friends, who all testified at trial" and patient also testified to some of the same matters). There are two components of waiver: the disclosure must be (1) *by the client* and (2) *voluntary*. *In re Univ. of Texas Health Ctr. at Tyler*, 33 S.W.3d 822, 827 (Tex. 2000) (orig. proceeding). In a case involving trial court's mistaken disclosure of confidential documents, the Texas Supreme Court relied upon both components in finding no waiver:

> We note that the trial court did not waive the Health Center's privilege when it released the documents at issue to McClain. The privilege belonged to the Health Center, not the trial court, and production was involuntary from the Health Center's standpoint. An involuntary production of documents did not constitute a waiver, even before implementation of our new rules of procedure governing discovery.

In re Univ. of Texas Health Ctr. at Tyler, 33 S.W.3d at 827; *see also In re Ford Motor Co.*, 211 S.W.3d 295, 301 (Tex. 2006) ("Mistaken document production by a court employee in violation of a court-signed protective order cannot constitute a party's voluntary waiver of confidentiality.").

The discovery rules provide additional protection against accidental disclosure. Rule 193.3 provides:

> (d) **Privilege not waived by production.** A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

Tex. R. Civ. P. 193.3(d). This rule has been called the "snap back" rule because it allows a party to "snap back," or retrieve, privileged materials that were inadvertently produced. *In re Parnham*, 263 S.W.3d 97, 105 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The focus under this Rule is the intent to waive the privilege, not the intent to produce the materials or information during discovery. *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 918 (Tex. App.—Dallas 2006, no pet.) (citing Tex. R. Civ. P. 193.3 cmt. 4).

Thus, the Rule is intended to be broader than Rule 511 of the Rules of Evidence. Tex. R. Civ. P. 193.3 cmt. 4. However, it should be noted that even though a document may be retrieved, the privileged information may have been seen by the other side.

B. Relationship to Other Rules/Doctrines

1. Texas Disciplinary Rules of Professional Conduct

Although the Texas Disciplinary Rules of Professional Conduct ("TDPRC") are not intended to govern or define the attorney-client privilege,[3] they and the accompanying commentary illustrate the issues and concerns that can arise in representing a governmental entity.

Rule 1.12 governs an attorney representing an entity. It provides that, while an attorney "may report to, and accept direction from, an entity's duly authorized constituents," the attorney "represents the entity." Tex. Disciplinary R. Prof. Conduct 1.12(a). Thus, the attorney is required to explain that the client is the entity and not the constituents "when it is apparent that the organization's interests are adverse to those of

[3] The Preamble to TDRPC, under "Scope," specifically states:

> 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.

Tex. Disciplinary R. Prof. Conduct Preamble (1989), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (West, WestLaw current through 2013 session).

the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part." *Id.* 1.12(e).

The comments give examples of the unique issues that may arise while representing an entity. Because an entity may only act through its authorized constituents or agents, what is a communication from the client? "[I]f an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.05 [governing Confidentiality of Information regarding or furnished by the client]." *Id.* 1.12 cmt. 3.

Here's an example of a potential issue that could occur in such a scenario. What if, during the course of this investigation, it appears that the entity's interest has become adverse or may become adverse to the constituent with whom the attorney is communicating? As stated above, Rule 1.12(e) requires the attorney to explain that the entity is the client, not the constituent. The attorney should ensure that the constituent understands that the attorney "cannot represent such constituent, and that such person may wish to obtain independent representation," and that "discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned." *Id.* 1.12 cmt. 4. The attorney's failure to adequately clarify his role and inform the constituent or employee that the attorney's client is the entity can result in any communications being privileged. *DeAngelis*, 116 S.W.3d at 406

(upholding finding of privilege for former assistant chief of police where city attorney never clarified her role or the identity of the client).

Although beyond the scope of this paper, Rule 1.12 also provides that an attorney has a duty to act when a person associated with the entity is going to violate a legal obligation that "is likely to result in substantial injury." *Id.* 1.12(a), (b). And, in certain circumstances (generally involving crime or fraud) an attorney may have a duty to disclose confidential client information. *Id.* 1.05. The comments affirmatively state that the duty defined by Rule 1.12 applies to governmental entities. *Id.* 1.12 cmt 9. It also recognizes that "when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved." *Id.* "Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances." *Id.* Although it does not provide specific guidance, this comment illustrates the potential unique concerns that may be encountered by an attorney representing a governmental entity.

