

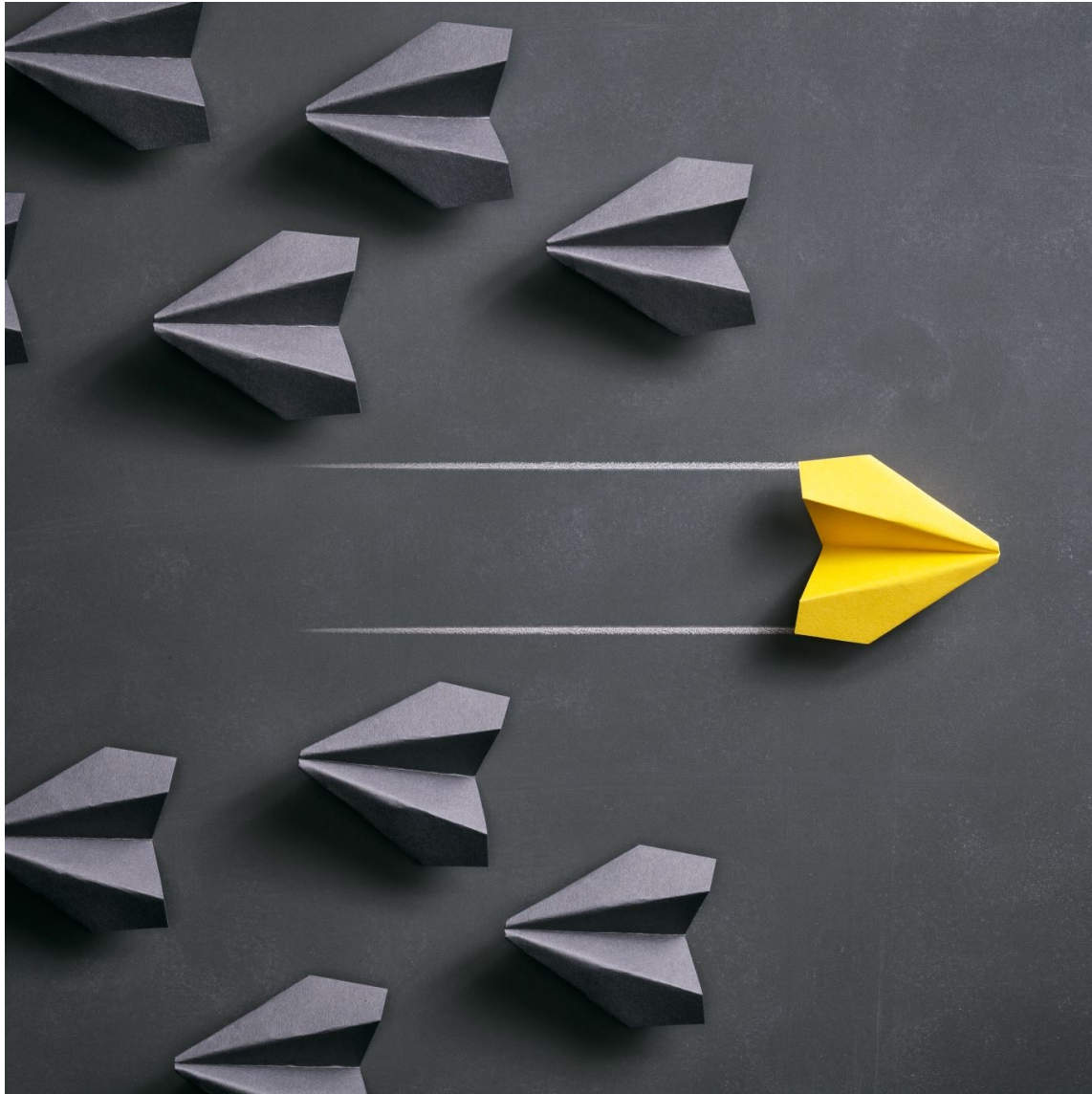
The Evolution of the Attorney-Client Privilege for In-House Counsel

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In-House Counsel Often Wear Multiple Hats





Business vs. Legal

- Can the two be separated?
- What is the difference?
- Where do you draw the line?
- Can you draw a line?
- *Should* a line be drawn?



Attorney-Client Communication Privilege



Origins of A-C Privilege

- Rooted in nature of the relationship between attorney and client
- Roman times. Roman advocates incompetent to testify against clients b/c to do so would be an immoral breach of duty of loyalty and thus unworthy of belief.

