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Protecting The In-House Attorney Client Privilege

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BIOGRAPHICAL INFORMATION

Michael K. Hurst is widely recognized as one of the top trial lawyers in the country in large and complex commercial, intellectual property, and employment litigation. A graduate of South Texas College of Law, Michael is also a prominent leader of The Bar Association and the community, serving as President of the 11,000+ member Dallas Bar Association in 2018. He has extensive courtroom experience and has litigated and tried numerous high profile cases, including breach of contract, fraud, theft of trade secrets, non-compete agreements, partnership disputes, oil and gas, electricity, employment discrimination, tortious interference, and breach of fiduciary duty. Michael is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization.

Michael is a frequent speaker and panelist on topics ranging from trial skills, depositions, theft of trade secrets, attorney gender diversity, breach of fiduciary duties to energy litigation. He has been recognized every year by his peers in *Texas Monthly and Law & Politics* Magazines as a "Super Lawyer," including being named one of the "Top 100 Lawyers in Texas" in 2005, 2006, and 2008-2017. Also, Michael has been selected as a Benchmark Litigation Star (National Publication). Michael has been consistently named one of the "Best Lawyers in Dallas" by *D Magazine* and "Best Lawyers in America" by *U.S. News & World Report*, and was named Outstanding Mentor by both the Dallas Association of Young Lawyers and the Texas Young Lawyers Association in 2014. He was also named one of the Top 15 Business Defenders by the *Dallas Business Journal*. In 2012, Michael was elected to the prestigious BTI Client Service All-Stars.

REPRESENTATIVE CASES

- Obtained the #15 Verdict in the Nation by *The National Law Journal*—a $94 million verdict resulting in a $45 million judgment (now on appeal) for Plaintiffs and his clients, Intervenors L.W. Hunt Resources and Richard Raughton for breach of fiduciary duty and fraud after forming an oil and gas partnership
- Presented and argued appeal that overturned a substantial indemnity judgment for a large oil and gas contractor: *Nabors Drilling U.S.A., L.P. v. Encana Oil & Gas (U.S.A.) Inc.*, Case No. 2-12-00166-CV (Tex. App.-Fort Worth [2nd Dist.] 2013)
- Obtained a $1.4 million jury verdict on behalf of Hunt Consolidated, Inc. in Dallas against an international corporation for two counts of fraud
- Successful defense of a $19 billion hedge fund and two of its partners in a four-week jury trial over alleged breaches of fiduciary duties and contracts
- Obtained an $11 million jury verdict on behalf of entrepreneur against a publicly traded high finance company (settled for a lesser sum)
- Lead trial and appellate counsel in prosecution of an important trade secret case, published at 965 S.W.2d 19 (Tex. App-Houston [1st Dist.] 1998)- Obtained a $2.3 million trial verdict/recovery in bankruptcy court for a large energy construction contractor against landfill project and private equity group
- Represents/represented NFL quarterback, Division I college football coach, celebrity chef, titans of energy, financial industries, and many Fortune 100 companies

Energy Litigation

- Represented large FORTUNE 100 oilfield services company in cases involving largest well blowout on land in U.S.
- Represented large FORTUNE 100 oilfield services company in cases involving deaths from oilfield blowouts in Texas
- Handled disputes involving ownership of large offshore wells, and other partnership disputes
- Handles cases for large retail electricity providers
- Handles environmental contamination cases for FORTUNE 500 energy company
- Handles well blowouts and other oilfield cases for large oilfield services company

BIOGRAPHICAL INFORMATION

Jonathan R. Childers is an experienced trial lawyer helping businesses and executives prosecute and defend complex claims in Texas and throughout the United States. He has a special focus on energy litigation, partnership and business ownership disputes, trade secret litigation, complex financial issues and damages, and high-stakes business torts. Jonathan litigates and tries cases frequently involving breach of contract, fraud, breach of fiduciary duty (often in the finance and oil and gas contexts), theft of trade secrets, tortious interference, and business disparagement. His clients primarily comprise Texas businesses and executives, as well as businesses based outside of the state with important business interests at risk here.

Jonathan served as a law clerk for the Honorable Sam A. Lindsay, United States District Judge for the Northern District of Texas, 2005 to 2006. He is well-known by members of the local, state, and federal judiciary and bar community in Texas. "Clients and peers know Jonathan as a smart, quick-on-his-feet, strategic thinker," according to Michael K. Hurst, "who excels at taking a complex, factually jumbled case, making sense out of it, and taking it aggressively towards trial."

A graduate of Southern Methodist University School of Law, Jonathan is known for providing top-notch, effective client service. In addition to his superb client service, Jonathan has been designated as a "Rising Star" by Texas Monthly and Law and Politics magazines, 2010-2018; listed in the top 100 Up-and-Coming Texas Rising Stars, 2017-2018; Named one of the "Top 20 Lawyers on the Rise" by Texas Lawyer, 2016; and Listed as a "Best Lawyer" by D Magazine, 2017.

Jonathan is involved in several organizations. He is currently a member of the Board of Directors of the Dallas Bar Association, a member of the Advisory Council of the Energy Section, and former President of the Dallas Association of Young Lawyers.

Jonathan's speaking engagements and publications include the *State of Texas Legal Market: Oil & Gas Litigation Trends* for the Law360 publication; *Trends in Texas Oil & Gas Litigation*; *Texas Oil & Gas Litigation Update* at the DBA Energy Symposium; *State of Texas Legal Market: Oil & Gas Litigation Trends*, Law360, and other commercial and energy-litigation topics, including horizontal drilling, fracking, and trade secrets.

Business Litigation

- Obtained joint $93.8 million jury verdict for Fort Worth based energy investment firm for breach of fiduciary duty and fraud (over $28 million for his clients).
- Obtained $7.86 million jury verdict on behalf of medical consulting and services company for breach of contract and tortious interference.
- Successful defense of international private equity firm and two of its executives in four-week jury trial over alleged breach of fiduciary duty and contracts.

Energy Litigation

- Obtained Number 15 Verdict in the Nation in 2015 by *The National Law Journal* on behalf of Fort Worth based energy investment firm
- Successful representation of oilfield services company in West Texas blowout dispute
- Favorable defense of substantial litigation involving alleged fraud in a mineral sale
- Obtained summary judgment on behalf of national pipeline company accused of alleged ground water contamination on private land in West Texas
- Handles oil and gas catastrophic matters and environmental contamination cases
- Represents an international oilfield services company in indemnity disputes
- Successful defense of offshore operator concerning an ownership and insurance proceeds dispute

BIOGRAPHICAL INFORMATION

Jervonne D. Newsome represents a diverse list of clients, including top Fortune 500® companies, small businesses, corporate officers, and individuals in range of complex civil and business litigation matters such as trusts and estates, breach of fiduciary duty, breach of contract, business torts, trade secret and non-compete disputes, oil and gas, and much more.

Dubbed a "Superstar" by a United States District Court Judge during a moot court competition, Jervonne zealously advocates for her clients by focusing on the client's specific needs and goals throughout the dispute. Jervonne's optimistic approach, unyielding work ethic, and "outside-the-box" litigation strategy is highly esteemed among her clients and has earned her invaluable respect. When faced with complex issues, Jervonne's ability to synthesize and create streamlined arguments yields successful results and speedy resolutions.

