

PROFESSIONAL LIABILITY UPDATE

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ATTORNEY-CLIENT PRIVILEGE

Federal Law

By Ann L. Strayer

Barton v. United States District Court for the Central District of California (2005)
410 F.3d 1104

The Ninth Circuit holds that a law firm's internet questionnaire for prospective clients is protected by the attorney-client privilege despite the law firm's disclaimer advising individuals that they are not forming an attorney-client relationship.

Plaintiffs who sued Smith-Kline Beecham Corp. claiming injuries from the antidepressant drug Paxil had initially contacted their law firm by responding to a questionnaire the law firm had posted on the internet. The questionnaire entitled "Paxil Withdrawal Litigation Initial Contact" was to gather information from potential class members and sought extensive information about the potential clients, their use of Paxil, and their symptoms. Potential clients were required to check a "yes" box acknowledging that the questionnaire was not a request for legal advice and that an attorney-client relationship was not being formed by its submission.

Ruling that the attorney-client privilege had been waived by checking the "yes" box, the District Court ordered disclosure of the questionnaires.

The Ninth Circuit noted that there was some doubt about whether the plaintiffs

were trying to secure legal services and that the questionnaire was ambiguous. Nevertheless, the plaintiffs should not be penalized for the law firm's ambiguity. A layperson seeing the law firm's internet material would likely believe he or she was being sought as a potential client and the questionnaires were submitted with a view towards retention of the law firm in the course of an attorney-client relationship.

The District Court's focus should have been on the client's rights, not the lawyer's. The vagueness and ambiguity of the "law firm's prose" did not create a waiver of confidentiality by the client.

Under California law, when a person consults with an attorney with the objective of obtaining legal services, the consultation communications are protected by the attorney client privilege. Potential clients must be able to tell their lawyers their private business without fear of disclosure. Lawyers must be able

to obtain full, complete, and accurate information to provide sound advice and skilled advocacy.

Comment: This decision reflects California's public policy of vigorously protecting the attorney-client relationship.

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