PRIVILEGE IN THE PATCH

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CHAPTER #

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page(s)**

Statutes and Rules

Other Authorities

I. INTRODUCTION.

A "privilege" allows a party to avoid disclosing communications in a legal proceeding under certain well-defined circumstances. While privilege can seem clear in litigation, the lines often blur in the midst of an oil and gas transaction. This article covers Texas legal privileges, common privilege issues in the oil patch, and provides some practical takeaways.

II. PRIVILEGE IN TEXAS.

A. Underlying Theories of Privilege in Texas.

Texas shields certain communications from being disclosed in legal proceedings based on privilege.[1] The Texas Rules of Evidence codify several privileges including the attorney-client privilege, spousal privilege, physician-patient privilege, and clergy privilege.[2] Each of these privileges serve important public interests by protecting specific communications from disclosure.[3] The rationale behind privilege is rooted in the belief that some relationships—such as those between attorney and client—require confidentiality to function effectively and to serve broader societal goals.[4]

However, as courts have noted, this protection runs counter to the general principle that the legal system benefits from the free flow of information and the broadest possible access to relevant evidence.[5] As a result, Texas courts approach privilege as an exception to the general rule of disclosure and apply it only when there is a strong societal interest in protecting the communication. The Texas framework is thus characterized by a careful balancing act: courts weigh the value of confidentiality against the public's interest in full disclosure.[6] Texas courts narrowly construe privileges to their intended purposes.[7]

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[1] *See, e.g.*, *In re* Silver, 540 S.W.3d 530, 533 (Tex. 2018) (orig. proceeding) (noting that under the Texas Rules of Evidence, a "client is privileged from disclosing, and may prevent others from disclosing, communications made in confidence for the purpose of obtaining legal services"); TEX. R. CIV. P. 192.3(a) ("In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action . . . ."). *Cf.* TEX. R. EVID. 501 ("Unless a Constitution, a statute, or these or other rules prescribed under statutory authority provide otherwise, no person has a privilege to: (a) refuse to be a witness; (b) refuse to disclose any matter; (c) refuse to produce any object or writing; or (d) prevent another from being a witness, disclosing any matter, or producing any object or writing.").

[2] *See* TEX. R. EVID. 501–513.

[3] *See* James Johnson, *The Accountable Attorney: A Proposal to Revamp the ABA's 1976 Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 14 TEX. WESLEYAN L. REV. 27, 36–37 (2007); Donald McFall & Caroline Little, *Privileges Under Texas Law: A Dying Breed?*, 31 S. TEX. L. REV. 471, 507 (1990); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1454 (1985) (discussing the traditional theories of privileges).

[4] *See In re* XL Specialty Ins., 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding) ("[T]he attorney-client privilege promotes free discourse between attorney and client, which advances the effective administration of justice."); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.").

[5] *See, e.g.*, *In re* XL Specialty Ins., 373 S.W.3d at 49 ("But a strict rule of confidentiality may also suppress relevant evidence." (citing Republic Ins. Co. v. Davis, 856 S.W.2d 158, 160 (Tex. 1993))).

[6] *See id.* ("[C]ourts balance this conflict between the desire for openness and the need for confidentiality in attorney-client relations by restricting the scope of the attorney-client privilege.") (quoting *Republic Ins.*, 856 S.W.2d at 160.)).

[7] McFall & Little, *supra* note 3 (noting that in Texas "there is a perception both by the courts and by lawmakers that privileges should be strictly confined within the narrowest possible limits consistent with their applicability"); Johnson, *supra* note 3; *see also* Christina Culver & Megan Tilton, *The Attorney-Client Privilege: A Review of the Privilege and Potential Waiver*, 20 J. TEX. INS. L. 18 (2023).

B. Burden and Requirements for a Party Asserting a Privilege.

In Texas, the party asserting a privilege to prevent another party from discovering a communication bears the burden of establishing the privilege's applicability. The asserting party must make a prima facie showing that: (1) the privilege claimed is recognized by the court; (2) the privilege applies in the specific context; and (3) the privilege would actually protect the particular testimony or documents at issue.[8] Courts require only a "minimum quantum of evidence necessary to support a rational inference" that the privilege applies.[9] If this threshold is met, the court may conduct an *in camera* review of documents to determine whether they are in fact privileged.[10] Likewise, if privilege issues arise regarding testimonial evidence, a court may conduct its own review and questioning of the witness outside the presence of the fact finder.[11]

C. Texas's Attorney-Client Privilege.

Among one of "the oldest of the privileges . . . known to the common law,"[12] the attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[13] As practitioners can appreciate, the free flow of communication between the lawyer and client benefits both the lawyer and client and prevents the potential chilling effect that would likely occur were these communications subject to open discovery.

The Texas Rules of Evidence define the scope of the attorney-client privilege as follows:

> 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:
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> (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
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> (B) between the client's lawyer and the lawyer's representative;
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> (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
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> (E) among lawyers and their representatives representing the same client.[14]

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[8] *See In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding).

[9] *Id.* (quoting Tex. Tech Univ. Health Scis. Ctr. v. Apodaca, 876 S.W.2d 402, 407 (Tex. App.—El Paso 1994, writ denied)).

[10] *See id.*

[11] *See* Suarez v. State, 31 S.W.3d 323, 329 (Tex. App.—San Antonio 2000, no pet.).

[12] *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding) (quoting United States v. Zolin, 491 U.S. 554, 562 (1989)).

[13] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[14] TEX. R. EVID. 503(b)(1).

