



Litigation Protections Post-Pandemic

Association of Corporate Counsel South/Central Texas
Division

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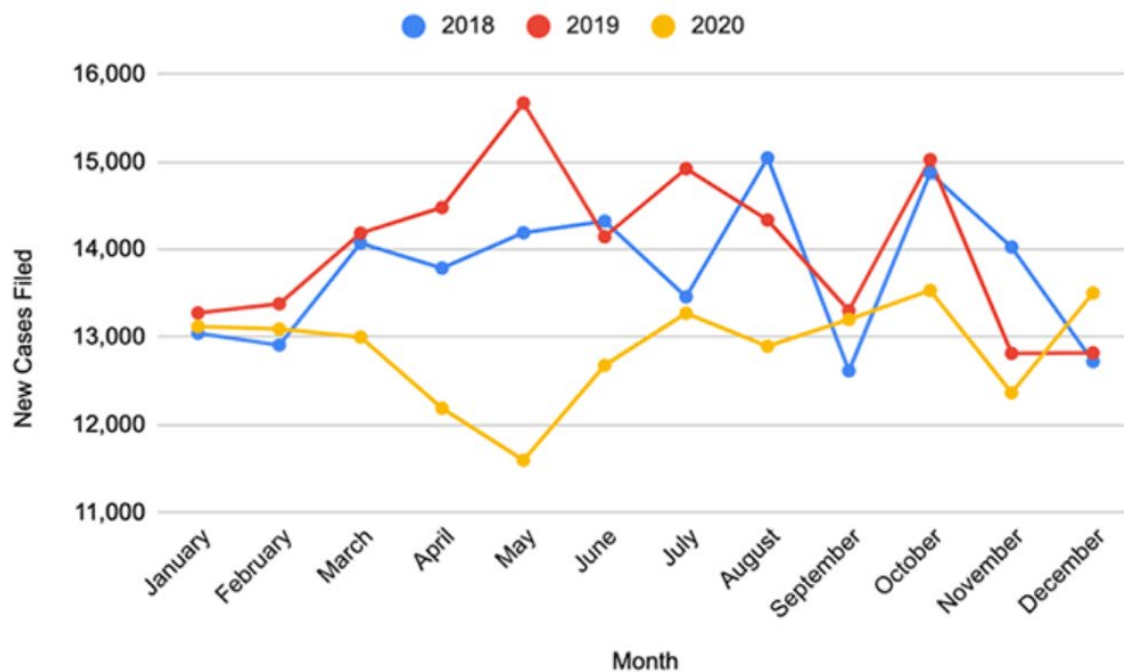
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Litigation slowly increasing



Total Federal District Court Case Filings (Excluding Product Liability*) By Month





Case Filings in 2020 Due to COVID-19 by Practice Area



Case Type	Cases
Antitrust	33
Bankruptcy	2
Civil Rights	121
Consumer Protection	292
Contracts	1,082
Copyright	21
ERISA	25
Employment	799
Environmental	14
Insurance	1,180
Patent	27
Product Liability	52
Securities	228
Tax	0
Torts	260
Trade Secret	68
Trademark	129

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Texas Rules of Civil Procedure Amendments in 2021

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Initial Disclosures – TRCP 194.2

- No more requests for disclosures
- Initial disclosures now similar to those required in federal practice
- These initial disclosures go beyond prior disclosure rules:
 - “Computation of each category of damages” along with “documents or other evidentiary material on which each computation is based”
 - Must **produce** or make available all documents a party may use to support its claims or defenses
- **In-house Practice Tip: Ensure policies are in place to facilitate early production**

Expert Discovery – TRCP 199.5



- Production of testifying expert related material must occur without waiting for a discovery request
- Additional disclosure of expert information now required concerning prior publications, prior testimony, and compensation information
- Communications between attorneys and experts are now protected, with limited exceptions
- Draft expert reports are protected from disclosure
- **In-house Practice Tip: Consider impact if fact witness employee is also going to serve as testifying expert**



Privilege as the In-House Lawyer

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Attorney-Client Privilege

The intricacies of attorney-client privilege are funny. But not "ha-ha" funny. More "psych, you're not protected" funny.



