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**PRODUCTION, PRIVILEGES, AND PRACTICE
(PRESERVING AND PIERCING PRIVILEGES
IN AN OIL AND GAS PRACTICE)**

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TABLE OF CONTENTS

	<u>Page No.</u>
I. INTRODUCTION.....	1
II. THE ATTORNEY-CLIENT PRIVILEGE	1
A. Elements and Parameters of the Privilege.....	1
B. Choice of Law in Federal Court	2
C. Scope of the Privilege for Corporations.....	3
D. Scope of the Privilege for Corporate Counsel	4
E. Erosion of the Scope of the Privilege for Corporate Counsel	4
F. Other Parties Covered by the Privilege	5
1. Joint Defense and Common Legal Interest Privileges.....	5
2. “Representative of the Lawyer”	5
G. Exceptions to the Privilege	6
1. Crime Fraud Exception.....	6
2. Joint Client Exception	7
III. THE WORK PRODUCT PRIVILEGE.....	7
A. Definitions.....	7
B. What Constitutes “In Anticipation of Litigation”?	8
C. The Scope of the Privilege	9
1. Core Work Product	9
2. The Rest / Non-Core Work Product.....	9
IV. SELF-EVALUATION PRIVILEGE.....	10
A. The Scope of the Privilege	10
B. The Privilege Does Not Apply to Discovery Requests from Government Agencies	10
C. Recognition of the Privilege is Not Uniform Across Jurisdictions	11
V. DELIBERATIVE PROCESS PRIVILEGE	11

VI.	WAIVER OF PRIVILEGES	12
A.	Intentional Disclosure.....	12
1.	Disclosure Outside of Litigation	12
2.	Use in Litigation	13
B.	Inadvertent Disclosure.....	13
1.	Texas Law	13
2.	Federal Common Law	13
3.	Federal Rule of Civil Procedure 26(b)(5)(B)	15
C.	Offensive Use of Privileged Information.....	16
D.	Sarbanes-Oxley Authorizes Attorneys to Disclose Privileged Information Without Client Consent.....	16
E.	Waiver Through Disclosure of Privileged Information to Auditors	17
F.	Requests from Government Agencies for Companies to Waive Privileges	18
G.	Attorney-Client Privilege Protection Act of 2007	19
H.	Selective Waiver Doctrine	19
I.	Proposed Federal Rule of Evidence 502.....	21
VII.	ADDITIONAL PRIVILEGE ISSUES PERTINENT TO THE OIL AND GAS INDUSTRY.....	21
A.	Title Opinions	21
B.	Protecting Privileges When Selling Assets.....	22
VIII.	TIPS FOR PRESERVING OR PIERCING PRIVILEGES	23
IX.	CONCLUSION	25

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I. INTRODUCTION

An oil and gas practice covers a lot of ground. Transaction-oriented lawyers in the business determine interest ownerships. They handle purchases and sales of leases and other interests. They supervise mergers, acquisitions, and divestitures, as well as the financing thereof. They handle employment and employee benefit matters. They assist clients with environmental and other regulatory issues and make the regulatory filings required under the relevant international, federal, state or local laws. If they work for a public company, transaction-oriented oil and gas practitioners will also supervise or draft or review the company's public filings.

Of course, oil and gas litigators have their own diverse dockets. They are often involved in internal as well as governmental investigations. They consult with and advise clients and client employees faced with litigation or the threat of litigation. They deal with consulting and trial experts. They handle seemingly never-ending discovery. And – in the end – they settle, mediate, adjudicate, litigate, and/or arbitrate the full range of their clients' disputes with others until those disputes have been fully resolved.

Given the diversity of the practice, in-house and outside counsel in the oil and gas business deal with many different applications of privileges and in many different contexts. Because there is nothing about oil and gas law that creates special privileges different from other areas of law, the oil and gas lawyers' art in preserving a client's privileges must rest, first, on a sound understanding of the first principles of privilege law, and, second, on an appreciation for how those principles have been or will be applied in the almost infinite variety of oil and gas contexts.