This codification of the attorney-client privilege encompasses three basic principles common across many jurisdictions: (1) the communication must be confidential;[15] (2) the communication must concern legal advice, not merely business or commercial advice;[16] and (3) the privilege belongs to the client, not to the attorney.[17]

Each of these can be a trap for the unwary oil and gas practitioner. In relation to the first principle, the Supreme Court of Texas has explained that "[a] communication is 'confidential' if it is not intended to be disclosed to third persons other than (1) those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or (2) those reasonably necessary for the transmission of the communication."[18] Issues can arise when clients divulge otherwise confidential information to third parties other than those that fall under the scope of (1) or (2), thereby risking waiver of privilege.[19]

Second, only legal advice, not general business advice, is protected by the scope of the privilege.[20] However, in the course of day-to-day operations or in the middle of a transaction, oil and gas companies and their lawyers are frequently communicating about both legal and business issues. So what if a communication contains a mix of both legal and non-legal elements? Does the non-legal portion of the communication "taint" the legal portion and nullify the privilege? The answer in Texas is "no": the communication will be privileged so long as obtaining legal advice is "one of the significant purposes" of the communication.[21] As the Restatement of the Law Governing Lawyers explains, "[s]o long as the client consults to gain advantage from the lawyer's legal skills and training, the communication is within [the attorney-client privilege], even if the client may expect to gain other benefits as well, such as business advice or the comfort of friendship."[22] In fact, Texas courts consider only the purpose, not the subject matter, of the attorney-client communication in determining privilege.[23]

Furthermore, Texas applies the attorney-client privilege to the entirety of the communication, not just to those portions regarding legal advice.[24] As one Texas court has explained, "[i]f we determine that a document contains a

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[15] Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, 675 S.W.3d 273, 280 (Tex. 2023).

[16] *Id.*

[17] *See In re* XL Specialty Ins. Co., 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding) ("The privilege belongs to the client and must be invoked on its behalf." (citing West v. Solito, 563 S.W.2d 240, 244 n.2 (Tex. 1978))).

[18] *See Univ. of Texas Sys.*, 675 S.W.3d at 280 (citing TEX. R. EVID. 503(a)).

[19] *See infra* Section III.D discussing waiver issues and third-party consultants.

[20] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72 cmt. c (Am. Law Inst. 2000) ("Also not privileged are communications with a person who is a lawyer but who performs a predominantly business function within an organization, for example as a director or nonlegal officer of a corporation.").

[21] *See* Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, 675 S.W.3d 273, 281 (Tex. 2023). When the Supreme Court of Texas adopted the "significant purpose" test, it rejected the more stringent "primary purpose" test that other jurisdictions use. *See id.*; *see also id.* at 292 (Devine, J., dissenting).

[22] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72 cmt. c (Am. Law Inst. 2000). Texas courts generally follow the Restatement when interpreting Texas's privilege laws. Indeed, the Supreme Court of Texas recently cited this exact provision. *See Univ. of Tex. Sys.*, 675 S.W.3d at 281 (majority opinion). Practitioners should note that merely copying legal counsel on a communication does not, "in and of itself, . . . transform an otherwise nonlegal communication into one made for a legal purpose." *Id.* at 280.

[23] *See In re* ExxonMobil Corp., 97 S.W.3d 353, 364–65 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (citing *In re* Carbo Ceramics, Inc., 81 S.W.3d 369, 374 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding)).

[24] But note that other jurisdictions may not afford the same breadth of protection to the entire document or communication. *See, e.g.*, Jacqueline Kate Unger, *Maintaining the Privilege: A Refresher on Important Aspects of the Attorney-Client Privilege,* AM. BAR ASS'N (Oct. 2013), https://www.americanbar.org/groups/business_law/resources/business-law-today/2013-october/maintaining-the-privilege/ (discussing that underlying facts will not be protected by privilege—even when recited in an otherwise confidential communication—and noting that "[b]ecause the privilege is contrary to the judicial goal of bringing

confidential communication, the attorney-client privilege extends to the entire document, and not merely to the specific portions relating to legal advice, opinions, or mental analysis."[25] To that end, even if a document contains information that would not otherwise be privileged—such as factual information in an attorney's opinion letter—the entire document is still cloaked with privilege and may be withheld in its entirety.[26] Indeed, Texas courts have held that a trial court abuses its discretion by requiring production of documents with the attorney-client communication redacted as the privilege protects the entire document from disclosure.[27] But practitioners engaging in multi-jurisdictional deals should keep in mind that other states do not necessarily allow for Texas's broad protections.[28]

Finally, because the client—not the attorney—holds the privilege, only the client can choose to either assert or waive the privilege.[29] That means that parties outside of the attorney-client relationship may not assert the privilege to withhold communications.[30] This principle becomes more acute in the context of an oil and gas transaction because, depending on how the transaction is structured, the attorney-client relationship may be transferred between parties.[31] In that case, the former client may no longer be able to shield its pre-transaction communications with its counsel from discovery.[32] The nuances of how the transactions' structure—an asset sale versus an entity sale—plays in to this principle is discussed in greater detail later in this article.

D. Waiver of Privilege.

While privilege can protect a party from disclosing certain communications, privilege can also be waived. Texas law dictates that waiver is "an intentional relinquishment of a known right or intentional conduct inconsistent

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relevant evidence to light, it is construed narrowly and protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege").

[25] *See In re* Rescue Concepts, Inc., 556 S.W.3d 331, 345 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding [mand. denied].).

[26] *See id.*

[27] *See In re ExxonMobil*, 97 S.W.3d at 361 (holding that a trial court abused its discretion by ordering a party to produce the factual portion of a privileged communication as the attorney-client privilege extends to the entire document).

[28] *See supra* note 24.

[29] *See* TEX. R. EVID. 503(c); *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding) ("The privilege belongs to the client and must be invoked on its behalf." (quoting West v. Solito, 563 S.W.2d 240, 244 n.2 (Tex. 1978))).

[30] *See, e.g.*, *In re* Baytown Nissan Inc., 451 S.W.3d 140, 146 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) ("The purpose of the attorney-client privilege is to protect the confidential relationship between the attorney and client and to promote full and open disclosure of facts so that the attorney can best represent his client. *It is the relationship with the client that confers the privilege*.") (emphasis added) (citation omitted). *Cf.* Smith v. State, 770 S.W.2d 70, 71 (Tex. App.—Texarkana 1989, no pet.) (noting general principle that attorney-client privilege could not be asserted by a third-party to the attorney-client relationship).

[31] *See infra* Section III.A.

