

A woman entered a guilty plea to a charge of embezzlement. Her attorney hired a retired probation officer as a consultant to gather information for the preparation of a sentencing plan for the woman that would avoid jail. For that purpose, the consultant interviewed the woman for three hours.

Thereafter, the prosecution undertook an investigation of the woman's possible involvement in other acts of embezzlement. The consultant was subpoenaed to testify before a grand jury. The consultant refused to answer any questions concerning his conversation with the woman.

The prosecution has moved for an order requiring the consultant to answer those questions.

How should the court rule on the prosecution's motion?

- A. Deny the motion in the absence of probable cause to believe the interview developed evidence relevant to the grand jury's inquiry.
- B. Deny the motion on the basis of the attorney-client privilege.
- C. Grant the motion because exclusionary evidentiary rules do not apply in grand jury proceedings.
- D. Grant the motion because the consultant is not an attorney.

Explanation:

Common law privileges apply in all stages of a federal legal proceeding, including grand jury proceedings.* This includes the **attorney-client privilege**, which protects **communications**—even those made with the **attorney's agent**—that are (1) made for the purpose of obtaining or providing **legal assistance** for the client *and* (2) intended to be and kept **confidential**.

Here, the attorney hired a consultant to help him prepare the woman's sentencing plan. The consultant therefore acted as the attorney's agent when he interviewed the woman for that purpose. And since that interview was in furtherance of the woman's legal representation and likely intended to be confidential, it is protected by the attorney-client privilege **(Choice D)**. As a result, the prosecution's motion should be denied.

*The Federal Rules of Evidence do not specifically address evidentiary privileges (or constitutional limitations on admissibility). They merely instruct federal courts to apply common law privileges except in diversity cases, where state rules apply.

(Choice A) A grand jury gathers evidence (eg, subpoenas persons to testify) to determine if there is probable cause to indict the accused. But probable cause is not required to subpoena information relevant to the grand jury's investigation. Therefore, this is not a basis for denying the motion.

(Choice C) The Federal Rules of Evidence—except those regarding privilege—do not apply at grand jury proceedings. Therefore, exclusionary evidentiary rules (eg, the rule against hearsay) are inapplicable in a grand jury hearing, but the attorney-client privilege can still be asserted.

Educational objective:

Attorney-client communications are privileged when made to obtain or provide legal assistance for the client *and* intended to be and kept confidential. This privilege extends to confidential communications between a client and the attorney's agent if those communications are made in furtherance of the legal representation.

References

Fed. R. Evid. 501 (federal common law privileges).

Copyright © 2002 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