In light of that premise, this paper discusses the basic rules and cases relating to privileges and where possible, discusses those principles in the context of cases that specifically involve oil and gas companies or oil and gas issues.¹ Hopefully, this summary of the rules, their interpretations, and their applications in circumstances familiar to the oil and gas industry will prove helpful to this audience.

II. THE ATTORNEY-CLIENT PRIVILEGE

A. Elements and Parameters of the Privilege

Texas Rule of Evidence 503 defines the scope of the attorney-client privilege under Texas law. In contrast, the federal privilege is not defined statutorily – but via common law. Nevertheless, the elements of the Texas attorney-client privilege and the federal common law attorney-client privilege are essentially the same. In order for a communication to be privileged:

¹ Given the locus of this presentation, we have focused on Texas privilege law, as well as on the federal common law of privilege.

- (1) The communication must have been between: (a) the asserted holder of the privilege, *i.e.*, a client, someone who sought to become a client or a representative of a client; and (b) an attorney or a representative of an attorney in his professional capacity;
- (2) The communication must have been made for the purpose of obtaining legal advice or legal services;
- (3) The communication must have been intended to be confidential and made confidentially (outside the presence of strangers); and
- (4) The privilege must not have been waived.

See TEX. R. EVID. 503(b)(1); *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981) (holding that communications between an attorney and a client and the client's representatives made to secure legal advice were privileged and not subject to discovery); *SEC v. Brady*, 238 F.R.D. 429, 438 (N.D. Tex. 2006) (listing the elements of the federal common law attorney-client privilege).

The attorney-client privilege protects both communications from the client to its lawyer (or the lawyer's representatives) and statements and advice from an attorney to his or her client (or the client's representative). *Dewitt & Rearick, Inc. v. Ferguson*, 699 S.W.2d 692, 693 (Tex. App.—El Paso 1985, orig. proceeding); *Brady*, 238 F.R.D. at 438-39. The privilege extends not just to an attorney's legal advice, but to the complete communication between the attorney and his or her client, including factual information. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *In re Seigel*, 198 S.W.3d 21, 27 (Tex. App.—El Paso 2006, orig. proceeding). However, a person cannot cloak a fact with privilege merely by communicating it to an attorney. *Huie*, 922 S.W.2d at 923; *Brady*, 238 F.R.D. at 439.

In *In re ExxonMobil Corp.*, 97 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2003, no pet.), the Fourteenth Court of Appeals confirmed that, when a document evidences a privileged communication, “the privilege extends to the entire document and not merely to the portion of the document containing legal advice, opinions, or analysis.” *Id.* at 357.

The party asserting the privilege has the burden of proving that it applies to the communication at issue. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004); *U.S. v. Mobil Corp.*, 149 F.R.D. 533, 536 (N.D. Tex. 1993).

B. Choice of Law in Federal Court

The federal common law of attorney-client privilege applies in federal courts when the court's subject-matter jurisdiction is based on a federal question or on federal admiralty jurisdiction. FED. R. EVID. 501; *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 133 (E.D. Tex. 2003) (“In cases where a federal question exists, the federal common law of attorney-client privilege applies even if complete diversity of citizenship is also present.”); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985) (applying the federal common law of attorney-client privilege in an admiralty and maritime case). However, when jurisdiction is based on diversity of citizenship, state law governs the attorney-client privilege. *In re Avantel, S.A.*, 343 F.3d 311, 323 (5th Cir. 2003).

C. Scope of the Privilege for Corporations

The attorney-client privilege extends to communications between representatives of the client on the one hand and the client's lawyer or a representative of the lawyer on the other hand. When the client is a corporation, it is important to determine which corporate representatives are covered by the attorney-client privilege. Historically, courts have adopted two different tests for determining which corporate representatives are covered by the attorney-client privilege: the control group test and the subject matter test.

The "control group" test provides that a corporate representative's communication is protected by the attorney-client privilege if the representative is "in a position to 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." *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993).