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What Hat Are You Wearing?

- Copying in-house lawyer ≠ privileged
- For in-house counsel, only those communications that facilitate the rendition of professional legal services are protected by the attorney-client privilege.
- Are you acting as legal counsel, corporate officer, or human resources personnel?
- If both, Courts look at the predominant purpose of the communication

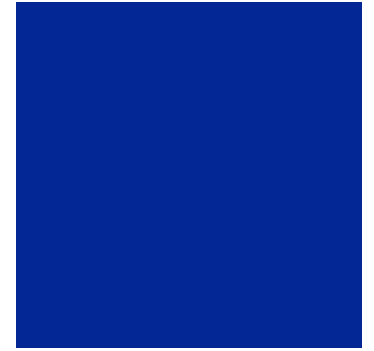
Business Advice Versus Legal Counsel

- Activities that likely will not be protected: normal business negotiations, preparation of tax returns, lobbying, serving on corporate committees, and public relations issues
- This is often a very fact intensive issue:
 - Could this task have been handled by a non-lawyer?

Practice Tips: A/C Communications

- Courts look to content & context of advice
- Make clear the purpose of the communication is to help facilitate legal work
- Have sender or recipient acknowledge attorney's role
- Exercise discretion regarding who is provided with legal advice
- Discuss legal principles in e-mail

Practice Tips: A/C Communications



- Include title of attorney in any communication intended to provide legal advice
- Do not provide legal and business advice in same e-mail without extreme care
- Educate client on differences in protections for legal & business advice

Work Product Doctrine

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Work-Product Privilege

- Material prepared, mental impressions developed, or communications made *in anticipation of litigation* or for trial between a party and the party's representatives or among a party's representatives
- **Warning:** work product privilege will likely not apply to routine transactional services provided by in-house counsel

When Is Litigation Anticipated?

- Controlled by a two-part inquiry:
 - **Objective standard**: Would a reasonable person believe in good faith that there was a substantial chance that litigation would ensue?
 - **Subjective standard**: Did the party resisting discovery actually believe litigation would ensue?

Practice Tips: Work Product

- When litigation is anticipated, ensure litigation hold notice policies are in place
- In real time, document work that is performed in anticipation of litigation
- Involve external counsel early when possible
- Know the law – different jurisdictions have different scopes!

Protecting Information: Employees



*"But . . . most of all, I'm thankful for things that are
privileged and confidential."*