Origins of A-C Privilege

- Elizabethan times. Privilege based on claims of the lawyer's honor as a "gentleman". Until the mid-1700's English courts granted a privilege to "gentlemen" from testifying if such testimony would violate a promise of secrecy. Based on client's interest in secrecy and damage to the lawyer's honor should a vow of secrecy be broken.



Origins of A-C Privilege

- By the time of the American Revolution, oath of honor and secrecy rejected. More utilitarian basis emerges: To encourage client to speak freely and openly with lawyer. Privilege held by the lawyer. Foundation of modern basis of AC privilege, which is now held by client.



Modern Definition of A-C Privilege

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his or her capacity as such
- (3) the communications relating to that purpose
- (4) made in confidence
- (5) by the client
- (6) are at his or her instance permanently protected
- (7) from disclosure by himself or herself or by the legal adviser
- (8) except where waived

A-C Privilege



Policy Pros?



- Candor between client and lawyer
- Comfort of client and lawyer
- Protect sanctity of relationship between client and lawyer
- (More) Effective representation
- Full, frank advice by lawyer
- Deal with bad facts/law up front
- Protect privacy of the client
- Protect dignity of the client
- Reinforce duty of loyalty of lawyer to client
- Protect lawyer's role in an adversarial process

Policy Cons?



- Suppression of fact/information
- Dilution of facts/information
- Suppression of “truth”
- Game-playing & evasive tactics
- Increased attorneys’ fees in discovery battles over privilege
- Distraction from merits
- Corporate/Big \$ advantage

Humans vs. Corporations (Companies)



Is the company entitled to benefits of A-C Priv?

Is in-house attorney treated differently than outside counsel?

Upjohn Co. v. U.S., 449 U.S. 383 (1981)

- Corporation entitled to protection of A-C privilege.
- Rejected “Control Group” test.
- Adopted “Subject Matter” test.

“In the case of the individual client, the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below -- "officers and agents . . . responsible for directing [the company's] actions in response to legal advice" -- who will possess the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.”

“[The Control Group test] overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.”

Federal standards

State standards

Choice of law

A-C Privilege may not be as sacrosanct as you thought!



Fed. R. Evid. 501

Fed. R. Evid. 501. Privilege in General

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Where federal/state law claims are mixed in a civil/diversity case, fed. common law will apply to A-C Priv. Fed. Common law will also generally apply to attorney work product questions.

Tex. R. Evid. 503

Tex. R. Evid. 503 - Lawyer–Client Privilege

(b) Rules of Privilege.

(1) General 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:

- (A)** between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;
- (B)** between the client’s lawyer and the lawyer’s representative;
- (C)** by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;
- (D)** between the client’s representatives or between the client and the client’s representative; or
- (E)** among lawyers and their representatives representing the same client.



Tex. R. Evid. 503

Tex. R. Evid. 503 - Lawyer–Client Privilege

(2) *Special Rule in a Criminal Case.* In a criminal case, a client has a privilege to prevent a lawyer or lawyer’s representative from disclosing **any other fact that came to the knowledge of the lawyer or the lawyer’s representative by reason of the attorney– client relationship.**

(c) Who May Claim. **The privilege may be claimed by:**

- (1)** the client;
- (2)** the client’s guardian or conservator;
- (3)** a deceased client’s personal representative; or
- (4)** the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence.

The person who was the client’s lawyer or the lawyer’s representative when the communication was made may claim the privilege on the client’s behalf—and is presumed to have authority to do so.



Tex. R. Evid. 503

Tex. R. Evid. 503 - Lawyer–Client Privilege

(d) Exceptions. This privilege does not apply:

- (1) **Furtherance of Crime or Fraud.** If the lawyer’s services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.
- (2) **Claimants Through Same Deceased Client.** If the communication is relevant to an issue between parties claiming through the same deceased client.
- (3) **Breach of Duty By a Lawyer or Client.** If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.
- (4) **Document Attested By a Lawyer.** If the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.
- (5) **Joint Clients.** If the communication:
 - (A) is offered in an action between clients who retained or consulted a lawyer in common;
 - (B) was made by any of the clients to the lawyer; and
 - (C) is relevant to a matter of common interest between the clients.



A-C Privilege vs. Client Confidential Info

- What is the difference?
- Ethics rules define a lawyer's duty of confidentiality to client more broadly than just protecting privileged communications.



A-C Privilege vs. Client Confidential Info

- TX Rule 1.05(a): Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

A-C Privilege vs. Client Confidential Info

- ABA Model Rule 1.06(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Exceptions under TX Rule 1.05

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(9) To secure legal advice about the lawyer's compliance with these Rules.

(10) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from dying by suicide.

Exceptions under TX Rule 1.05

(d) A lawyer also may reveal unprivileged client information.

