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## **Protecting, Overcoming and Distinguishing the Work Product Privilege in Texas**

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# Protecting, Overcoming and Distinguishing the Work Product Privilege in Texas

Updated By John F. Sullivan III, K&L Gates LLP<sup>1</sup>

## I. INTRODUCTION

Privileges are anomalous in the law, in that they are not designed to maximize, or even further the search for truth. Indeed, to the contrary, they reflect society's decision to prioritize certain other societal values over access to truth—namely privacy, efficiency, and the encouragement of effective legal and medical services. John Henry Wigmore, in his evidence treatise, described the application of privileges as a balancing test, where the societal value of the interest protected by shielding the evidence from discovery must be weighed against the impact on the search for truth. 8 Wigmore, Evidence § 2285 (McNaughton rev. 1961). This is the prism through which all privilege law should be understood and evaluated, and it is useful to keep this notion in mind when dealing with privileges.

This paper addresses the two most common privileges—the attorney-client privilege and the work product doctrine<sup>2</sup>—and attempts to address several key distinctions between the application of these privileges in Texas state and federal courts. Also addressed is the application of these privileges to information exchanged following an incident likely to result in litigation—such as a catastrophic accident, discovery of potential corporate fraud, or other possible wrongdoing within an organization. In these situations, it is common, almost ubiquitous, for a flurry of documents—including investigative

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<sup>1</sup> This paper was originally prepared for the Page Keeton Civil Litigation Conference (UTCLE), October 25, 2012, with a byline of Robert Campbell who was then of Watt Beckworth Thompson Henneman and Sullivan LLP (“Watt Beckworth”) and a title of “Select Topics Regarding the Assertion and Maintenance of Attorney Client and Work Product Privileges in Texas Civil Cases.” Mr. Campbell is now of Bain & Co. Mr. Sullivan is formerly a named partner of Watt Beckworth. He is now of K&L Gates LLP in Houston, Texas.

<sup>2</sup> It is worth noting here that the work product protection is not technically a privilege, but rather a “qualified immunity” granted to documents created in anticipation of litigation. The concept is that “work product” is *immune* from discovery, rather than outside of its scope. See *Smith v. Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582, 584 (S.D. Tex. 1996). Regardless, the work product protection is referred to here as a “privilege” because this is a common usage, and the term employed by the relevant procedural and evidentiary rules.

materials, emails, letters, memoranda, notes, and outlines, *inter alia*—tends to be created very quickly, within a matter of hours, days, and/or weeks. It is critical for a practitioner to consider, at the earliest point possible, how the law of privilege applies to these documents and how one can ethically maximize the benefit of protections allowed under the law.

## II. APPLICABLE LAW

When approaching a privilege question, the applicable law is not a given.<sup>3</sup> What follows is a brief explanation of the applicable law inquiry.

### A. Attorney-Client Privilege

Under Texas law, the rule of attorney-client privilege is found in Tex. R. Evid. 503. When conflict-of-law issues are involved in determining which state's privilege law should apply, Texas courts follow the RESTATEMENT (SECOND) OF CONFLICT OF LAW. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 646-647 (Tex. 1995). Under this rule, the privilege law of the state with the *most significant relationship to the communication* applies, with only a few minor nuances. *Id* (emphasis added).<sup>4</sup>

In federal court, Fed. R. Evid. 501 provides the attorney-client privilege rule. Pursuant to Fed. R. Evid. 501, “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” Fed. R. Evid. 501.<sup>5</sup> On the other hand, where the court is applying *federal substantive law*, such as often occurs in a federal question, bankruptcy, or admiralty matters, the

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<sup>3</sup> Remember that this paper is restricted in focus to the attorney-client privilege and the work product doctrine. As for other privileges, some are constitutional, some are subsumed within the attorney-client privilege and/or the work product doctrine, and some are codified substantively into state law. There are many privileges—including obscure ones like, for example, the veterinary client-patient privilege that exists in Texas. See Tex. Occ. Code Ann. § 801.353.

<sup>4</sup> See also, *In re Arterial Vascular Engr., Inc.*, 1999 WL 150882 (Tex. App.—Dallas 1999).

<sup>5</sup> See also, *In re Avantel, S.A.*, 343 F.3d 311, 318 (5th Cir.2003); *Dunn v. State Farm*, 927 F.2d 869, 875 (5th Cir. 1991) (applying Tex. R. Evid. 501 to attorney-client privilege, but applying FRCP 26(b)(3) to the work product doctrine).

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