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Protecting The In-House Attorney Client Privilege

**Michael K. Hurst
Jonathan R. Childers
Jervonne D. Newsome**

Michael K. Hurst
Jonathan R. Childers
Jervonne D. Newsome
Lynn Pinker Cox & Hurst, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201

mhurst@lynnllp.com
jchilders@lynnllp.com
jnewsome@lynnllp.com

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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

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.

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).

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