2. Open Meetings Act

The Open Meetings Act provides that, generally, all meetings of a governmental body "shall be open to the public." Tex. Gov't Code Ann. § 551.002 (West, WestLaw current through 2013 session). Section 551.071 of the Texas Government Code provides that "consultation with an attorney" is one exception to the general open meeting

requirement. Tex. Gov't Code Ann. § 551.071 (West, WestLaw current through 2013 session). Section 551.071(2) "incorporates the attorney-client privilege, an attorney's duty to preserve the confidences of a client." Op. Tex. Att'y Gen. No. JC-0233 (2000), *cited in Killam Ranch Properties, Ltd. v. Webb County*, 376 S.W.3d 146, 157 (Tex. App.—San Antonio 2012, pet. denied). However, the mere presence of an attorney cannot be used to avoid the requirements of the Open Meetings Act.

> *A governmental body may not engage in a general discussion of policy unrelated to legal matters in a closed session merely because its counsel is present*, but it may hold an executive session to seek or receive its attorney's advice about either matters related to a specific pending or contemplated legal proceeding or matters for which it seeks the attorney's legal advice. …. "[*T*]*he communication must be related to an opinion on law or legal services or assistance in some legal proceeding*."

Texas State Bd. of Pub. Accountancy v. Bass, 366 S.W.3d 751, 759 (Tex. App.—Austin 2012, no pet.) (emphasis added) (citing Tex. Att'y Gen. Op. No. JC–0233 (2000) and quoting Tex. Att'y Gen. Op. No. JM–100 (1983)). For example, a governmental body may meet in executive session with its attorney to receive advice on the legal issues raised by a proposed contract, but "the governmental body may not discuss the merits of a proposed contract, financial considerations, or other non-legal matters related to the contract merely because its attorney is present." Op. Tex. Att'y Gen. No. JC–0233 (2000), *cited in Killam Ranch Properties, Ltd.*, 376 S.W.3d at 157.

3. Open Records

The Open Records Act provides that public information (which is rather broadly defined) is available to the public. Tex. Gov't Code Ann. § 552.021 (West, WestLaw

current through 2013 session). But information that "the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct" is excepted from the requirements of section 552.021. Tex. Gov't Code Ann. § 552.107 (West, WestLaw current through 2013 session). The *Harlandale ISD* case cited above was a Open Records case. Because the Austin Court of Appeals determined that the reports authored by the outside counsel were privileged under Rule 503, they were excepted from the disclosure requirement by section 552.107. *Harlandale Indep. Sch. Dist.*, 25 S.W.3d 328, at 335.

4. Work Product

Work product is a concept related to the attorney-client privilege. The discovery rules define work product.

> (a) *Work Product Defined.* Work product comprises:
>
> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

Tex. R. Civ. P. 192.5(a). Thus, work product is *both* broader and narrower than the attorney-client privilege. It is *broader* because it covers more than just "confidential communications," extending to material prepared and mental impressions in addition to

communication. But it is *narrower* because it only covers material prepared, mental impressions, and communications developed or made "in anticipation of litigation." There is no "anticipation of litigation" requirement for the attorney-client privilege. *In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 818 n.11 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

5. Burden of Proof

The party asserting a claim of privilege has the burden of proof. Tex. R. Civ. P. 193.4; *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004). The party must make at least a prima facie showing that the privilege applies. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d at 223. The prima facie standard requires only the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id.* The documents at issue may themselves constitute prima facie evidence of the privilege. *Id.* (citing *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding)); *see also Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 589-90 (Tex. App.—Dallas 1994, no writ) ("The allegedly privileged documents themselves may be the only evidence that substantiates the privilege claim.") (citing *Weisel Enters., Inc.*). If a party makes a prima facie showing or if the documents are the only evidence substantiating the privilege, the court should conduct an *in camera* inspection of the documents before ordering production. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d at 223; *Marathon Oil Co.*, 893 S.W.2d at 590.

IV. Conclusion

Although the attorney-client privilege is a well-established privileged, defining the precise scope of the privilege can present a challenge when representing an entity. In particular, an attorney representing a governmental entity may encounter situations where the identity of the client is not clear or where public and private interests clash. Thus, an attorney must attempt to clearly identify the client and expressly clarify the attorney's role when dealing with constituents or employees of the client.