The "subject matter" test provides that a corporate representative's communication is protected by the attorney-client privilege if:

The [representative] 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.

Prior to March 1998, Texas courts used the control group test to determine which corporate representatives were covered by the attorney-client privilege. However, in March 1998, Texas adopted the subject matter test, in addition to the control group test, as part of the amendment to Texas Rule of Evidence 503(a). *Dupont*, 136 S.W.3d at 226 n.3. That move away from strict adherence to the control group test was consistent with the direction already taken by the United States Supreme Court in the *Upjohn* case. In that 1981 case, the United States Supreme Court had rejected the control group test in favor of a case-by-case determination of the scope of a privilege. *Upjohn*, 449 U.S. at 396-97.

Other states still rely on and apply the control group test, however. For example, see *Exxon Corp. v. Department of Conservation & Natural Resources*, 859 So.2d 1096 (Ala. 2002), in which the Alabama Supreme Court considered whether the trial court had erred in admitting a letter prepared by one of Exxon's in-house counsel – on the grounds that Exxon had allegedly waived the attorney-client privilege with respect to the letter. *Id.* at 1103-04. In that letter, the in-house counsel had analyzed the royalty provisions of a lease agreement between Exxon and the Alabama Department of Conservation and Natural Resources, and had evaluated "potential areas of cost recovery for Exxon in the production and treatment process." *Id.* at 1100.

The trial court in *Exxon* had concluded that the letter was not a confidential communication because it was circulated to too many people. *Id.* at 1104. However, the Alabama Supreme Court disagreed. It concluded that the letter was only circulated to "those directly involved in the royalty-payment decision and the process of payment." *Id.* Because those individuals were members of the "control group," the Court concluded that the letter was privileged. *Id.*

D. Scope of the Privilege for Corporate Counsel

It is often difficult to determine which communications to and from corporate counsel are privileged and which communications are not privileged. This is so because modern corporate counsel are involved in all facets of the corporations for which they work. Moreover, many corporate counsel hold officer and director positions that further involve them in day-to-day business operations and decision-making. When corporate counsel act in their capacity as business persons, their communications are not privileged. *See, e.g., In re CFS-Related Secs. Fraud Litig.*, 223 F.R.D. 631 (N.D. Okla. 2004) (“Business advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client.”).

Courts have adopted a variety of tests for determining whether communications to or from corporate counsel are privileged. For example, some courts have adopted the “primarily or predominantly legal” test, which provides that, for a communication involving a corporate counsel to be privileged, the holder of the privilege must demonstrate that “the communication [was] designed to meet problems which can fairly be characterized as predominately legal.” *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99 (D.N.J. 1990) (quoting *Cuno Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988); *see also In re Vioxx Products Liability Litig.*, 501 F. Supp. 2d 789, 798 (E.D. La. 2007) (“The test for the application of the attorney-client privilege to communications with legal counsel in which a mixture of services are sought is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance.”); *U.S. v. Chevron Corp.*, No. C-94-1885 SBA, 1996 WL 264769, *3 (N.D. Cal. Mar. 13, 1996) (stating that the party asserting the privilege must prove that “all of the communications it seeks to protect were made primarily for the purpose of generating legal advice”).

Other courts have focused on whether the corporate counsel was, in connection with the communication, engaging in activities typically performed by attorneys. *See, e.g., Diversey U.S. Holdings, Inc. v. Sara Lee Corp.*, No. 91 C 6234, 1994 WL 71462, at *2 (N.D. Ill. Mar. 3, 1994). (holding that corporate counsel’s circulation of drafts of a contract to various employees at the company constituted privileged communications because “[d]rafting legal documents is a core activity of lawyers, and obtaining information and feedback from clients is a necessary part of the process”).