Jervonne started her journey to becoming a lawyer while at Arkansas State University where she was the team captain of the moot court team before attending the University of Arkansas School of Law. After graduating amongst the top of her class from law school, Jervonne clerked for the Honorable Bobby E. Shepherd of the United States Court of Appeals for the Eighth Circuit and the Honorable Denzil Price Marshall Jr. of the United States District Court for the Eastern District of Arkansas. Jervonne's experience at both the district and appellate courts has proved invaluable when it comes to her motion practice, appellate research and writing, oral arguments, and trial strategy with clients.

In 2016, Jervonne had the distinct honor of being asked to serve on an 8th Circuit Court of Appeals panel discussion on the topic of diversity. Jervonne, joined by one 8th Circuit appellate judge and two federal district judges, offered solutions to issues of race and gender inequality within the legal sphere.

Jervonne's professional and communication involvements includes the Dallas Bar Association, the Dallas Association of Young Lawyers, the Patrick E. Higginbotham Inn of Court, and the J.L. Turner Legal Association where she currently holds the position of Corresponding Secretary.

REPRESENTATIVE CASES

- Obtained summary judgment on behalf Fortune 500® processing services company, reducing her client's potential damages exposure by nearly 50 percent.
- Obtained dismissal of all claims against Fortune 500® company in the federal district court of Montana.
- Utilized creative tactical litigation methods to protect former business partner's interest in partnership assets moved across state lines and obtained a favorable settlement on behalf of client after just two weeks of settlement discussions.
- Spearheaded initial litigation strategy in complex trust and business dispute related to the large Texas ranching operation and property owned by the trust leading to favorable settlement on behalf of trustee of multi-million trust.
- Advanced strategic and cutting-edge motion practice on behalf of the founder and CEO of a major investment company in a breach of contract dispute that resulted in a favorable settlement.
- Provided innovative research and critical analysis to settlement demand proposal on behalf of an investment banking officer of a prominent banking institution in an employment discrimination dispute leading to a favorable pre-lawsuit settlement.
- Obtained order vacating default judgment on behalf of former business partner in a business dispute through inventive appellate briefing.

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I. INTRODUCTION

In-house legal counsel often serve dual responsibilities as both a traditional lawyer and business adviser. This dual role, together with the array of services performed by in-house counsel, present unique challenges to protecting the attorney-client privilege. This is particularly true for in-house lawyers who represent businesses in the oil and gas industry.

Oil and gas businesses often have broad functionality – from exploration and production, to leasing and royalties, to transport, to end-product and services. The legal and business responsibilities of in-house lawyers are equally diverse. They often involve negotiating deals, finalizing contracts and transactions, advising senior management, leading mergers and acquisitions, monitoring land and leasing operations, overseeing regulatory matters and public filings, and handling employment matters. Because in-house lawyers in the oil and gas industry often handle responsibilities and perform services both as a traditional lawyer *and also* a business adviser, in-house counsel must be aware of how the attorney-client privilege applies in the corporate setting, and of the nuances of attorney-client privilege as it pertains to in-house legal relations.

The attorney-client privilege is one of the oldest privileges pertaining to confidential information.[1] The privilege encourages full and frank communication between the client and the attorney, while promoting broader public interest in the observance of law and administration of justice.[2] There is friction between discovering information and protecting the confidential relationship between a client and its attorney.[3] And sometimes, the application of the privilege is not easily determined. Courts have expressed concern about this strained dichotomy and are more apt now than ever to narrowly construe the privilege, particularly regarding in-house counsel relations.

This article provides an overview of the law governing the attorney-client privilege, and it addresses topics that in-house counsel in the oil and gas industry regularly address or are likely to encounter. The article also provides practical tips to assist in-house counsel in protecting their company from legal risks.

II. THE ATTORNEY-CLIENT PRIVILEGE

A. The Law.

Rule 503 of the Texas Rules of Evidence governs the application of the attorney-client privilege in Texas. Under this rule, a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client.[4] The Texas privilege contains four elements: (1) a communication; (2) made between privileged persons; (3) in confidence; and (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.

The attorney-client privilege in federal courts is not codified in the Federal Rules of Evidence. Rather, the Federal Rules provide that "the common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" unless the United States Constitution, a federal statute, or Supreme Court rules states otherwise.[5] When a federal court possesses federal question jurisdiction, the federal common-law attorney-client privilege applies.[6] Under federal common law, the elements of the attorney-client privilege are: (1) a confidential communication; (2) made to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion, legal services, or assistance in a legal proceeding.[7]

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[1] *Annesley v. Anglesea*, 17 How. St. Tr. 1139 (1743).

[2] *Republic Ins. Co. v. Davis*, 856 S.W. 2d 158, 160 (Tex. 1993).

[3] *Trammel v. United States*, 445 U.S. 40, 50 (1980) (noting that the assertion of privilege runs counter to the general truth-seeking interest of a trial).

[4] Tex. Evid. 503(b).

[5] Fed. R. Evid. 501.

[6] *Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005). Applying the Standard 503 of the Model Code of Professional Responsibilities promulgated by the United States Supreme Court, federal courts generally require the party asserting the privilege to show a confidential communication made to a lawyer 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).

[7] *S.E.C. v. Microtune, Inc.*, 258 F.R.D. 310, 315 (N.D. Tex. 2009).

When state law governs a particular claim in a diversity action, that state law informs the attorney-client privilege analysis.[8]

B. The Scope of the Attorney-Client Privilege.

Whether the purportedly privileged communication occurred between "privileged" persons is often the material issue. Because of technology, people are more accessible than ever, and the channels of communication have become more democratized, user-friendly, and instant. But technological innovation does not come without communication risks. Modern corporate communication is less formal. Employees at all levels within business operations commonly have direct access and communication lines with the in-house attorneys and vice versa. The subject-matters of these employee-counsel communications could range from corporate legal matters, to advice about business strategy, to personal legal requests, to last night's football game. Open and pervasive communication channels have eroded many of the formalities once utilized to ensure privacy and confidentiality. Modern forms and style of communication render it difficult to ascertain who holds the corporate privilege and to whom the corporate privilege applies.

1. Who is the Client?

Texas Rule of Evidence 503 sets forth the following as persons of privilege.

1. The client and the client's lawyer, including representatives of each;
2. The client's lawyer and that lawyer's representatives;
3. Persons sharing common interest in a pending lawsuit;
4. The client and the client's representatives;
5. Lawyers and their representatives representing the same client.[9]

Determining whether a communication is protected is easier when dealing with individuals: either the individual is a client, or a representative of the client or the client's lawyer. But when corporate entities are involved, the question of who is the client becomes more difficult.

2. When the Client is the Business Entity.

A lawyer retained or employed by an organization represents the entity.[10] The entity acts and conducts business through its individual officers, directors, and employees. While in-house lawyers often do not represent these individuals, in-house lawyers must communicate with them in order to serve as counsel to the corporation. Thus, although the corporation is the client, communications must necessarily occur through individuals and therefore must be afforded protection so that in-house counsel can serve their purpose. The United States Supreme Court in *Upjohn Co. v. United States* addressed which communications are afforded such protection.[11] Prior to *Upjohn*, a communication by an employee to in-house counsel was privileged only if the employee "was in a position of control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney . . .."[12] This was referred to as the "control group" test. In *Upjohn*, the Supreme Court rejected this test in favor of the broader "subject-matter test." Under the subject matter test, the attorney-client privilege extends to all communications with counsel by corporate employees that are made under a superior's orders and for the known corporate purpose of obtaining legal advice.[13] To be protected, the information must relate to matters within the scope of the employee's corporate duties.[14]

Today, *Upjohn*'s subject-matter test controls in federal courts and under Texas law. In 1998, Texas amended Rule 503, officially adopting the subject-matter test. Under Texas law, an employee is considered a privileged person with respect to the corporate entity if the employee (a) has authority to obtain professional legal services or to act on the rendered advice, or (b) makes or receives confidential communication at the direction of the corporation and *while acting in the scope of his/her employment*.[15] Like federal courts, Texas courts require the communication to have been made within the scope of the employee's employment to receive protection.

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[8] FED. R. EVID. 501. *In re Avantel, S.A.*, 343 F.3d 311, 323 (5th Cir. 2003).
[9] TEX. EVID. R. 503.
[10] TEX. GOV'T CODE ANN. TITLE 2, SUBT. G, APP. A, ART. 10, § 9, Rule 1.12.
[11] 449 U.S. 383 (1981).
[12] *Id.* at 390.
[13] *Id.*
[14] *Id.*
[15] TEX. EVID. R. 503(a)(2)(A-B) (emphasis added).

The test for whom the privilege applies is not the same for every state. Determining who counts as an extension of the corporation for purposes of privilege client varies by jurisdiction. For example, in *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.,* an Illinois federal district court applied the "control group" test to conclude that documents to and from in-house counsel lacked confidentiality because they had been disclosed to individual employees who did not hold an "advisory role to top management in a particular area is such that a decision would not normally be made without [their] advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority."[16] The court found, however, that the documents were still protected under the work-product privilege.[17]

Because jurisdictions treat the confidentiality of communications differently, they may apply modified versions of the "control group" and "subject-matter" tests. It is important for in-house counsel to scrutinize who is involved in confidential discussions, and to educate employees about communicating with in-house counsel as well as about discussing the information they have received from or provided to in-house counsel.

3. Parents, Subsidiaries, and Affiliates.

The applicability of the "control group" or "subject-matter" tests may also vary depending upon whether in-house counsel also represents or deals with subsidiaries, affiliates, or the parent corporation, in addition to representing the company. The Third Circuit Court of Appeals held that when an intra-group – such as a parent corporation and its subsidiary – are involved in litigation, and those entities at one point had *joint* in-house representation, then either entity may discover and access materials from each other in the litigation that, under different circumstances, would have been privileged.[18] The court held that neither entity could prevent disclosure of in-house counsel communications if they were jointly represented by the same attorneys on a matter of common interest that is the subject-matter of the documents requested.[19] Accordingly, in-house counsel should educate themselves on the tests applicable to the relationship among the affiliate, subsidiary and parent corporations.

4. The Employee and In-House Counsel Relationship.

What about when an employee reaches out to in-house counsel for advice on personal legal matters or employment matters? Too often, the employee believes that such communications with in-house counsel are privileged. In-house counsel should proceed with caution by clarifying that they represent the company and not the employee personally. Otherwise, a misunderstanding can lead to an involuntary extension of the attorney-client privilege to these types of communications. If a lawyer neglects to make this clarification and the organization's employee *reasonably believes* that the lawyer represents him or her, the employee may assert the privilege personally with respect to his or her personal communications with in-house counsel.[20]

There are instances when in-house counsel (with permission of the corporation) can serve as counsel for an employee, *i.e.,* the Chief Executive Officer. But counsel must remain mindful that the representation could reach an impasse if the employee's interests become adverse to the company's. At that point, in-house counsel should follow applicable conflict of interest rules, which generally mandate full disclosure of a conflict and consent from each of the parties to proceed with the joint representation.

- Always inform employees that you represent the company and not them indivudally.
- Avoid discussions about an employee's personal legal matters or employment. Inform the employee that he or she should discuss those matters with the human resources department or their own lawyer.

[16] No. 00 C 1926, 2000 WL 1898518, at *6 (N.D. Ill. Dec. 20, 2000).
[17] *Id.*
[18] *In re Teleglobe Communications Corp.,* 493 F.3d 345, 372-73 (3rd Cir. 2007).
[19] *Id.*
[20] Restatement (Third of the Law Governing Lawyers § 73 cmt. (d) (2000).

- Scrutinize who is placed on distrubition lists regarding corporate legal matters.

C. Privilege Exceptions and Waiver

Before exploring the intricacies of the attorney-client privilege as it relates to in-house counsel, it is crucial to understand areas where the privilege does not apply and how the privilege can be waived.

1. Exceptions

Texas Rule of Evidence 503 recognizes five exceptions to the attorney-client privilege. (1) Furtherance of crime or fraud: if a person knowingly seeks or obtains the attorney's services to further a criminal or fraudulent activity; (2) Claimants through same deceased client: If the communication is relevant to an issue between parties claiming through the same deceased client; (3) Breach of duty by a lawyer or client: If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer; (4) Document attested by a lawyer: If the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness; (5) Joint clients: If the communication is offered in an action between clients who retained or consulted a lawyer in common, was made by any of the clients to the lawyer, and is relevant to a matter of common interest between the clients.[21]

Additionally, although not specifically viewed as an "exception," underlying facts contained in a privilege communication are not protected from disclosure.[22] The law in Texas is clear, "a person cannot cloak a material fact with the privilege merely by communicating it to an attorney."[23] In other words, the communication itself remains privileged and is not subject to disclosure regardless of the facts contained therein, but the *facts disclosed* are still subject to discovery either by deposition or other discovery tools.[24] Thus, in-house lawyers are wise to remember that the mere communication of a fact to an attorney does not mean that the fact is now undiscoverable.

In-house counsel should also consider whether the "common interest" doctrine exists in the applicable jurisdiction. The "common interest" doctrine protects general communications between persons having common legal interests but separate counsel. No such doctrine exists in Texas. In Texas, the attorney-client privilege applies to persons sharing common interest in *a pending lawsuit*.[25] This is called the allied-litigant doctrine, which specifically protects communications made between a client, or the client's lawyer, to another party's lawyer, but not communications to the other party itself.[26] The primary difference between the "common interest" doctrine and the "allied-litigant" doctrine is that with the allied-litigant doctrine, the parties must be a part of a litigation proceeding for the privilege to apply. Understanding this difference is critical for attorneys and clients having joint interests and for protecting the attorney-client privilege.