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Exceptions under ABA Model Rule 1.06

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

In re Grand Jury (No. 21-1397)

- What the heck happened?
- Why important?
- What you need to know!



In re Grand Jury -Overview

- 9th Circuit case, appealed from Central District of CA.
- Federal Grand Jury subpoena to tax law firm (outside counsel!) to produce records, including tax returns prepared by the law firm along with other documents and communications.
- The law firm advised its Client about tax law issues that arise upon expatriation and prepared the tax filings required when a U.S. citizen expatriates.
- District Court carefully parsed through the disputed documents claimed privileged.

In re Grand Jury -Overview

- With respect to certain documents with “dual purpose” communications, the district court ordered produced based on THE primary purpose test.
- 9th Circuit affirmed application of THE primary purpose test, rejecting the law firm’s arguments that the 9th Circuit should adopt the “because of” test applied to work product privilege.
- Appealed to USSCT. Cert. Granted. Merits briefing and multiple amicus briefs submitted. Oral arguments conducted (Jan 2023). Two weeks after oral arguments, Cert. dismissed as improvidently granted (a rare “DIG”).

In re Grand Jury -Overview

- At USSCT oral argument, Justices seemed reluctant to change the prevailing standards (e.g., THE primary purpose test).
- Justices were concerned about pretext and gamesmanship, with parties using the A-C privilege to skirt disclosure.
- Why DIG?
 - No one knows for sure.
 - USSCT comfortable with status quo (the primary purpose test),
 - Case riddled with redacted/sealed documents.
 - Case too specific to tax arena.

Circuit “Split”

Federal Common Law – Dual Purpose Communications

Prevailing view in most (but not all) Fed. Circuits and States. Check law!

“THE” primary purpose test applied to dual purpose communications.

In re Grand Jury, 23 F.4th 1088 (9th Cir. 2022) (Lee) (Tax case)

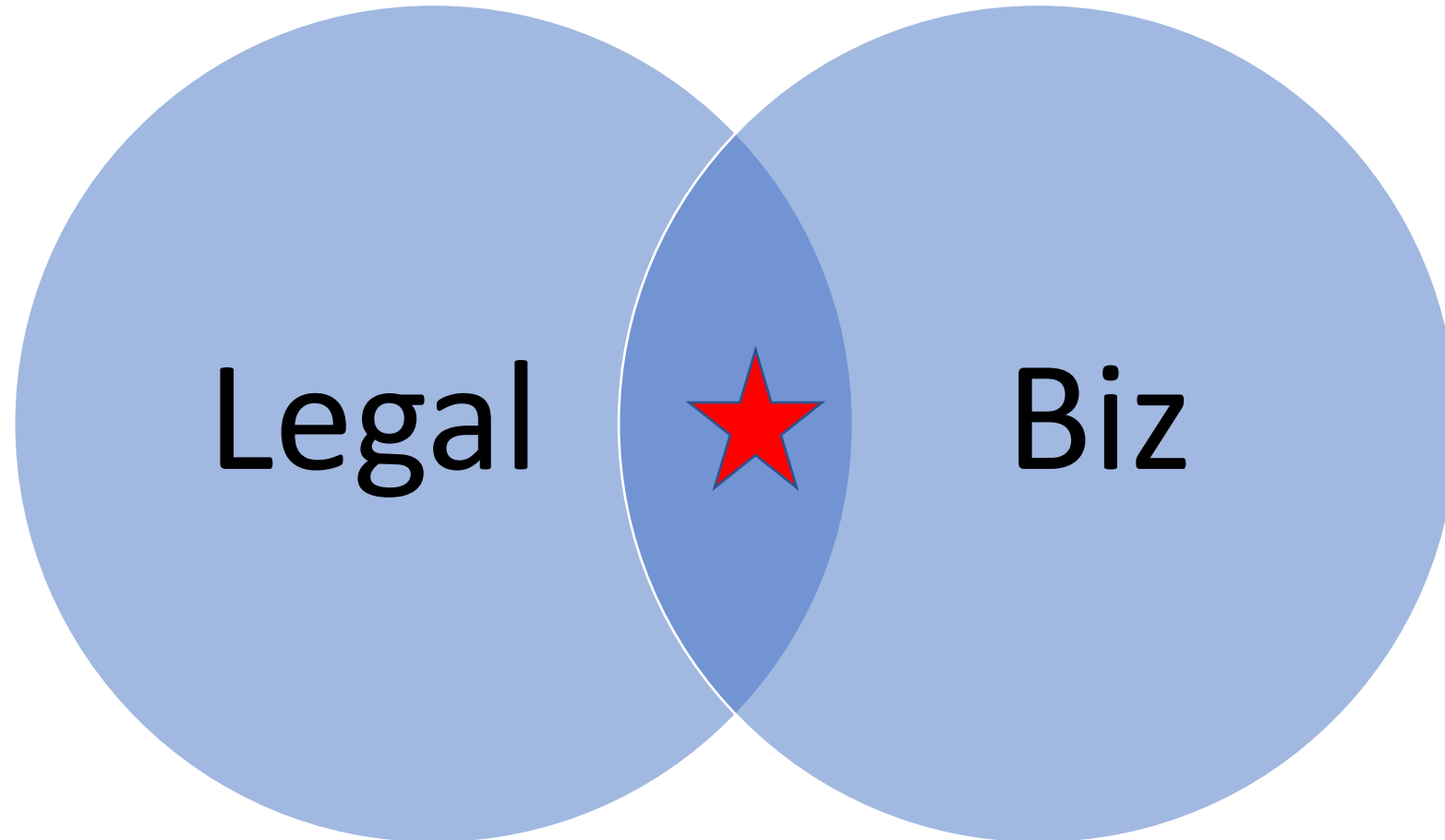
“A” significant purpose test applied to dual purpose communications.

