

**Presented:**33<sup>rd</sup> Annual Corporate Counsel Institute

April 14-15, 2011 Dallas, TX

April 28-29, 2011 Houston, TX

**Protecting the In-House Attorney-Client Privilege**

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# **Protecting the In-House Attorney-Client Privilege**

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## **I. INTRODUCTION**

Clients depend on their lawyers to provide advice confidentially and to protect that advice from disclosure to the fullest extent permitted by law. In many instances, it is easy to determine whether a particular communication is privileged or protected. There are other instances, however, when the scope of protection is not as clear. This uncertainty arises, in part, because applying the attorney-client privilege and work product doctrine raises intensely fact-specific questions. As a result, courts have reached different, sometimes conflicting, decisions when determining the scope of protection provided to confidential and privileged communications.

Although this fact-intensive nature of privileges makes bright-line rules difficult, there are useful guidelines and best practices that attorneys can follow. This paper provides a brief overview of the attorney-client privilege, the attorney work-product doctrine, and some of the common privilege questions that arise for in-house and transactional attorneys.

This paper outlines general principles on the attorney-client privilege and work product doctrine as they apply to in-house counsel, and provides practical guidelines for protecting communications and avoiding waiver of those protections. Primary attention is given to Texas law. This paper also provides some guidance on protecting confidential and privileged communications from disclosure.

Some of this guidance is especially important for in-house counsel. Although in-house counsel are subject to the same general rules regarding privilege as outside counsel, because in-house counsel often have more than one role at a company, courts often apply heightened scrutiny when analyzing whether a privilege applies to a particular communication or document. There are particular practices that in-house counsel can follow to help maximize the likelihood that privileged communications will be protected. For all lawyers, being aware and thoughtful of the potential risks is vital to protecting privileged or protected information.<sup>1</sup>

## **II. OVERVIEW OF ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE**

### **A. Overview of Attorney-Client Privilege**

The attorney-client privilege protects communications between a client and his or her attorney by prohibiting disclosure by the attorney or compulsion of the client to disclose. It is “the oldest of the privileges for confidential communications known to the common law.”<sup>2</sup> In Texas, the privilege is governed by Rule of Evidence 503. The rule provides, “a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the

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<sup>1</sup> This paper focuses primarily on Texas law, but also provides citations to relevant case law from other jurisdictions when appropriate.

<sup>2</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

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rendition of professional legal services to the client.”<sup>3</sup> The basic elements of the attorney-client privilege are:

1. A communication;
2. Made between privileged persons (*i.e.*, attorney, client or agent);
3. In confidence; and
4. For the purpose of obtaining or providing legal assistance for the client.<sup>4</sup>

The purpose of the privilege is the promotion of unrestrained communication and contact between the lawyer and client in matters in which the attorney’s professional judgment is sought.<sup>5</sup> The attorney-client privilege has developed from two assumptions: (1) good legal assistance requires full disclosure of a client’s legal problems, and (2) a client will only reveal details required for proper representation if her confidences are protected.<sup>6</sup> Because privileges prevent a judge and jury from reviewing relevant evidence, courts construe the privilege narrowly.<sup>7</sup>

There are two fundamental aspects of the attorney-client privilege, both of which must be met in order for the privilege to apply. The first fundamental aspect of the attorney-client privilege is that the communication must have been made for the purpose of *obtaining legal advice*, rather than business or other advice.<sup>8</sup> The lawyer’s primary role cannot be non-legal, such as giving business advice.<sup>9</sup> The second fundamental aspect of the attorney-client privilege is there must be an expectation that the communication will not be disclosed.<sup>10</sup>

### B. Overview of Work Product Doctrine

The work product doctrine is of more recent vintage than and conceptually distinct from the attorney client privilege. In contrast to attorney-client privilege, work-product doctrine promotes an adversary system directly by enabling attorneys to prepare cases without fear that their work product will be used against their clients.<sup>11</sup> The doctrine provides the attorney with a zone of privacy so that he or she can prepare a client’s case to the fullest extent possible, free from exposure to an adversary. Some

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<sup>3</sup> Tex. R. Evid. 503(b)(1).

<sup>4</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (hereinafter REST. 3D).

<sup>5</sup> *Huie v. DeShazo*, 922 S.W.2d 920, 921 (Tex. 1996); *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978).

<sup>6</sup> *Fisher v. United States*, 425 U.S. 391, 403 (1976).

<sup>7</sup> *See id.*

<sup>8</sup> *SEC v. Brady*, 238 F.R.D. 429, 438-39 (N.D. Tex. 2006).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

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First appeared as part of the conference materials for the  
33<sup>rd</sup> Annual Corporate Counsel Institute session  
"Protecting the In-House Attorney-Client Privilege"