2. Waiver

Communication mishaps are inevitable, but they can lead to a waiver of the attorney-client privilege. Waiver can occur when the privileged information is disclosed to a non-privileged person. It can also occur when privileged information is inadvertently disclosed and the disclosing party fails to employ necessary measures to claw-back the disclosed information.[27]

In the oil and gas industry, waiver of the attorney-client privilege frequently arises in the context of title opinion disclosures, and disclosures to the federal government related to internal investigation

[21] TEX. EVID. R. 503(d).

[22] *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (holding while the trustee's communication to his attorney that he misappropriated funds was protected, the fact that he misappropriated trust funds was not and further holding that a party "cannot cloak a material fact with the privilege merely by communicating it to an attorney."); *see also MortgageAmerica Corp. v. American Nat'l Bank*, 651 S.W. 2d 851, 858 (Tex. App.— Austin 1983, writ ref'd n.r.e.) (The attorney-client privilege "does not extend to the disclosure of underlying facts, but merely to the disclosure of attorney-client communications").

[23] *In re Toyota Motor Corp.*, 94 S.W.3d 819, 822 (Tex. App.--San Antonio 2002).

[24] *In re Fairway Methanol LLC*, 515 S.W.3d 480, 494 (Tex. App. 2017) ("Once it is established that a document contains a confidential communication, the privilege extends to the entire document, and not merely the specific portions relating to legal advice, opinions, or mental analysis.").

[25] TEX. EVID. R. 503

[26] *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52-53 (Tex. 2012).

[27] While TEX. R. CIV. P. 193.3(d) protects against inadvertent disclosures, there are other requirements that must be met for those protections to apply.

(*See* below).[28] There are instances, however, where waiver is not readily apparent because the disclosure is partial or because a party attempts to use the privilege offensively.

a. Partial Disclosures

Texas Rule of Evidence 511 "allows a partial disclosure of privileged material to result in an implied waiver of the privilege as to additional material that has not been disclosed."[29] The object is to ensure fairness.[30] "Implied waiver" occurs "only if the disclosure is of 'any significant part' of the privileged material."[31] The threshold determination is whether any "significant part" of the privileged matter has been disclosed.[32] Implied waiver through partial disclosure can especially arise in internal investigations and regulatory compliance (*see* below).

b. Offensive-Use Waiver

A person "cannot claim privilege to pertinent evidentiary information while he simultaneously seeks affirmative relief."[33] The offensive use waiver doctrine ensures that a party cannot "use one hand to seek affirmative relief and with the other lower an iron curtain of silence" around the facts of the case.[34] To determine whether an offensive-use waiver has occurred, courts consider the following factors: (1) whether the party asserting the privilege has sought affirmative relief; (2) the information sought must be such that, if believed by the factfinder, in all probability it would be outcome-determinative of the cause of action asserted; and (3) disclosure of the information must be the only means by which the aggrieved party may obtain the evidence.[35] Texas courts have held that a party's affirmative defenses do not qualify as affirmative relief for purposes of the offensive use doctrine. In such instances, the attorney-client privilege remains fully intact.[36]

The offensive-use waiver also applies in the context of the work-product doctrine.[37]

D. The Attorney-Client Privilege vs. the Work-Product Doctrine.

1. Work Product in General

The work product doctrine is another mechanism that in-house counsel should understand in protecting the confidential information of the company. Established by the Supreme Court in *Hickman v. Taylor*, the work product doctrine protects from disclosure any materials prepared or mental impressions developed in anticipation of litigation, including communications made in anticipation of litigation or for trial between a party and its representatives or among party's representatives, including the party's attorneys.[38] Work product exists in two forms: core work product and non-core work product. Core work product refers to the work product of an attorney or that attorney's representatives. Such work product generally contains the mental

[28] *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) (determining there was a waiver of privilege when a gas well-operator disclosed results of an investigation to federal agencies and the media); *see also In re ExxonMobil Corp*., 97 S.W.3d 353, 363 (Tex. App.—Hous. [14th Dist.] 2003) (trial court did not abuse its discretion in ordering the title opinion produced because there was conflicting evidence as to whether the company had previously disclosed title opinions to third parties); *cf. In Re BP Products N.A. Inc*., 263 S.W.3d 106, 117 (Tex. App.—Hous. [1st Dist.] 2006) (because the company strictly limited its disclosure to the reserve figure itself rather than the methodologies behind the figure, it did not waive its attorney-client privilege when disclosing that figure to the SEC).

[29] TEX. EVID. R. 511; *see also Terrell State Hosp. of Texas Dep't of Mental Health & Mental Retardation v. Ashworth*, 794 S.W.2d 937, 940 (Tex. App.—Dallas 1990) (orig. proceeding).

[30] For additional provisions governing waiver and disclosures related to the attorney-client privilege see the Rule 502 of the Federal Rules of Evidence.

[31] *Ashworth*, 794 S.W.2d at 940.

[32] TEX. EVID. R. 511.

[33] *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 590 (Tex. App. —Dallas 1994).

[34] *Ginsberg v. Fifth Ct. of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985).

[35] *In re Bonding*, 522 S.W.3d 75, 89 (Tex. App. —Hous. [1st Dist.] 2017) (concluding that the privilege protecting the purported work-product emails was waived under the doctrine of offensive-use waiver); *see also Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 478 (N.D. Tex. 2004) (finding the privileged documents used offensively were not outcome-determinative).

[36] *Marathon Oil Co.*, 893 S.W.2d at 590; *Krug v. Caltex Petroleum Corp*., 05-96-00779-CV, 1999 WL 652495, at *3 (Tex. App. —Dallas Aug. 27, 1999).

[37] *In re Bonding*, 522 S.W.3d at 89-90.

[38] TEX. R. CIV. P. 192.5(a).

impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representatives and is usually never discoverable.[39] Non-core work product is everything else, which may include communications by the party, *i.e.*, the company. Non-core work product is discoverable if the other party can show that it has a substantial need for the materials in the preparation of its case and that it would be unable to obtain the substantial equivalent by other means without undue hardship.[40]

Texas courts employ a two-part test to determine the application of the work product doctrine. First, courts consider whether a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would commence. Second, courts determine whether the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.[41]

Because the primary purpose of the work product doctrine is protecting an attorney's mental impressions, conclusions, and legal theories in preparing a case for trial, the work product doctrine is essential to the attorney-client relationship.

The protections afforded by the work product doctrine must not be confused with the protections afforded by the attorney-client privilege. The work product doctrine is distinct from – and broader than – the attorney-client privilege because it protects more than communications.[42] Whereas the attorney-client privilege enables the client to be open and frank with the attorney in seeking legal advice, the work product doctrine allows the attorney and the client to engage in the work necessary to prosecute or defend the case without fear that his or her strategy or opinions will be disclosed to the opposition.

The work product doctrine is narrower in one respect: it only protects those matters prepared in anticipation of litigation. The attorney-client privilege, on the other hand, is perpetual if an attorney-client relationship is established.

III. FREQUENT PRIVILEGE ISSUES FOR OIL AND GAS IN-HOUSE COUNSEL

The purpose of the attorney-client privilege for in-house counsel is the same as for outside lawyers: to promote full and frank communication between counsel and the client – here, the company. This fosters an environment promoting candid internal reporting, unrestricted advice-seeking from employees regarding corporate legal matters, and effective internal investigations. This section addresses common topics that in-house counsel encounter in navigating the attorney-client privilege and work product doctrines.