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Owner of Privilege

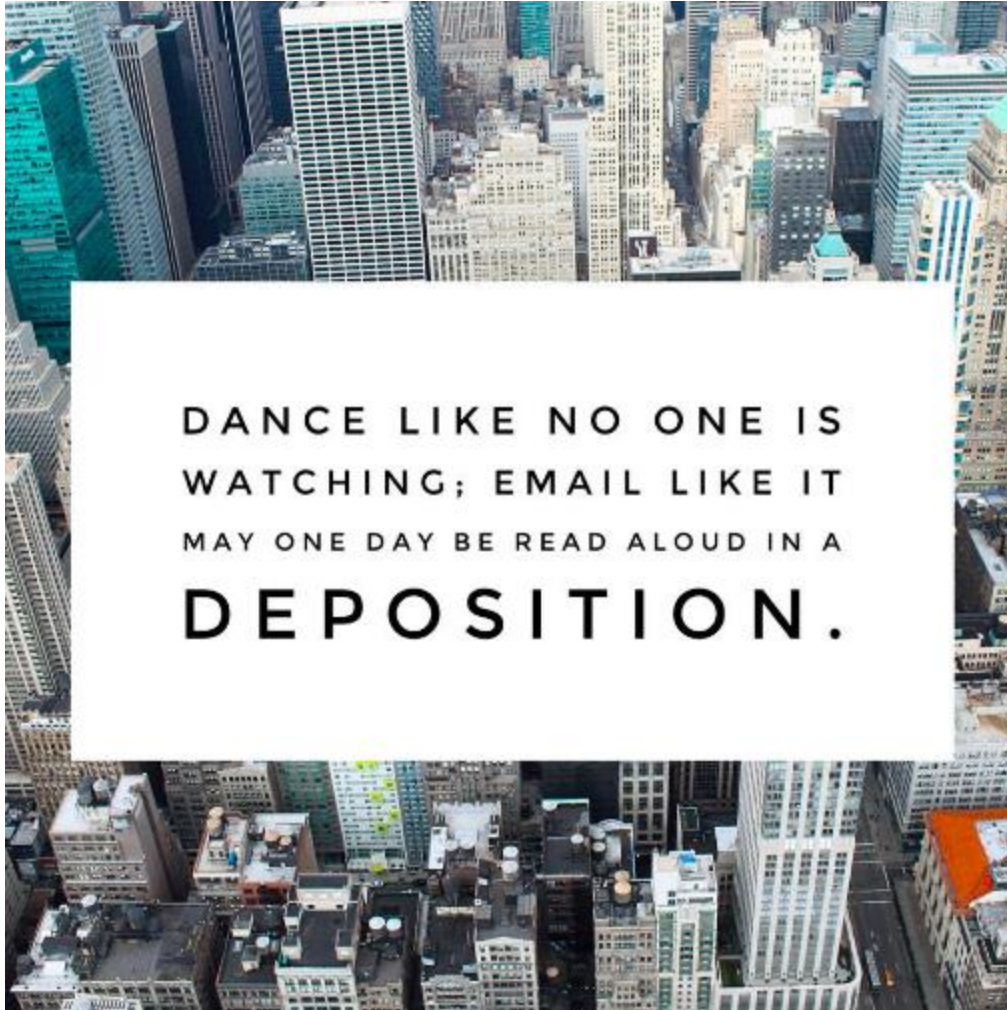
- Attorney-client privilege belongs to company, not individual employees
- **In-house Practice Tip: have employees step out during privileged discussion in board meetings**
- Upon sale of a company, privilege transfers to the purchasing company
- **In-house Practice Tip: negotiate to not transfer / limit transactional lawyer's scope**

Who Qualifies as a Client Representative for A/C Privilege?



- Subject Matter Group: any other person who, to facilitate the rendition of legal services, makes or receives a confidential communication in the scope of their employment with the client
 - Texas & Federal Courts follow
- Control Group: persons who have authority to obtain legal services for the client or to act on legal advice rendered

Does it need to be written?



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Employees: Discovery Collection

- Understand all locations of e-discovery
- Pandemic “working from home” could lead to additional unknown sources of data and backups
- Locally saved v. cloud-based system
- **In-house Practice Tip: Don't forget text messages – especially on company phones!**