In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014) (Kavanaugh) (Internal investigation case)

“A dual-purpose document— a document prepared for use in preparing tax returns and for use in litigation—is not privileged.”

U.S. v. Frederick, 182 F.3d 496 (7th Cir. 1999) (Posner) (Tax case)

Dual Purpose Communications



Texas vs. 5th Circuit

- Texas law does NOT apply the primary purpose test.
- Under Texas law, the A-C privilege extends to the entire communication.
- Under Texas law, the subject matter of the information communicated between attorney and client is irrelevant when determining whether A-C privilege applies.



Texas vs. 5th Circuit

- 5th Cir. Follows the primary purpose test.
- The assertor of the lawyer-client privilege must prove: 1) that they made a confidential communication 2) to a lawyer or his/her subordinate 3) for the primary purpose of securing a legal opinion or legal service or assistance in some legal proceeding.

U.S. v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997)



5th Circuit Nuggets

- No presumption that a company's communications with counsel are privileged.
- Vital to a claim of A-C privilege that the communication have been made and maintained in confidence.
- Confidential communication between client and counsel is privileged only if it is generated for the purpose of obtaining or providing legal assistance.
- Communications by a corporation with its attorney, who at the time is acting solely in his/her capacity as a business advisor ARE NOT privileged.

Equal Employment Opportunity Comm'n v. BDO USA, L.L.P., 876 F.3d 690, 695 (5th Cir. 2017)



5th Circuit Nuggets



- Documents sent from one corporate officer to another merely because a copy is also sent to counsel ARE NOT privileged.
- Simply describing a lawyer's advice as “legal,” without more, is conclusory and insufficient to establish privilege.
- Where there is a mixed discussion of business and legal advice, courts should consider the context ... ultimately seeking to glean the “manifest purpose” of the communication.

5th Circuit Nuggets



- Determining applicability of the privilege is a highly fact- specific inquiry. The party asserting the privilege bears the burden of proof. Once the privilege has been established, the burden shifts to the other party to prove any applicable exceptions.
- Ambiguities as to whether the elements of a privilege claim have been met are construed against the proponent.
- Because the attorney-client privilege has the effect of withholding relevant information from the fact-finder, it is interpreted narrowly so as to apply only where necessary to achieve its purpose.

Implied Waiver of the A-C Privilege



- Courts (in 5th Circuit and beyond) generally recognize that a privilege cannot be used simultaneously as both a sword and a shield.
- *See, e.g., Willy v. Admin. Review Bd.*, 423 F.3d 483, 497 (5th Cir. 2005) (stating that under doctrine of implied waiver, “a party may not use privileged information both offensively and defensively at the same time”).
- *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 n.18 (5th Cir. 1999) (“In accord with this principle is a client's inability to, at once, employ the privilege as both a sword and a shield.... Attempts at such improper dual usage of the privilege result in waiver by implication.”)
- “In other words, when a party entitled to claim [a] privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege.” *Willy*, 423 F.3d at 497.

Implied Waiver of the A-C Privilege

- Similar standards apply under Texas law:

“[A] privilege cannot be used simultaneously “as a shield and a sword”: after a partial disclosure is used as a sword to gain litigation advantage, the privilege cannot then be used to shield the remainder of the privileged communication.”