A. TOPIC #1: INTERMINGLED ROLES

The responsibilities of in-house counsel have grown rapidly. In-house lawyers provide vital legal advice and ensure corporate compliance, and they also often provide business advice to senior management regarding potential transactions, strategy, and operational decision-making. Despite the multiple benefits the company receives from its in-house counsel, with respect to confidential communications, the benefits must be balanced with counsel's primary objective of protecting the company from legal risks. In-house counsel must be ready and able to decipher their legal roles from their business ones and, for purposes of maintaining privilege, must be careful not to blend the two. Striking this balance is easier said than done.

Failure to distinguish between business and legal roles can result in devastating consequences regarding the attorney-client privilege. Courts routinely find that no attorney-privilege exists where in-house counsel functioned in a business capacity rather than a legal capacity. For example, if in-house counsel participates in negotiating a business transaction, relies on her background knowledge of the commercial practice, and performs no legal analysis, then communications made in this role have been considered to be business-related and not privileged.[43]

[39] *Id.* 192.5(b)(1).
[40] *Id.* 192.5(b)(2).
[41] *National Tank Co. v. Brotherton*, 851 SW.2d 193, 203-04 (Tex. 1993).
[42] *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).
[43] *MSF Holdings, Ltd. v. Fiduciary Trust Co. Int'l*, 2005 WL 3338510 at *1 (S.D.N.Y. December 7, 2005); *cf In re City of Dallas*, No. 05-03-00516-CV, 2003 WL 21000387, at *2 (Tex. App.—Dallas May 5, 2003, no pet.) (mem. op.) (holding that attorney-client privilege applied to communications between attorney, who also acted "as a

There is no presumption that communications made to or from in-house counsel are made for the purposes of securing legal advice. This is because in-house counsel have numerous responsibilities outside of the legal sphere. If the lawyer functions in any other capacity besides her legal capacity – including in providing business advice instead of legal advice, then the communication will not be privileged.[44]

There is no single test for determining whether in-house counsel is operating in a business capacity rather than a legal one. Some courts examine the communication itself to determine whether any legal analysis is present and whether such analysis or advice predominates any business advice. Other courts consider the attorney's actual placement in the organizational structure of the business, including whether the attorney serves as general counsel or in a separate legal department, or whether the attorney works in senior business management.

According to a recent Texas opinion, even if an attorney performs some functions of a real estate broker or negotiator as well as a lawyer, the communications with that attorney may still be privileged if the discussion includes legal work and there are indicators that the attorney is working in his or her legal capacity – such as the inclusion of the firm's signature block to the email communications and the provisions in the engagement letter describing the business relationship as one where the attorney would provide legal representation.[45] In the *Rescue Concepts* case, although the attorney assisted in the negotiations of the sale of property, the e-mail communications in dispute were privileged based on the particular circumstances.[46] An important distinction, however, is this case involved an outside attorney and ***not*** in-house counsel. Would communications be privileged had the attorney worked in-house and performed some functions of a broker for the benefit of the company? In this scenario, a court would likely examine whether the lawyer performed a legal function or business function, and when the communications were rendered.

- Make sure you are still licensed as an attorney in your jurisdiction and that your continuing legal education requirements are current. Some courts have held that in-house counsel with no active bar license could not render legal advice. Therefore, the communications thought to have been privileged, were not.[47]

- Adhere to the following guidelines of the ABA/BNA Lawyers' Manual on Professional Conduct, § 91:2209 for in-house counsel tasked with performing multiple legal and business responsibilities:

  If possible, avoid serving in both legal and business decision-making roles;

  When clearly acting as a legal advisor, make a written record of the legal aspects of any communication, and/or have another lawyer participate in the communications in the role of legal advisor;

  Make sure that requests for legal advice are so designated and that counsel's capacity as a legal advisor is spelled out in writing;

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negotiator," and his client; rejecting argument that privilege never attached because attorney acted "only as a negotiator" and stating that "while [the attorney] may well have acted as a negotiator ..., he also acted as a lawyer" and that "[w]hen a lawyer acts in dual roles, the attorney-client privilege attaches").

[44] *In re Bivins*, 162 S.W.3d 415, 419–20 (Tex. App.—Waco 2005, orig. proceeding) (holding that attorney-client relationship is not created when attorney is hired in non-legal capacity); *In re Texas Farmer Ins. Exch.*, 990 S.W. 2d 337, 340 (Tex. App. – Texarkana 1999, orig. proceeding) (holding that privilege did not apply where attorney was acting as an investigator); *see also Georgia-P. Corp. v. GAF Roofing Mfg. Corp., 93 CIV. 5125 (RPP), 1996 WL 29392, at *5 (S.D.N.Y. Jan. 25, 1996)* (finding no privilege where in-house counsel conducted negotiations).

[45] *In re Rescue Concepts, Inc*., 01-16-00564-CV, 2017 WL 4127839, at *11 (Tex. App. —Hous. [1st Dist.] Sept. 19, 2017).

[46] *In re City of Dallas*, No. 05-03-00516-CV, 2003 WL 21000387, at *2 (Tex. App.—Dallas May 5, 2003, no pet.) (mem. op.) (holding that attorney-client privilege applied to communications between attorney, who also acted "as a negotiator," and his client; stating that "[w]hen a lawyer acts in dual roles, the attorney-client privilege attaches").

[47] *Gucci Am., Inc. v. Guess?, Inc*., 271 F.R.D. 58, 72 (S.D.N.Y. 2010).

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Avoid combining legal and non-legal matters in either oral or written communications, and never let non-legal matters predominate in sensitive communications.

- Tell employees to direct all legal questions to the legal department and not to business people. Business people should be included only if necessary for the purpose of rendering legal advice.

- Preface your written responses to comport with the legal advice you are providing. For example, start your response off with, "Yesterday, you asked me about a legal issue. Here is my answer . .. ." Inform the client that you are responding to a request for legal advice.

- Include and emphasize your legal advice/opinion in your communication. Incorporate legal reasoning and cite legal principles or case law.

- Add esquire or your legal title to the end of your name when providing legal advice. Also, use an e-mail signature block denoting your title as in-house legal counsel.

- Avoid writing memoranda to file that do not communicate any legal advice to the client. If it is not a document prepared in anticipation of litigation and is not a communication conveying legal advice, it is likely not protected.[48]

- Avoid responding to vague requests for information. If you are unsure whether the request is legal or business, ask the employee to be more specific.

B. TOPIC #2: TAMING E-MAILS

E-mails entail risks separate and apart from whether the substance of an e-mail contains legal advice. For example, many employees believe that simply copying in-house counsel on an e-mail is sufficient to invoke privilege. In reality, merely carbon copying in-house counsel to an e-mail is not enough.[49] In-house counsel should educate employees that e-mails and their attached documents do not magically become privileged simply by channeling them through in-house counsel.