Other courts have focused on the corporate counsel’s position on the corporation’s organizational chart. *See, e.g., Boca Investering’s P’ship v. U.S.*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998). If the corporate counsel works in the legal department or for the general counsel, courts presume that the corporate counsel’s communications involve the rendition of legal advice. *Id.* The opposite presumption applies when the corporate counsel works for a management or business group in the company. *Id.*

E. Erosion of the Scope of the Privilege for Corporate Counsel

In recent years, there has been substantial erosion in the scope of the attorney-client privilege for corporate counsel. That erosion is attributable to, among other things:

- Courts increasingly presuming that corporate counsel's communications are not privileged.
- Pressure from government agencies to waive privileges when companies participate in disclosure programs and respond to investigations, *etc.*
- Requests from outside auditors for waivers of privileges and/or access to all of a company's files.
- The requirements of the Sarbanes Oxley Act and the accompanying SEC regulations.
- Courts increasingly finding that, once companies have disclosed privileged information to government agencies, they cannot assert the privilege with respect to that information in subsequent proceedings involving private parties.

These issues are more fully discussed in the waiver section of this paper.

According to a 2005 survey conducted by the Association of Corporate Counsel, 30% of the 719 corporate counsel surveyed said that their corporate clients had experienced an erosion in the protections offered by the attorney-client and work product privileges in the post-Enron business environment. The percentage of outside counsel who had experienced this erosion was 47.3%.

F. Other Parties Covered by the Privilege

1. Joint Defense and Common Legal Interest Privileges

Texas recognizes a "joint defense" privilege as part of the attorney-client privilege. *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding). The joint defense privilege protects confidential communications made between the client, his (or her) lawyer, or his (or her) representative on the one hand and a lawyer or a representative of a lawyer who is representing another party in a pending action and concerning a matter of common interest. *Id.*

Similarly, the federal common law recognizes a "common legal interest" privilege as part of the attorney-client privilege. *In re Auclair*, 961 F.2d 65, 68-69 (5th Cir. 1992). The common legal interest privilege protects two types of communications: (1) communications between co-defendants in actual litigation and their counsel; and (2) communications between potential co-defendants and their counsel. *In re Santa Fe Intern. Corp.*, 272 F.3d 705, 710 (5th Cir. 2001). "With respect to the latter category [of communication], the term 'potential' has not been clearly defined." *Id.*

2. "Representative of the Lawyer"

Texas Rule of Evidence 503(a)(4) defines the phrase "representative of the lawyer" as follows:

- (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)(4). An investigator hired to assist an attorney in representing a client can qualify as a "representative of the lawyer." *IMC Fertilizer, Inc. v. O'Neill*, 846 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Under federal law, the attorney-client privilege extends to communications made by or to an accountant employed by an attorney when the accountant's role is to clarify communications between the attorney and the client. *U.S. v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999); *Ferko*, 218 F.R.D. at 139 (holding that the attorney-client privilege applied to confidential client information that the attorney disclosed to an accounting firm).

G. Exceptions to the Privilege

There are several exceptions to the attorney-client privilege, including the crime-fraud exception and the joint-client exception.

1. Crime Fraud Exception

Texas Rule of Evidence 503(d)(1) provides that there is no privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." TEX. R. EVID. 503(d)(1). Courts have held that the party who asserts the crime-fraud exception must establish:

- (1) A *prima facie* case showing a violation sufficiently serious to defeat the privilege; and
- (2) A relationship between the document for which the privilege is challenged and the *prima facie* proof offered.

Arkla, Inc. v. Harris, 846 S.W.2d 623, 630 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In *Arkla*, the Fourteenth Court of Appeals held that the crime fraud exception to the attorney-client privilege did not apply with respect to title opinions and related documents that *Arkla* had destroyed. *Id.* at 630. The Court explained that that there was no showing that the services of the attorneys who prepared the title opinions and related documents were obtained with any fraudulent or illegal intent. *Id.* Moreover, the Court also explained that the party seeking the documents had failed to offer any proof supporting its allegation that *Arkla's* document destruction constituted fraud. *Id.*

Under the federal common law, the party asserting the crime-fraud exception to the attorney-client privilege must:

