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Lawyers as Witness

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I. INTRODUCTION

There is no special rule exempting attorneys from being called as witnesses. There are, however, two important caveats to this general statement, one applicable to all attorneys and another applicable to advocate attorneys:

1. **All Attorneys** – An attorney is not required to testify to information protected by the attorney-client privilege or (in most cases) the attorney work product privilege—provided the applicable privilege has not been waived—but it is unlikely a court will pre-emptively prevent the attorney's testimony from being taken on the basis of such a privilege;

2. **Advocate Attorneys** – A party seeking the testimony of an advocate attorney—that is one representing a party as an advocate in the matter in which the testimony is sought—may be required to additional showings to secure that testimony (certainly in federal court), given the disruption, confusion, potential for tactical abuse, and potential for disqualification created by having advocate counsel testify.

This paper will discuss the extent to which privilege may preclude or limit the deposing or calling of an attorney-witness, how privilege is handled for lawyer-witnesses who are called to testify, and the showings that must be made if the attorney in question is also an advocate in the proceedings. This paper will also touch on the distinctions between the attorney-client and attorney work-product privileges, the application of such privileges to in-house counsel and investigative counsel, and the waiver of such privileges.

II. THE ROLE OF PRIVILEGE

There is no special rule exempting a non-advocate attorney from being deposed or called as a witness. *See Advanced Technology Incubator, Inc. v. Sharp Corp.*, 263 F.R.D. 395, 397 (W.D. Tex. 2009) ("Simple possession of a law license does not result in blanket immunity from a deposition."); *In re Mason & Co. Property Management*, 172 S.W.3d 308, 313 (Tex. App.—Corpus Christi, 2005. orig. proceeding) ("[T]here is no blanket immunity that exempts lawyers from being deposed. …"). Indeed, the Texas Rules of Evidence explicitly state, "Except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority, no person has a privilege to … refuse to be a witness. …" TEX. R. EVID. 501 (cited by *In re Bexar County Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 193-94 (Tex. 2007) (J. Johnson dissenting) ("There is no rule that gives an attorney or an attorney's employees a privilege from being called to testify.").

That said, the attorney-client and attorney work product privileges may of course limit an attorney's testimony, at least to the extent a privilege applies to the subject matter on which the attorney is to be examined.

A. Privilege Protocol

1. State Rules

Although the Texas Rules of Civil Procedure protect privileged information from discovery, they do not preemptively prohibit the attempt to take testimony from an attorney simply because some of the information sought may be privileged. *Compare* TEX R. CIV. P. 193.3(a) ("A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response.") *and* 193.4(b) ("To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request or required disclosure") *with* TEX. R. CIV. P. 176.6(e) (allowing anyone to move in advance for protection from a subpoena commanding appearance at a deposition or trial and excusing the person from complying the subpoena pending a ruling) *and* 192.6(a) ("A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege."); *see also* TEX. R. CIV. P. 199.5 ("An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege. …").

Indeed, Texas appellate courts have generally held that quashing depositions on the basis of a pre-emptive assertion of privilege is improper. *See, e.g., In re Mason*, 172 S.W.3d at 313 (holding the trial court abused its discretion by quashing an attorney's deposition on the basis of privilege) ("[A] deposition may not be quashed in its entirety on grounds that some of the matters to be explored may be privileged. … The mere possibility that a deponent will assert a privilege against answering a specific deposition question does not justify the quashing of a deposition notice."); *Hilliard v. Heard*, 666 S.W.2d 584, (Tex. App.—Houston [1st Dist.], no writ) ("Whether or not such claims [of privilege] will be asserted is conjectural until they are made of record, and the mere prospect that such privilege or immunity will be urged on deposition does not justify prior restraint on the taking of a deposition."); *see also West v. Solito*, 563 S.W.2d 240, 246 (Tex. 1978) noting the rules permit the defending attorney to preserve privilege in response to specific questions by instructing the witness not to answer).

That said, if the specific subject matter on which testimony is sought is *necessarily* privileged—for example, an attorney's thought processes protected by the attorney work-product privilege—a court may be inclined to pre-emptively preclude the testimony so as to preserve the privilege. *See In re Bexar County Criminal District Attorney's Office*, 224 S.W.3d 182, 190 (Tex. 2007) ("Given the nature of what Crudup seeks and his inability to show both 'substantial need' and 'undue hardship' under Rule 192.5(b)(2), he cannot force DA personnel to discuss their mental processes or other case-related communications and preparation, even if the subpoenaed testimony relates to documents already produced."); *In re Exxon Corp.*, 208 S.W.3d 70, 75 (Tex. App.—Beaumont 2006, orig. proceeding) (citing TEX. R. CIV. P. 192.5(a)(1), (b)(1)) ("[T]he plaintiffs seek to depose an Exxon representative for the purpose of inquiring specifically into the process by which Exxon's representative responded to the requests for production. This subject necessarily and almost exclusively concerns the 'mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives' and consists of the 'attorney's representative's mental impressions, opinions, conclusions, or legal theories' subject to protection as work product and core work product.").

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First appeared as part of the conference materials for the
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