Just because an e-mail communication starts-off as being privileged does not mean it will end that way. Business employees often hit "reply to all" and interject non-legal discussions into a legal discussion. They also frequently add other employees to the e-mail chain who were not involved in the original discussion. When this happens, the privileged communication is voluntarily disclosed to other personnel to whom the privilege may not apply.[50] Even worse, employees often forward privileged discussions to non-privileged persons – including adversaries – especially when trying to close a business deal. Once these mishaps occur, it may be too late to reverse the damage – privilege may be waived.

- Include a disclaimer below the signature block of your e-mail to help protect against inadvertent disclosures. Although such disclaimers are not dispositive, they are helpful to evidence efforts in protecting the confidentiality of information.

- Instruct how to handle confidential e-mail communications in your company's policies and employee handbooks. This will help establish to employees and courts situations where the company expects the privilege to apply.

- Inform employees to not overly use the term "privileged" in the subject line when the communication is obviously not privileged. While it is important to use proper labels, it is equally important not to misuse or overuse labels that may detract the credibility of proper ones.

[48] *See Kelly v. Gaines*, 181 S.W.3d 394, 419 (Tex. App.—Waco 2005), reversed on other grounds, 235 S.W.3d 179, (finding a "memo to file" was not privileged because it did not contain or refer to any communications between the party claiming privilege and his attorneys and the attorneys were not acting in their legal capacity).

[49] *In Re Avantel, S.A.* 343 F.3d 311, 321 n.11 (5th Circuit 203) (applying Texas law); *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 800–801. (E.D. La. 2007); *see also Phillips v. C.R. Bard, Inc*. 290 F.R.D. 615, 643 (D. Nev. 2013) (finding no privilege when no questions were posed that could be interpreted of requesting legal advice).

[50] *See supra* Section II.B.

- Discourage use of "reply all" in important legal communications where the topic of the e-mail could change.

- Instruct employees that they should not forward any communications to and from in-house counsel, especially to persons beyond the company. If you know a business person may convey your advice to the other side of a transaction, consider drafting a template suggested response that the business person can then cut-and-paste and send.

- If the advice being rendered is extremely important or sensitive, consider not sending it in writing at all. Instead, convey it orally to the appropriate business people. This approach must be balanced with the need to paper the file and to meet any reporting requirements.

- Remember, just because a communication may be privileged *does not mean* that it will never be seen beyond your company. A court may order an *in camera* inspection to review the contents of communication. The communication could also be leaked or inadvertently disclosed. Therefore, educate employees that their communications must be professional and free of color jokes, offensive racial or gender remarks, and statements that would otherwise damage the company's reputation and credibility.

C. TOPIC #3: INTERNAL INVESTIGATIONS

To maintain privilege and to protect materials and communications made during internal investigations, the investigations must be done for the purpose of obtaining legal advice or done in anticipation of litigation. In-house counsel should instruct all employees assisting with the investigation that they are working under the direction of in-house counsel and for the purposes of obtaining legal advice or in anticipation of litigation. These instructions should be in writing. In-house counsel should also inform employees participating in the investigation that any questions, findings, or conclusions should only be directed or reported to in-house counsel.

Internal investigations often suffer from the lack of direction. In-house counsel must develop a plan for the investigative process, including how to keep communications concerning the investigation confidential. Employees should not be left to fend for themselves. Instead, in-house counsel must ensure that everyone involved in the investigation has a specific assignment that leaves no room for employees to deviate. Specific assignments and instructions are critical, because sometimes an employee tasked with investigating may want to contact third parties, involve personnel whose communications would not be privileged, or forward communications and tasks onto subordinates. Any of these events could potentially destroy privilege.

It is usually best to initiate internal investigations only in anticipation of litigation. This is because the work product doctrine applies only if and when litigation is imminent. In-house counsel should therefore resist the urge to indulge investigations when there are few indications that a lawsuit is likely. Courts are strict in their application of this doctrine, requiring that the party seeking to protect materials show "more than a remote prospect, inchoate possibility, or a likely chance of litigation."[51] Discussions or assertions during contract negotiations relating to the possibility of litigation are likely not enough.[52] Likewise, investigation of employment related matters by the human resource department if not conducted in anticipation of litigation or for purposes of obtaining legal advice likely will not be protected from discovery. There must be particularized suspicion of litigation.

- Inform all employees involved that the investigation is under your direction, is a legal matter, and is being performed for "the purposes of rendering legal advice" or in "anticipation of litigation or for trial."

[51] *In re Gabapentin Patent Litig.*, 214 F.R.D. 178, 183 (D.N.J. 2003) (internal citations omitted).

[52] *Kingsway Fin. Servs., Inc. v. PricewaterhouseCoopers*, No. 03Civ.5560 (RMB) (HBP), 2007 WL 473726, at *5 (S.D.N.Y. Feb. 14, 2007) (noting that a boilerplate choice of law provision in a contract was not indicative of an impending litigation).

- Use operative words in your communications such as "anticipation of litigation" or "this is in conjunction with the senior management's request for legal advice."

- Inform all involved employees that they should direct all questions, findings, and reports to inside counsel or outside counsel, and that they should avoid discussing the matters or forwarding any communications, findings, or reports to other persons or employees not involved.

- Avoid personally participating in interviews of employees or witnesses, because you could be called to testify as a witness if you have knowledge of the facts and may be required to disclose your interview notes.

- Keep a record of the documents and communications indicating that litigation is imminent.

- If you are unsure whether the investigation meets the "anticipation of litigation" threshold, proceed with extra caution. The investigation must be conducted at the direction of counsel and for the purposes of obtaining legal advice.

- When in doubt, ask outside counsel. Especially if you have concerns whether the attorney-client privilege or work product doctrine will apply.

- Remember partial disclosure can cause waiver. The attorney-client privilege is waived if "any significant part of the privileged communication is voluntarily disclosed." Be sure not to disclose privileged communications regarding the findings of an investigation to those beyond who have a need to know, even if the findings are good. Such disclosure could open the door for the discovery of all communications regarding the investigation. To avoid disclosing privileged communications, have the company draft a separate report that simply identifies the findings and conclusions without referencing internal communications, if such a report must be provided to a third party for compliance purposes.

D. TOPIC #4: JURISDICTIONAL NUANCES

The parameters of the attorney-client privilege are not the same in every jurisdiction. In-house counsel should anticipate were a legal dispute related to the subject matter of communications might be litigated. This is particularly true when negotiations, transactions, and decision-making cross international borders. In-house counsel must educate themselves on the law of jurisdictions that may potential affect the application of the attorney-client privilege and the work product doctrine.

The privilege protections for in-house counsel with respect to our contiguous neighbors, Canada and Mexico, are similar to those offered under state and federal law. In Canada, for in-house communications to be protected, (1) counsel must act in his or her role as a solicitor (legal advisor) of the company, (2) the communication must be intended to be confidential, and (3) the communication must be in regard to requesting or providing legal advice.[53] Canada refers to this as the "legal advice" privilege or the "solicitor-client" privilege.