Bailey v. State, 469 S.W.3d 762, 774 (Tex. App.—Houston [1st Dist.] 2015), aff'd, 507 S.W.3d 740 (Tex. Crim. App. 2016) (citing *In re Lott*, 424 F.3d 446, 454 (6th Cir.2005) (“litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case”); *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir.2003); *In re von Bulow*, 828 F.2d 94, 103 (2d Cir.1987); see also *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933) (“The privilege takes flight if the relation is abused.”); *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (“In an instance in which the privilege is being used as a sword rather than a shield, the privilege may be waived.”)).

Work Product Privilege

- Whether documents are exempt from discovery under the attorney work product doctrine is governed by federal law in (federal) diversity cases because work product is not a substantive privilege within the meaning of Federal Rule 501.
- The federal work product doctrine, codified in Rule 26(b)(3), provides for the qualified protection of documents and tangible things prepared by or for a party or that party's representative “in anticipation of litigation or for trial.”
- A document need not be generated in the course of an ongoing lawsuit in order to qualify for work product protection.
- But “**the primary motivating purpose**” behind the creation of the document must be to aid in possible future litigation.
- Advisory committee notes to Rule 26(b)(3) state: “[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.”

Work Product Privilege

- Similar standards under Texas law. Texas Rule of Civil Procedure 192.5
- Work product includes material prepared, mental impressions developed, or communications made “in anticipation of litigation” or for trial.
- “In anticipation of litigation” can be hard to determine.
- Texas courts apply two-part test:
 - (1) whether a reasonable person would have anticipated litigation under the circumstances.
 - (2) whether the client trying to keep information confidential believed in good faith that there was a substantial chance that litigation could happen and made the notes, communications, etc. to prepare for that possibility.
- Good markers include date of receipt of demand letter or date of receipt of citation.

Work Product Privilege – Core/Non-Core

- “Non-core” work product -- Materials that don’t reflect an attorney’s thoughts – may not be protected.
- “Non-core” may be turned over (very rare) if:
 - (1) Opposition has a substantial need to prepare its case, and
 - (2) Unable to obtain that information by other means without undue hardship.
- “Core” work product – reflecting an attorney’s thoughts -- is absolutely protected.



Do



Don't



Tips and Traps

- Can't predict the future (with 100% certainty).
- Take conservative approach as much as possible.
- Know the law in your jurisdiction(s) on privilege.
- Be aware that privilege (A-C and W-P) is not locked down in all situations/jurisdictions. A court (and potentially opposing counsel) may be retroactively looking over your shoulder.

Tips and Traps

- Avoid mixing business advice and legal advice as much as possible, especially in writing.
- Separate communications. Use headers or sections at the very least.
- Consider telephone call or an in-person (could be zoom) meeting over email.
- But is someone recording your zoom meeting?

Tips and Traps

- Coach your business counterparts at your company to use monikers to designate as “Protected by Attorney-Client Privilege” AND add further protective language at the beginning of email (such as: “I am writing to seek your legal opinion and advice regarding an issue effecting our business unit.”).
- Coach your business counterparts on the consequences of waiving attorney-client privilege and the importance of keeping advice (in writing or otherwise) confidential.
- Coach legal team to use same monikers and responses that have additionally protective language (such as: “You requested my legal opinion and advice on X. This email summarizes my legal opinion and advice on this matter. Do no forward this email to or share the contents of this email with third parties or anyone beyond the recipients of this email.”).

Tips and Traps

- Be mindful of internal team members and whether they “need to know” or whether they need/should sit in on legal strategy meetings. Advise in advance or at start of an interview the purpose of the meeting/interview.
- Watch copying third parties on emails or inviting third parties to meetings. Privilege busters!
- Be prepared to document and prove the application of the A-C privilege. Same goes for work product privilege. You have the burden!

Questions?

Thank You!





About Karen ...

Karen L. Hart is a business attorney with over 20 years of experience litigating commercial and real estate disputes.

Prior to joining Bell Nunnally, Karen served as a law clerk to the Honorable Hayden Head, Jr., United States District Court, Southern District of Texas, Corpus Christi Division. Karen is an honors graduate of the University of Texas at Austin School of Law. Karen also serves as Bell Nunnally's General Counsel.

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Karen's accolades include: *Texas Super Lawyers* (2022); Dallas Best Lawyers, D Magazine (2022, 2023); Best Lawyers® in America (2017-2023); Litigation Star, Benchmark Litigation (2021-2023); Best Lawyers® *Texas' Best Lawyers* (2020); Dallas Top 50 Women Lawyers Award, Texas Diversity Council (2017); Winning Women Award, Texas Lawyer (2014); Women in Business Award, Dallas Business Journal (2012).



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- **Special Thanks to my associate, Luke Collins, for his research assist!**