Privilege: Other Litigation Parties

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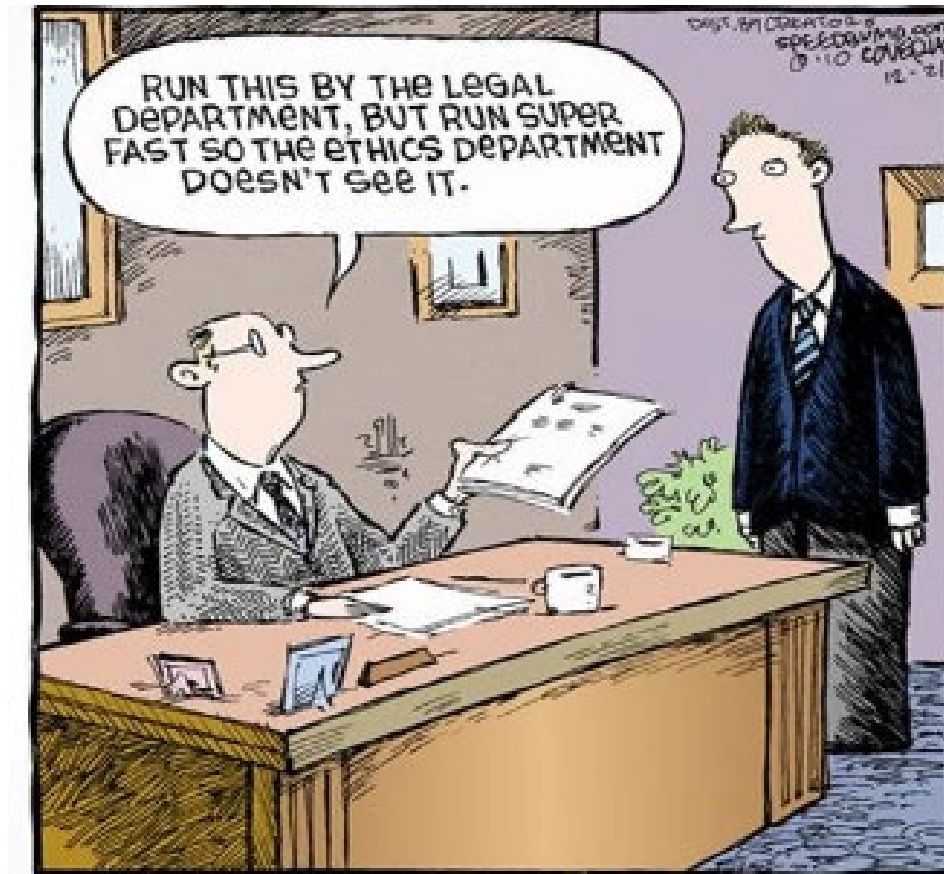
Allied Litigant Privilege - Texas

- The Attorney-Client Privilege extends to protect communications between parties to litigation if the communications concern a matter of “common interest in the pending action”
- Texas does not recognize joint defense or common interest privilege ***prior to litigation*** being filed
- **In-house Practice Tip: This privilege does not apply to separate but related ongoing litigation**

Joint Clients

- The Texas Rules of Evidence provide that the attorney-client privilege does not apply to “a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.”
- The Joint Client Rule can, on occasion, create issues with privilege. These situations typically occur in the context of a bankruptcy or in the context of a spin-off transaction or merger/acquisition.

Internal Investigations



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In-house Involvement in Internal Investigations



- Know what role in-house counsel is playing at the outset
- Provide written notice that investigation is in use for potential litigation
- Communications limited to legal advice
- Consider retaining outside counsel – courts are more inclined to give benefit of the doubt on privilege where outside counsel is involved

In-house Counsel Interviews

- Is investigation likely to result in litigation?
- *Upjohn* warnings – privilege belongs to company and witness does not have a right to waive or assert privilege
- Notes can be discoverable!
 - At risk if witness later becomes unavailable
 - Parse out mental impressions from statement of facts (write immediately after interview)
 - Make clear summary of notes is more than simply a transcript of the interview
- Get clear authority from client that in-house counsel is responsible for investigation

Trade Secrets

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Trade Secrets

- Strategic issues to consider within the context of litigation
 - As a plaintiff: consider whether your actions in pursuing litigation could result in requiring disclosure of confidential information
 - As a defendant: raising certain legal defenses could permit discovery that could touch on trade secret information
- Parties may overreach on claiming trade secret privilege and, in the process, create unnecessary legal fights over issues that may not be central to the litigation
- Beware of the law of unforeseen consequences

In sum...

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Practice Tips to Ensure that Confidential Information Is Protected



- Timing: is litigation anticipated, and what facts allowed you to form that belief?
- When in doubt, pick up the phone
- Train executives and employees
 - Think before you ink
 - Emphasis on not only the policy, but the reason for it and what can occur if the policy is not followed
- Always consider who is copied on correspondence



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