Mexico does not recognize a specific attorney-client privilege but instead imposes a general *professional secrecy* obligation on all professionals, including attorneys.[54] Whether counsel is in-house or a private practitioner, the same obligations regarding professional secrecy will apply. Although in-house communications and documents are protected by professional secrecy, "any person may be compelled to disclose information related to civil, criminal, or antitrust procedures by court order."[55]

The solidity of privilege in other international jurisdictions is less promising. France, Italy, Sweden, China, Japan, Korea, Switzerland, and many Latin America countries do not recognize in-house attorney-client privilege.[56] The United Kingdom, Germany, and

[53] *In-House Counsel and the Attorney-Client Privilege, Canada – Federal*, LEX MUNDI PUBLICATION, 2009; *see also Rv Campbell*, [1999], 1 SCR 565 (recognizing that in-house counsel can claim privilege); Bower, Scott H.D. and Bilsland, Joan D. *Legal Privilege*, BENNETT JONES, December 2016.

[54] Azar, Cecilia, *Legal Professional Privilege*, DLA PIPER, GLOBAL GUIDE, MEXICO, 4th Ed., p. 2 (2017).

[55] *Id.*

[56] Marc Vockell, *Helping the in-House Counsel Avoid International Litigation Disasters*, 63 The Advoc. (Texas) 42, 44 (2013).

Belgium recognize in-house attorney-client privilege on a limited basis.[57]

Moreover, there is no attorney-client privilege under European Union law for anti-competition proceedings involving in-house counsel.[58] Indeed, the European Court of Justice held that employee communications with in-house counsel are not protected by the attorney-client privilege in anti-competition investigations conducted by the European Union. For such communications to be protected, they must be made for the purposes of the exercise of the client's rights of defense and must emanate from independent lawyers—lawyers who are not bound to the client by a relationship of employment. Companies that could face anti-competitive related allegations in Europe should consider implementing additional protections.[59]

- Make a list of all countries in which your company has current or potential business operations. Given the company's business operations in each county, what legal issues are likely to arise?

- Consult with outside counsel for advice in maintaining the confidentiality of communications in a foreign jurisdiction.

- Consider including an international arbitration provision in applicable business contracts to alleviate concerns regarding the applicability of the attorney-client privilege.

- Reach out to organizations such as the Association of Corporate Counsel,[60] through which in-house counsel can obtain recommendations from colleagues as needed.

E. TOPIC #5: HANDLING DISCOVERY IN LITIGATION

Another common headache for in-house counsel is the lack of preparedness for and involvement in litigation discovery. In-house counsel should develop a discovery protocol for litigation for responding to and requesting discovery, even when there are no pending threats of litigation. Discovery problems often arise from failing to preserve documents and address litigation holds adequately; not understanding how – and the methods through which – employees communicate; not understanding the company's technology; and not participating in document searches and in drafting a litigation privilege log. It is especially important for in-house counsel to have a system in place for locating and preserving documents, both physical and electronic.

Federal Rule of Civil Procedure 37(b)(3) permits sanctions if a party fails to take "reasonable steps" to preserve electronically stored information relevant to the issues in the case. In-house counsel should know the inner workings of the company's email system, including how data is stored and where. Some companies have email systems that have instant messaging options or chatrooms and in-house counsel should be aware of these additional channels of communication. Similarly, they should develop a policy governing employee use of share file and off-site storage systems, such as Dropbox. Knowing the what, where, who, why, and how of the company's email database, technology, file-sharing software, and other messaging software is consistent with containing legal risks.

Another often overlooked facet related to discovery is "metadata"—the data embedded in a document that provides detailed information such as the title, author, date created, date modified and even revisions and comments. This hidden world of information can pose serious risk to the attorney-client privilege and work-product doctrine. For example, if a senior corporate manager sends a document to in-house counsel for her legal advice, any comments added to

[57] Beth S. Rose, Sam Khichi, Micichelle T. Quinn, *Challenges For In-House Counsel in Multinational Corporation: Preserving the Attorney-Client Privilege in the Aftermath of Akzo Nobel Chemicals Lts. V. European Commission*, CORPORATE COUNSEL BUSINESS JOURNAL, (April 2, 2011), http://ccbjournal.com/articles/13684/challenges-house-counsel-multinational-corporations-preserving-attorney-client-privil

[58] *Akrzo Nobel Chems. Ltd. v. European Commission*, Case C-550/07 P (Court of Justice, 14 Sept. 2010).

[59] *Id.*

[60] *Association of Corporate Counsel*, (1998-2018), https://www.acc.com/ (last visited Mar. 15, 2018).

the document by in-house counsel or the manager are embedded in the document's metadata. Even if the business person removes all of the comments prior to disseminating the document, the metadata pertaining to those comments remains embedded. In-house attorneys should insist that any privileged metadata be removed from any such outgoing documents.

In litigation, the preservation of metadata can be just as important as its removal is during the ordinary course of business. In-house counsel should train employees how to preserve metadata for documents that may be responsive to discovery and which do not invoke the attorney-client privilege or work-product doctrine. Hence, electronic documents and correspondence need to be preserved once the company is on notice of potential litigation, and the metadata pertaining to those electronic materials should also be preserved, especially if the company is directed to preserve it through a document retention or litigation hold letter.

- In-house counsel should understand the company's technology or – at minimum – obtain the assistance of information technology professionals to answer questions as needed.

- Instruct employees about the company's retention policies. Employees should know what information they should keep and what information they may delete.

- Once you become aware of potential litigation and/or receive a document preservation or litigation hold request, be sure that documents and communications potentially relevant to the material issues are properly preserved. This includes halting the company's ordinary data deletion/destruction procedures pertaining to the items.

- Be personally involved in responding to discovery, including in overseeing the drafting of any privilege log.

- If there is a large amount of potentially privileged documents to review, you should personally train your reviewers and provide input in identifying key search terms and the authors and topics that are likely the source of privileged items, to avoid inadvertent productions of privileged information. Data search software is likely a good alternative/supplement to manual review.

F. TOPIC #6: HANDLING TITLE OPINIONS AND COMMUNICATIONS WITH LANDMEN

1. Title Opinions

Title opinions "are much more than just a recitation of that which appears in the public records" because they account for "attorney's opinion concerning title to the property."[61] Courts generally hold that the attorney-client privilege protects title opinions.[62] However, some courts are leery of this blend of land information and legal opinion and may hesitate to pronounce that all such title opinions are protected.[63] Whether the title opinion is privileged may be decided on a case-by-case and document-by-document approach.[64] One thing is certain in most jurisdictions: once the title opinion is disseminated to non-privileged person, the privileged is waived.[65]

2. Landmen

In-house counsel may communicate frequently with landmen about securing leasehold and land. Any disclosure with these landmen, who are generally independent contractors, may remain confidential if the landman is the functional equivalent of an employee of the operator and understands that such communications are confidential. In *In re Small*, a suit against an energy company and its landman by a former lessee, the former lessee claimed that the energy company waived its attorney-client privilege as to e-mails related to the title work performed with respect to the oil and gas

[61] *DCP Midstream, LP v. Anadarko Petroleum Corp*., 303 P.3d 1187, 1199 (Colo. 2013).
[62] *In re Exxon Mobile Corp*., 97 S.W. 3d 353, 362 (Tex. App. – Houston [14th Cist.] 2003, no. pet.); *Skaggs v. Conoco*, 957 P.2d 526 (N.M.1998) (title opinions are privileged); *Texaco, Inc. v. Phoenix Steel Corp*., 264 A.2d 523, 525 (Del. Ch. 1970) (title opinions are privileged).
[63] *DCP Midstream, LP*, 303 P.3d at 1199.
[64] *Id*.
[65] *In re ExxonMobil Corp*., 97 S.W.3d at 363.

lease because such communications included a third-party landman.[66] The court disagreed. It noted the evidence showed that the landman was aware that the communications were confidential, the communications were not disclosed to anyone other than those involved in the furtherance of the attorney's representation of the company, and the landman attested that he was retained to assist the attorney in the title work that needed to be performed on the property.[67]

In re Small suggests that the attorney-client privilege will not be waived if an in-house counsel discloses privileged communications with an independent landman so long as the landman functions as a representative of counsel and assists counsel for purposes of providing legal services.

- Separate the actual title opinion from other documents – especially publicly available documents. Such documents are not considered privileged. Keeping them separate from the title opinion may help bolster the confidentiality of the opinion itself.

- If title opinions are kept on a central database, limit access to those who need the title opinions to perform their job. Allowing additional employees to access title opinions will dilute a claim of confidentiality.

- Maintain a written policy on how the confidentiality of title opinions shall be maintained, and set forth the relationship between in-house counsel and both company and third-party landmen, as well as restrictions on dissemination.

- Make sure the title opinions contain legal advice or analysis rather than merely factual information.

- Define in writing the company's relationship with independent landmen and specify that landman are held to a duty of confidentiality. Make sure landmen understand the purpose for which they are retained: to assist with rendering legal services. The company's landmen contracts should provide that landmen are assisting in-house counsel for purposes of rendering legal services.

- Inform landmen to avoid needlessly disseminating title opinion to third parties, unless disclosure is necessary for closing a deal or required in conjunction with the operating agreement or transaction.

G. TOPIC #7: REGULATORY COMPLIANCE AND DISCLOSURE TO THE GOVERNMENT

What about the disclosure of privileged information to governmental agencies? With respect to government and regulatory compliance, the material inquiry is usually whether disclosure of a privileged communication amounts to a full waiver of the privilege as to all items or whether the disclosure amounts to a limited or selective waiver to the government entity.[68] The policy behind a limited waiver is to encourage cooperation in the investigatory and registration processes. Accordingly, a court may impose a limited waiver of privilege, permitting disclosure of privileged communications only as to the particular government entity without such disclosure amounting to a full waiver of the privilege outside the proceeding.[69] This same principle of limited waiver can also be applied in the context of the work product doctrine.[70]

But many courts are not fond of selective waivers.[71] Some courts hold that selective waivers

[66] *In re Small*, 346 S.W.3d 657, 664 (Tex. App. —El Paso 2009).
[67] *Id.*
[68] *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977), disapproved of by *U.S. v. Massachusetts Inst. of Tech.*, 957 F. Supp. 301 (D. Mass. 1997) (holding that the voluntarily disclosure or privileged information to the SEC regarding a nonpublic SEC investigation only amounted to a limited waiver of privilege as to the SEC).
[69] *Id.*
[70] *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir.1988).
[71] *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423–27 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623–24 (4th Cir.1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002); *In re Oracle Securities Litig.*, C-01-0988 MJJ JCS, 2005 WL 6768164, at *8 (N.D. Cal. Aug. 5, 2005).

would manipulate rather than assist the investigatory process by allowing litigants to "pick and choose among regulatory agencies in disclosing and withholding communications of tarnished confidentiality for their own purposes."[72] The Fifth Circuit has yet to address this issue. However, Texas appears to stand with many other states that reject this notion of limited or selective waiver.[73] According to these courts, waiver to one should be a waiver to all.

If your company must disclose information to a government entity that is privileged, first attempt to disclose that information pursuant to a written non-waiver agreement. While there is no guarantee that such waiver agreement will successfully protect the privileged items, the agreement will provide evidentiary support for the company's position that the privilege should remain intact. Also, consider providing the requested information in redacted form.

H. TOPIC #8: MERGERS AND ACQUISITIONS

Does the privilege survive a merger or acquisition? According to the United States Supreme Court, "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well."[74] The Supreme Court in *Weintraub* further opined as follows:

> New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.[75]

Courts in Delaware hold similarly.[76] Texas courts generally follow the reasoning in *Weintraub* with the added principle that "the mere transfer of assets with no attempt to continue the pre-existing operation generally does not transfer the attorney-client privilege."[77] Accordingly, when there is a merger, the privileges of the acquired company generally are transferred to the surviving company. However, if there is an asset sale such that the selling company does not continue forward, the attorney-client privilege generally will not transfer to the buyer. Transfer of the privilege thus depends on whether the transaction is characterized as a merger or as an acquisition of assets.[78]

In-house counsel should be aware of privilege issues that may arise after a sale or purchase, or in connection with a merger or acquisition. They should encourage the company to address attorney-client privilege and work-product status as part of the deal documents. Doing so should help prevent future disputes. Moreover, courts often give deference to the parties' agreement.

IV. CONCLUSION

The legal and business responsibilities of in-house counsel in the oil and gas industry are diverse, consistent with the broad functionality and scope of operations of oil and gas businesses. In-house counsel should exercise vigilance in delineating their responsibilities as a traditional lawyer and business adviser, and should regularly educate business employees about best practices for protecting confidential communications. Knowing the law pertaining to the attorney-client privilege and work product doctrine – including jurisdictional nuances and general exceptions and waiver issues – is essential. In-

[72] *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221–22 (D.C. Cir. 1981) ("We believe that the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.").

[73] *In re Fisher & Paykel Appliances, Inc.*, 420 S.W.3d 842, 851 (Tex. App.—Dallas 2014) ("This Court concludes that the weight of authority does not favor recognition in Texas of a doctrine of selective waiver of privilege, as more recent federal opinions have pointed out.").

[74] *Commodity Futures Trading Commn. v. Weintraub*, 471 U.S. 343, 349 (1985).

[75] *Id.*

[76] *Great Hill Eq. Partners IV, LP v. SIG Growth Eq. Fund I, LLLP*, 80 A.3d 155, 161 (Del. Ch. 2013).

[77] *In re Cap Rock Elec. Co-op., Inc.*, 35 S.W.3d 222, 227 (Tex. App.—Texarkana 2000).

[78] *Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P.*, 178 S.W.3d 40, 44 (Tex. App.—Hous. [1st Dist.] 2005) (deciding that "the attorney-client privilege for the documents passed as a matter of law to the surviving corporation in the merger").

house counsel should also recognize how privilege often applies in the context of e-mail communications, internal investigations, litigation discovery management, title opinions and communications with landmen, regulatory compliance, and mergers and acquisitions. This article should hopefully provide a starting point for addressing the unique privilege issues that in-house counsel in the oil and gas industry face.