[32] *See, e.g.*, Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 161–162 (Del. Ch. 2013) (holding that because the attorney-client privilege transferred to the buyer as part of merger agreement the seller could not assert privilege over its own pre-merger communications with counsel).

with claiming that right."[33] Waiver can occur where the holder of a privilege—the client[34]—"voluntarily discloses or consents to disclosure of *any significant part of the privileged matter* unless such disclosure itself is privileged."[35]

What constitutes a "significant part" sufficient to trigger a waiver is a fact-specific inquiry and determined on a case-by-case basis.[36] While not dispositive, courts may consider the measures a privilege holder has taken to keep a communication confidential such as the signing of confidentiality agreements among employees.[37] But, disclosure of the *non-privileged* portions of a communication may not strip the privileged portions of their protection.[38] For example, if a party obtains the factual information in a privileged communication through other means, such as through written discovery or deposition, that will not result in a waiver of privilege to the communication as a whole.[39]

The Supreme Court of Texas has distinguished between inadvertent disclosures on the one hand and involuntary disclosures on the other hand. Generally, an involuntary disclosure will not result in waiver. A "[d]isclosure is involuntary only if efforts reasonably calculated to prevent the disclosure were unavailing."[40] Conversely, an inadvertent disclosure, while perhaps due to "inattention" or carelessness, is "nonetheless voluntar[y]"[41] and may lead to waiver.[42]

However, in the event of an inadvertent disclosure during discovery or a civil proceeding, the privilege holder can avoid waiver by promptly following the procedures set forth in Texas Rule of Civil Procedure 193.3(d)[43] which

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[33] Jernigan v. Langley, 111 S.W.3d 153, 156 (Tex. 2003) (discussing waiver of privilege) (quoting Sun Expl. & Prod. Co. v. Benton, 728 S.W.2d 35, 37 (Tex. 1987)).

[34] *In re* Ford Motor Co., 211 S.W.3d 295, 301 (Tex. 2006) (orig. proceeding) (per curiam); Carmona v. State, 941 S.W.2d 949, 953 (Tex. Crim. App. 1997) (noting that the "power to waive the attorney-client privilege belongs to the client, or his attorney or agent both acting with the client's authority").

[35] *See* TEX. R. EVID. 511(a)(1) (emphasis added); Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, 675 S.W.3d 273, 280 (Tex. 2023) ("The presence of third persons during the communication will destroy confidentiality, and communications intended to be disclosed to third parties are not generally privileged.")

[36] *See id.* at 288 (remanding to lower court to determine in the first instance whether a "significant part" of a communication had previously been disclosed).

[37] *See In re* ExxonMobil Corp., 97 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (discussing Exxon's measures to maintain confidentiality over title opinions).

[38] *See Univ. of Texas Sys.* 675 S.W.3d at 288 (suggesting that publication of non-privileged factual findings does not waive privilege as to legal advice).

[39] *See In re ExxonMobil Corp.*, 97 S.W.3d at 358 ("For example, in *Huie v. DeShazo*, the supreme court held that confidential attorney-client communications are shielded from discovery and that this privilege extends to the entire communication, including the facts contained therein; however, the court added that the parties seeking the documents could obtain the information in another way, by deposition or by questioning the other party or its attorney regarding factual matters.").

[40] Granada Corp. v. Honorable First Ct. of Appeals, 844 S.W.2d 223, 226 (Tex. 1992) (orig. proceeding); *accord In re* Univ. of Tex. Health Ctr. at Tyler, 33 S.W.3d 822, 827 (Tex. 2000) (orig. proceeding) (per curiam) (trial court's release of privileged party documents constituted an "involuntary production of documents" and did not constitute waiver).

[41] *Granada Corp.*, 844 S.W.2d at 226.

[42] *See, e.g.*, *In re* FEDD Wireless LLC., 567 S.W.3d 470, 473, 479–80 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (orig. proceeding) (due diligence report inadvertently attached as a summary judgment exhibit); *In re* City of Dickinson, 568 S.W.3d 642, 644, 646–49 (Tex. 2019) (orig. proceeding) (emails with counsel inadvertently e-filed into record).

[43] *See* TEX. R. EVID. 511(b)(2); TEX. R. CIV. P. 193.3(d). Under Texas Rule of Civil Procedure 193.3(d), the privilege holder must serve on the other parties an amended withholding statement that (1) identifies the information produced, (2) identifies the privilege asserted for that information, and (3) requests that all copies of the privileged information be returned. *See* TEX. R. CIV. P. 193.3(d).

"was designed to ensure that important privileges are not waived by mere inadvertence or mistake."[44] In application, this "snap back" rule generally permits a party to "snap-back" or retrieve materials that it has inadvertently disclosed to maintain a claim of privilege that might otherwise be waived.[45] Parties to a transaction might also include a "snap back" provision as part of their agreement requiring a party to promptly return any privileged communications inadvertently disclosed by their counterparty.[46] And while such a contractual arrangement would require the return of any privileged communication, it may not impact whether a party has waived privilege as to third parties.

Ultimately, when a party waives privilege over a communication, a third-party may discover that communication.[47] The Texas Supreme Court has noted that "[i]f the matter for which a privilege is sought has been disclosed to a third party . . . the party asserting the privilege has the burden of proving that no waiver has occurred."[48] Thus, if a party opposing the privilege produces some facts showing waiver, then the Texas Rules of Evidence shift the burden to the party asserting the privilege to prove there was no waiver.[49] This restrictive and carefully balanced approach to privilege in Texas underscores the importance of understanding both the scope and the limitations of privilege, particularly in complex contexts such as oil and gas transactions.

E. The "Allied Litigant" Doctrine: Texas's Exception to the General Waiver Rules.

1. Definition and scope.

Although voluntary disclosure of privileged information to third-parties usually results in waiver of the attorney-client privilege, jurisdictions across the United States recognize an exception to this general waiver rule where the party to whom the communication is disclosed shares a common legal interest with the disclosing party. This exception[50] is typically referred to as either the "common interest" privilege, the "joint client" privilege, or the "joint defense" privilege.[51] Generally, the "joint defense" privilege applies only in the context of pending litigation where multiple parties to the lawsuit communicate with each other for the purpose of sharing a joint defense strategy.[52] Relatedly, the "joint client" privilege applies where a single attorney represents multiple clients in the same matter.[53]

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[44] Paxton v. City of Dallas, 509 S.W.3d 247, 263 (Tex. 2017) (quoting *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 439 (Tex. 2007) (orig. proceeding)).

[45] *See, e.g.*, *In re* JDN Real Est.-McKinney L.P., 211 S.W.3d 907, 917–18 (Tex. App.—Dallas 2006, orig. proceeding [mand. denied]).

[46] Sample language for a contractual snap back agreement as part of a corporate transaction may resemble the following:

> If any documents containing information that is subject to the attorney-client privilege or attorney work-product privilege are inadvertently transferred to Buyer, Buyer shall promptly notify Seller of the inadvertent transfer and take all commercially reasonable efforts to preserve the confidentiality of such privileged documents and shall promptly return all such privileged documents, including any copies or extracts thereof, to Seller, and shall not retain any copies or extracts of such privileged documents. Buyer shall not disclose or use any information contained in such privileged documents for any purpose.

[47] *See, e.g.*, *In re* Alexander, 580 S.W.3d 858, 869 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding) (citing TEX. R. EVID. 511(a)(1)).

[48] Jordan v. Fourth Ct. of Appeals, 701 S.W.2d 644, 649 (Tex. 1985) (orig. proceeding).

[49] *See* TEX. R. EVID. 511.

[50] Although sometimes referred to as a "privilege," each of these are more accurately viewed as exceptions to the waiver of attorney-client privilege and not as standalone privileges.

[51] *See In re* XL Specialty Ins. Co., 373 S.W.3d 46, 50–52 (Tex. 2012) (orig. proceeding) ("[T]he privilege defined in Rule 503(b)(1)(C) . . . has been variously described as the 'joint client' privilege, the 'joint defense' privilege, and the 'common interest' privilege. Courts sometimes use these terms interchangeably, but they involve distinct doctrines that serve different purposes.").

[52] *See id*.

[53] *See id.*

The "common interest" privilege, however, typically does not require pending litigation and instead applies when parties represented by separate counsel share some common legal interest.[54]

In Texas, this exception to the third-party waiver rule is known as the "allied litigant" doctrine.[55] The allied litigant doctrine is a subset of the attorney-client privilege and allows parties to an action and their attorneys to coordinate strategy, share information, and develop a unified defense, offense, or approach without fear that their adversaries may discover their communications.[56] Specifically, Texas Rule of Evidence 503(b)(1)(C) protects communications made "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."[57] Texas's evidentiary rule is itself a codification of Rule 502 of the Uniform Rules of Evidence that a number of different states have adopted.[58]

Practitioners should be thoughtful about the boundaries of the "allied litigant" doctrine and its requirements in order to keep communications privileged. First, the "allied litigant" doctrine only protects communications made by the client or the client's lawyer "to another party's lawyer, not to the other party itself."[59] Direct communications between the clients, even if a client copies counsel on the communication, risk waiving privilege.[60] Second, unlike the broader "common interest" privilege found in certain states and federal jurisdictions,[61] Texas's "allied litigant" doctrine has a "pending action" requirement based on the assumption that "no commonality of interest exists absent actual litigation."[62] As the name implies, the litigation must actually be pending for the "allied litigant" doctrine to apply and not merely threatened or anticipated.[63] Further, only those communications "made in the context of a pending action" are subject to protection under the doctrine; communications shared prior to the common interest are likely not protected from disclosure.[64]

Third, the "allied litigant" doctrine only covers communications "made to a lawyer or her representative representing *another* party" in pending litigation.[65] In other words, this adds an additional requirement aside from the pending action requirement; the parties must also be co-litigants in the pending litigation for the doctrine

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[54] *See id.*; 24 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5493 (1st ed. 2025) ("The communication need not be made in anticipation of litigation.").

[55] *See In re XL Specialty Ins Co.*, 373 S.W.3d at 52 ("[Because] Texas requires that the communications be made in the context of a pending action … our privilege is not a 'common interest' privilege that extends beyond litigation. Nor is it a 'joint defense' privilege, as it applies not just to defendants but to any parties to a pending action. Rule 503(b)(1)(C)'s privilege is more appropriately termed an 'allied litigant' privilege.").

[56] *See In re* JDN Real Est.-McKinney L.P., 211 S.W.3d 907, 922–23 (Tex. App.—Dallas 2006, orig. proceeding [mand. denied]) ("[C]ase law suggests that the 'common-interest' privilege is a part of the attorney-client privilege.").

[57] TEX. R. EVID. 503(b)(1)(C).

[58] *See In re* XL Specialty Ins. Co., 373 S.W.3d 46, 52 n.8 (Tex. 2012) (orig. proceeding) (noting other states' and the Uniform Rules of Evidence's comparable requirements).

[59] *Id.* at 52–53.

[60] *See id.* at 52–53; *see also* Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, 675 S.W.3d 273, 280 (Tex. 2023) (citing Tex. Att'y Gen. Op. No. JC–0233, at 6 (2000)).

[61] *See In re XL Specialty Ins.*, 373 S.W.3d at 52.

[62] *See id.*

[63] *See* TEX. R. EVID. 503(b)(1)(C).

[64] *See In re* XL Specialty Ins. Co., 373 S.W.3d 46, 52 n.9 (Tex. 2012) (orig. proceeding) (citing *In re* Dalco, 186 S.W.3d 660 (Tex. App.—Beaumont 2006, orig. proceeding)).

[65] *See id.* at 54 (emphasis added).

to apply.[66] Fourth, unlike the "joint defense" doctrine, the "allied litigant" doctrine is not limited to just defendants to an action. It applies to all parties—plaintiffs or defendants—who share a common legal interest in the outcome of pending litigation.[67]

Finally, Texas law does not require a written agreement for the doctrine to apply.[68] That said, practitioners should consider entering into a written agreement to clarify the parties' mutual understanding, outline procedures for maintaining confidentiality, and help avoid disputes about the existence or scope of the privilege.[69] Importantly, a written agreement alone does not create the privilege as the parties must still satisfy the statutory requirements.[70]

In sum, the allied litigant doctrine in Texas is a powerful but narrowly tailored tool for protecting confidential legal communications among parties with aligned interests in pending litigation. Its effective use requires careful attention to the statutory requirements, strict maintenance of confidentiality, and, ideally, clear written agreements to avoid misunderstandings and inadvertent waiver.

2. Comparison to certain other oil and gas-producing jurisdictions.

The rules governing the common interest doctrine can vary significantly across oil and gas producing jurisdictions. While Texas maintains a particularly restrictive approach—limiting the privilege to communications made in the context of a pending legal action and requiring counsel's involvement—some states apply broader standards more protective of the attorney-client privilege in disclosures to third-parties. For those states which lack a litigation nexus, it is possible to cloak in privilege communications shared between parties to a transaction so long as a common *legal* interest exists between the parties.[71] Practitioners engaged in multi-jurisdictional oil and gas matters must understand these critical distinctions. Failure to appreciate the nuances in each jurisdiction's privilege law can result in inadvertent waiver of protections or the inability to assert privilege where it might otherwise be available.

a. Oklahoma and North Dakota.

Like Texas, both Oklahoma[72] and North Dakota[73] have adopted Uniform Rule of Evidence 502 requiring a "pending action" to shield privileged communications between co-litigants. Likewise, communications must be between counsel to maintain privilege and not directly between parties.[74]

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[66] *See In re* Nw. Senior Hous. Corp., 661 B.R. 345, 357 (Bankr. N.D. Tex. 2024) ("[U]nder Texas law, one must be an actual co-litigant in pending litigation for a communication to fall under the allied litigant exception to waiver of the attorney client privilege.").

[67] *In re XL Specialty Ins.*, 373 S.W.3d at 51–52; *In re* Park Cities Bank, 409 S.W.3d 859, 874–75 (Tex. App.—Tyler 2013, orig. proceeding).

[68] *See, e.g.*, TEX. R. EVID. 503(b)(1)(C); *In re* Skiles, 102 S.W.3d 323, 326 (Tex. App.—Beaumont 2003, orig. proceeding) ("While here there is no written joint defense agreement, one is not necessary.").

[69] TEX. R. EVID. 503(b)(1)(C).

[70] *See supra* Section II.C. (discussing requirements to form privilege); *In re Skiles*, 102 S.W.3d at 326; Tex. R. Evid. 503(b)(1)(C)

[71] But note that even in states with broader versions of the common interest doctrine, like Delaware, the common interest must still involve "primarily legal issues" rather than a common interest in a commercial venture. *See, e.g.*, Enhabit, Inc. v. Nautic Partners IX, L.P., No. 2022-0837-LWW, 2023 WL 5811077, at *4 (Del. Ch. Sept. 8, 2023) (citation omitted).

[72] *See* OKLA. STAT. ANN. tit. 12 § 2502(B)(3); GREG A. DRUMWRIGHT & W. RICK GRIFFIN, THE JOINT DEFENSE DOCTRINE—COHESION AMONG TRADITIONAL ADVERSARIES, IN EVIDENTIARY PRIVILEGES FOR CORPORATE COUNSEL, 40–41 (2008).

[73] *See* N.D. R. EVID. 502(b)(3); DRUMWRIGHT & GRIFFIN, *supra* note 72, at 40–41.

[74] *See* OKLA. STAT. ANN. tit. 12 § 2502(B)(3) (extending the protection only to communications "[b]y the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party"); N.D. R. EVID. 502(b)(3) (same).

b. New Mexico.

New Mexico, on the other hand, has rejected Uniform Rule of Evidence 502 in favor of a broader common interest privilege that applies to communications "between the client or client's lawyer and another lawyer representing another in a matter of common interest."[75] The common interest must be both identical between the parties and legal in nature—not solely commercial.[76] Notably, the state does not require pending legal action for the doctrine to apply.[77] As a result, New Mexico may shield a greater number of communications from disclosure than does Texas, Oklahoma, or North Dakota.[78]

c. Pennsylvania, Ohio, and West Virginia.

The Marcellus-shale states have not adopted the common interest privilege as part of their respective evidentiary rules. Instead, these states have left the development of the privilege to the courts. In Pennsylvania and Ohio, the common interest doctrine appears to protect communications shared between counsel for parties with a common legal interest even in the absence of pending litigation, similar to New Mexico's rule.[79] West Virginia, meanwhile, lacks case law on this issue and does not appear to have decided one way or another on the scope of the doctrine.[80]

d. The common-interest doctrine in the federal system.

For federal cases involving federal question jurisdiction, the applicable privilege law is a matter of federal and not state law.[81] Because there is no uniform federal privilege law as a matter of statute or the Federal Rules of Evidence, each federal circuit court of appeals has fashioned its own privilege laws, including variants of the "common interest" privilege.

The Fifth Circuit's so-called "common legal interest privilege" covers two different types of communications: "(1) communications between co-defendants in actual litigation and their counsel," and "(2) communications between *potential* co-defendants and their counsel."[82] With respect to the latter category, the Fifth Circuit has cautioned that it "must be construed narrowly to effectuate necessary consultation between legal advisers and clients."[83] This privilege may also extend to co-plaintiffs so long as the parties establish that these communications "further a joint or

[75] N.M. R. EVID. 11-503(B)(3).

[76] *See* Santa Fe Pac. Gold Corp. v. United Nuclear Corp., 175 P.3d 309, 318 (N.M. Ct. App. 2007) ("[T]he overlap of a commercial interest does not negate an existing legal interest." (citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974))).

[77] *See id.*

[78] *See supra* notes 72–74 and accompanying text, discussing this privilege in Oklahoma and North Dakota. *See also In re* XL Specialty Ins. Co., 373 S.W.3d 46 (Tex. 2012) (orig. proceeding).

[79] *See* Sandoz Inc. v. Lannett Co., 570 F. Supp. 3d 258, 267–71 (E.D. Pa. 2021) (describing Pennsylvania's "common interest" privilege); Gerace v. Cleveland Clinic Found., 2024-Ohio-2708, ¶¶ 22–25, 248 N.E.3d 872, 877–78 (Ohio Ct. App. 2024).

[80] *See* W. VA. R. EVID. 501; Eric Franz, *Anything but Common: New York's "Pending or Anticipated Litigation" Limitation to the Common Interest Doctrine Creates More Problems Than It Solves*, 92 WASH. L. REV. 983, 1024 (2017) (noting that West Virginia has "[n]ot adopted the civil common interest doctrine").

[81] Conversely, state privilege law applies to both cases in state court as well as cases in federal court under diversity jurisdiction. *See, e.g.*, *In re* Silver, 500 S.W.3d 644, 647 (Tex. App.—Dallas 2016, pet. denied) ("Where, as here, the substantive claims are governed by state law, the state privilege law also applies.").

[82] Vandenberg v. Univ. of Saint Thomas, No. 4:18-CV-379, 2020 WL 4018846, at *1–2 (S.D. Tex. July 16, 2020) (quoting *In re* Santa Fe Int'l Corp., 272 F.3d 705, 710 (5th Cir. 2001)).

[83] *In re* Santa Fe Int'l Corp., 272 F.3d 705, 710 (5th Cir. 2001).

common interest."[84] Because there is no requirement that litigation actually be pending for the privilege to apply, the Fifth Circuit's "common legal interest privilege" is broader than Texas's "allied litigant" doctrine. However, it is narrower than some states' "common interest" privilege because it requires a nexus to at least potential litigation. Practitioners should be considerate of the contours of each jurisdiction's doctrines.

III. COMMON PRIVILEGE ISSUES THAT ARISE FOR OIL AND GAS PRACTITIONERS.

Oil and gas transactions present novel privilege issues. There is a tension between sharing information with a potential counterparty while likewise protecting privileged communications. The "common interest" privilege may cover the disclosure of communications to a counterparty in certain states, but not in Texas. The "allied litigant" doctrine's strict limitations mean that in the course of a transaction—when parties may wish to collaborate, share information, or coordinate on potential legal risks—parties may risk waiving privilege by sharing communications. As a result, practitioners must exercise heightened caution to avoid inadvertent waiver of privilege and to ensure that sensitive communications do not lose their protected status.

This section explores some common privilege pitfalls and practical considerations that arise in the oil patch both during and after a transaction. It addresses the protection of privileged documents during purchase and sale transactions and the unique issues associated with title opinions and third-party consultants. For each scenario, the discussion highlights the statutory requirements for privilege, the limitations imposed by Texas law, and best practices for safeguarding confidential communications. By understanding these nuances, practitioners can better navigate the complex landscape of privilege during a transaction and minimize the risk of unwanted disclosure.

A. Asset Sales v. Entity Sales.

Both buyers and sellers in an oil and gas transaction communicate with their respective counsel during the course of a deal regarding due diligence and strategy. Many of these communications are privileged. But once the deal closes and the buyer has taken control over the asset or entity it purchased, how are the seller's privileged communications treated? Can the buyer, now standing in the shoes of the seller, access these communications? As with many legal questions, the answer is that it depends. Different privilege issues may arise depending on whether a transaction is structured as a sale of assets or as an equity transaction.[85] Because only the client may assert the attorney-client privilege, it is important to consider how the type of transaction may affect the attorney-client relationship and who the "client" is.

An asset transfer in Texas "with no attempt to continue the pre-existing operation" does not transfer the prior attorney-client relationship to the buyer; as a result, the seller retains privilege over all transaction-related communications even after the sale.[86] This also means that the seller will generally waive privilege if it shares any privileged communication with the buyer, a third-party, as part of the sale. Practitioners should think through sharing attorney-client communications as part of an asset sale, whether explicitly through a contractual provision or inadvertently, or risk waiver.

Conversely, the attorney-client relationship *will* transfer as part of a merger of two corporations or an acquisition of an entity because "the successor organization stands in the shoes of prior management and continues the

[84] *Id.* at 711–12; *see also* BCR Safeguard Holding, L.L.C. v. Morgan Stanley Real Est. Advisor, Inc., 614 F. App'x 690, 703 (5th Cir. 2015).

[85] For a merger to be effective, Texas generally requires compliance with the Texas Business Organizations Code. *See* Taylor v. Hunton Andrews Kurth, LLP, No. 14-22-00410-CV, 2023 WL 4502147, at *6 (Tex. App.—Houston [14th Dist.] July 13, 2023, no pet.) (differentiating between mergers and asset sales under Texas law and their respective effects on the attorney-client privilege); TEX. BUS. ORGS. CODE ANN. § 10.001(b). *See generally* Caleb Long, *Asset Sales Under Texas Law: Defining the Acquisition and Exploring Successor Liability*, 75 BAYLOR L. REV. 308 (2023) (exploring the differences between asset sales and mergers under Texas law).

[86] Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P., 178 S.W.3d 40, 44 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *In re* Cap Rock Elec. Coop., Inc., 35 S.W.3d 222, 227 (Tex. App.—Texarkana 2000, pet. denied)).

operations of the prior entity."[87] This transfer of the attorney-client privilege means that the acquiring party may be able to assert privilege over acquired communications even though it was not the initial client. While Texas courts have not spoken directly to this, certain jurisdictions allow full access to seller's pre-merger communications, while others have held that the privilege does not pass to the buyer for pre-merger communications about the merger itself, only about the business in general.[88]

These distinctions are critical because they inform the scope of the attorney-client privilege and whether clients can or cannot freely share communications without waiving privilege. There can be a friction between a free-flow of information related to transferred assets and the need to maintain privilege. Because most asset sales do not transfer the attorney-client relationship, and because the "allied litigant" doctrine has no realistic place outside of a pending lawsuit, practitioners must be careful not to divulge privileged communications to their counterparty.

One way to navigate this issue is to address it outright in the parties' sales documents.[89] For example, a seller may want to transfer certain information related to the transferred assets but hold back any attorney-client communications. While Texas courts have not explicitly addressed this issue, courts in other jurisdictions have emphasized that parties may be able to structure transactions to avoid potential privilege issues. In the merger context, the Court of Chancery of Delaware has explained that "the answer to any parties worried about facing this predicament in the future is to use their contractual freedom . . . to exclude from the transferred assets the attorney-client communications they wish to retain as their own."[90]

Oil and gas practitioners frequently handle this situation with a carve-out such as the sample below which excludes transferring any privileged communications:

> "Excluded Assets" . . .
>
> (a) all documents and instruments of Seller or its Affiliates that may be protected by an attorney-client privilege or treated as work product of an attorney (other than title opinions).

Language such as the above reflects the competing goals of retaining confidentiality over certain documents to maintain privilege while also recognizing that a buyer is likely to demand certain communications before agreeing to purchase an asset.

And while Texas case law is sparse, parties might also agree as a matter of contract that the surviving entity in a merger or acquisition not be allowed to use any of the seller's privileged pre-merger communications in post-closing litigation against the seller as part of a "no-use" clause.[91] Sample language for such a clause might resemble the

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[87] *Id.* (citing *In re* Cap Rock Elec. Coop., Inc., 35 S.W.3d at 227).

[88] While there do not appear to be any Texas cases addressing this point, other jurisdictions have held that buyers may be able to access the selling party's pre-merger communications with counsel. *See, e.g.*, Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 162 (Del. Ch. 2013) (explaining that "the privilege over all pre-merger communications—including those relating to the negotiation of the merger itself—passed to the surviving corporation in the merger" and allowing the buyer party to obtain pre-merger communications between the seller and its counsel). *But see* Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 136-39 (1996) (holding that the attorney-client privilege over general business communications passed to the surviving corporation in a merger but that the privilege did not pass for pre-merger communications regarding the merger).

[89] *See* DLO Enters., Inc. v. Innovative Chem. Prods. Grp., LLC, C.A. No. 2019-0276-MTZ, 2020 WL 2844497, at *5 (Del. Ch. June 1, 2020) ("Privilege regarding an asset purchase agreement and associated negotiations does not pass to the purchaser by the default operation of any law, but rather, remains with the seller *unless the buyer contracts for something different*.") (emphasis added).

[90] *Great Hill*, 80 A.3d at 161; *accord id.* ("Here, by contrast, the Seller did not carve out from the assets transferred to the surviving corporation any pre-merger attorney-client communications, and this court will not unilaterally read such a carve out into the parties' contract."); Sentinel Offender Servs., LLC v. G4S Secure Sols., Inc., No. SACV14298JLSJPRX, 2015 WL 13546228, at *3 (C.D. Cal. Sept. 3, 2015) (applying same).

[91] *See* S'holder Representative Servs. LLC v. RSI Holdco, LLC, No. 2018-0517-KSJM, 2019 WL 2290916, at *3 (Del. Ch. May 29, 2019).

following: "None of the parties may use or rely on any of the Privileged Communications in any action or claim against or involving any of the parties to the Merger Agreement after the Closing."[92] While this language may not protect a communication from being discovered and utilized by a third-party, it should limit what the buyer may use against a seller in litigation.

Texas courts have been quiet on these issues, but given Texas's strong public policy favoring freedom of contract, it stands to reason that Texas courts may be inclined to enforce similar provisions.[93]

B. Title Opinions.

The sharing of title opinions also highlights the interplay between maintaining privilege on the one hand and the practicality of selling an asset on the other. While buyers may agree to not receiving the majority of the seller's attorney-client privileged communications, they may want title opinions regarding the transferred assets, as reflected in the sample agreement language above.

A title opinion is simply an attorney's written opinion as to the client's property interests, the potential interests of third-parties, and the potential for adverse claims.[94] As such, title opinions typically fall under the protection of the attorney-client privilege and are not discoverable absent waiver.[95] More specifically, drilling title opinions are secured by oil and gas operators to ensure that they have good title to a particular drill site before undergoing the expense of drilling a well.[96] Meanwhile, division order title opinions help "those responsible for disbursing proceeds from the sale of produced oil and gas" to make payments to respective payees.[97] And while buyers are likely to push for all of seller's title opinions, in an asset-only sale where the attorney-client privilege does not necessarily transfer to the buyer, handing over title opinions may risk waiver.[98]

Texas courts have rarely had occasion to address privilege issues with title opinions. While it is clear that title opinions can constitute a communication protected by the attorney-client privilege, several older Texas cases have suggested that the privilege for a title opinion may pass with the transfer or assignment of an asset to which the title opinion relates—contrary to the usual privilege transfer rules. In *Arkla, Inc. v. Harris*, the court noted that a "title opinion concerning a lease prepared by the attorneys for a prior lessee has been held a privileged communication not subject to discovery, *even after the lease had been assigned*."[99] The *Arkla* court cited just one case in support of its statement: *Harrell v. Atlantic Refining Company*.[100] In *Harrell*, the court held, without citing authority, that the plaintiff

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[92] *Id.*

[93] *See* Endeavor Energy Res., L.P. v. Discovery Operating, Inc., 554 S.W.3d 586, 595 (Tex. 2018) ("As with contracts generally, the parties are free to decide their contract's terms, and the law's strong public policy favoring freedom of contract compels courts to respect and enforce the terms on which the parties have agreed … As a fundamental matter, *Texas law recognizes and protects a broad freedom of contract*.") (emphasis added) (citation omitted).

[94] Peter Hosey, *To Whom it May Concern: Title to the Title Opinion, the Duty of the Examiner and the Payment of Proceeds*, 2018 TXCLE ADVANCED OIL, GAS & ENERGY RESOURCES LAW 16-II.

[95] *See, e.g.*, Arkla, Inc. v. Harris, 846 S.W.2d 623, 630 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (explaining that "[a] title opinion concerning a lease prepared by the attorneys for a prior lessee has been held a privileged communication not subject to discovery").

[96] Hosey, *supra* note 94 ("No client wants to drill a well only to find outstanding unleased mineral interests, mortgages or other encumbrances to its title, thereby creating third party rights in the proceeds of production.").

[97] William Burford, *Maintaining Privilege Over Title Opinions*, 2023 TXCLE ADVANCED OIL, GAS & ENERGY RESOURCES LAW 18-IV.

[98] *See id.* ("[T]he owner of oil and gas assets may make title opinions available to prospective buyers, in order to demonstrate the strength of its asserted title to the properties being sold. . . . There seems no theory on which to base an argument that the privilege that may have otherwise attached to those opinions is not thereby waived."). *Cf. In re* ExxonMobil Corp., 97 S.W.3d at 362–63 (finding no error in the lower court's analysis that a party waived privilege by sharing title opinions with third parties)

[99] *Arkla*, 846 S.W.2d at 630 (emphasis added).

[100] 339 S.W.2d 548 (Tex. App.—Waco 1960, writ ref'd n.r.e.).

could assert privilege over a title opinion originally produced for a third-party regarding an oil and gas lease assigned to the plaintiff.[101] Just three cases appear to have cited *Harrell* in any capacity over the past half century, suggesting its precedential value may be limited.[102]

Harrell and *Arkla* appear to be the only Texas cases supporting the proposition that privilege over a title opinion can be asserted by a party who was not the initial client for the opinion but who inherited the asset to which the title opinion relates. One commentator has suggested that the "only way to harmonize those courts' remarks with the general rule that only the attorney's client has that right [to assert the attorney-client privilege], it would seem, is by construing the transferee of a client's assets as its 'successor.'"[103] As noted above, successor entities may be able to assert the privileges of their predecessor.[104]

C. Sharing Information in Virtual Data Rooms.

Another issue that can arise in the context of an oil and gas transaction is protecting privilege in relation to other non-title opinion documents shared with the other party. Parties to energy transactions frequently share access to certain documents with one another for due diligence purposes, often via virtual data rooms.[105] While information sharing between the parties is necessary to facilitate a transaction, parties may run the risk of accidentally disclosing information that the attorney-client privilege or work product privilege might otherwise protect in Texas. Although Texas courts have not addressed in much depth the potential privilege issues that may arise with sharing due diligence information in virtual data rooms, caselaw from other jurisdictions suggests that such communications likely are not privileged for several reasons.

For one, such communications may not be privileged in the first place if they are shared for a business, not legal, purpose.[106] As one court explained, "'courts have declined to extend the protections of the attorney-client privilege' to documents produced as part of a due diligence investigation 'where the purpose of [the] investigation was to obtain factual data for a business purpose.'"[107] While Texas is more protective of documents containing a mix of legal and non-legal advice than most states,[108] counsel should still be mindful that the attorney-client privilege covers only those communications made in furtherance of the rendition of legal services. And even if the communications are privileged, a party generally waives the attorney-client privilege by sharing the communications with a counter-party in an arms-length transaction.[109] This is the case even if the parties enter into an agreement to keep the information in

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[101] *Id.* at 554.

[102] Two of these three citations were to a wholly different point made by the *Harrell* court—that the attorney-client privilege extends to communications made by a lawyer to a client and not just the other way around. *See* Boring & Tunneling Co. of Am., Inc. v. Salazar, 782 S.W.2d 284, 290 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding); Dewitt & Rearick, Inc. v. Ferguson, 699 S.W.2d 692, 693–94 (Tex. App.—El Paso 1985, orig. proceeding).

[103] Burford, *supra* note 97.

[104] Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P., 178 S.W.3d 40, 44 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *In re* Cap Rock Elec. Coop., Inc., 35 S.W.3d 222, 227 (Tex. App.—Texarkana 2000, no pet.)).

[105] *See, e.g.*, Searcy v. Parex Res., Inc., 496 S.W.3d 58, 63 (Tex. 2016); Chalker Energy Partners III, LLC v. Le Norman Operating LLC, 595 S.W.3d 668, 670 (Tex. 2020).

[106] *See supra* Section II.C.; *see also* Calendar Rsch. LLC v. StubHub, Inc., No. CV 17-4062 SVW (SSX), 2019 WL 11558873, at *4 (C.D. Cal. July 25, 2019).

[107] Pham v. Talkdesk, Inc., No. 2:22-cv-05325-MCS-JPR, 2023 WL 3149270, at *3 (C.D. Cal. Mar. 14, 2023).

[108] *See, e.g.*, *supra* Section II.C. and accompanying text discussing Texas's expanded approach to protecting documents covered by the attorney-client privilege.

[109] *See Pham*, 2023 WL 3149270, at *3 ("[A] party waives this privilege when information is voluntarily provided to 'strangers to the attorney-client' relationship or to those who 'possess interests adverse to the client.'") (citation omitted).

the data room confidential.[110] Accordingly, practitioners should take care to not share any privileged information with a counterparty that they do not want others to discover. The best practice is to only upload what is absolutely necessary to a VDR and avoid data dumps or mass uploads.

D. Sharing Privileged Communications with Third-Party Consultants.

Sticky privilege issues can also arise in dealing with consultants. Energy practitioners or their clients often retain third-party environmental or regulatory consultants for their expertise to assist with operations or with a deal. Despite the general rule that sharing privileged communications with third-parties waives privilege, Texas courts are fairly protective of communications made with hired consultants and certain other third-parties working closely alongside the main client, such as a landman.[111]

Whether or not a communication with a consultant or contractor will remain privileged often depends on whether the third-party is considered a "representative" of the client.[112] Texas Rule of Evidence 503(b)(1) protects confidential communications made between a "client's representative and the client's lawyer" as well as "between the client and the client's representative."[113] The Supreme Court of Texas has broadly interpreted the term "representative" to include those outside of a "formal employee-employee relationship" such as independent contractors and consultants.[114] As one treatise recently cited by the Supreme Court of Texas explains:

> If the consultant was directed by the client to communicate with the client's attorney, and it was clear to the consultant that those communications were for the purpose of obtaining legal advice, and therefore, were confidential, the extension of the privilege's protection would place neither the client, the consultant, nor the attorney in a position different than they would have been in had the consultant been a "permanent" employee.[115]

However, privilege issues may arise when a client hires a consultant directly—instead of through retained counsel—and in turn shares otherwise confidential communications directly with that consultant. Although Texas has no explicit requirement, the best practice to protect the attorney-client privilege is generally to retain consultants through counsel on behalf of the client—instead of the client hiring the consultant directly.[116] Such a practice helps make clear that the communications with the consultant concern the rendition of legal services and not simply business matters.[117] Counsel should keep in mind Justice Devine's admonition that while the "complexities of modern business and legal practices often necessitate consulting with third-party experts to properly advise a legal client or prepare for litigation, when an engagement contract is between the client and an independent nonlawyer consultant, *the connection between the consultant's services and the rendition of legal advice should not be left to the imagination or open to*

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[110] *See, e.g., supra* Section II.C. and accompanying text, noting that the existence of a written agreement does not create privilege.

[111] *See, e.g.*, *In re* Small, 346 S.W.3d 657, 664 (Tex. App.—El Paso 2009, orig. proceeding) (disclosure of communications related to the title of property to a third-party landman did not waive privilege).

[112] *See id.* at 665 (holding that privileged applied to a communication with a client "representative in his capacity as a professional landman at the time" of the communication).

[113] TEX. R. EVID. 503(b)(1)(A), (D).

[114] *See* Univ. of Tex. Sys. v. Franklin Ctr. for Gov't & Pub. Integrity, 675 S.W.3d 273, 284 (Tex. 2023). Although this case concerned whether a consultant qualified as a "lawyer's representative" under Texas Rule of Evidence 503(a)(4), not a "client's representative," the principles discussed are broadly applicable.

[115] *Id.* at 284 (quoting 1 PAUL RICE ET AL., ATTORNEY–CLIENT PRIVILEGE IN THE U.S. § 4:19 (2022)).

[116] *Id.* (explaining that communications with an independent contractor can fall within the attorney-client privilege even where the contractor was hired directly by the client and not through counsel).

[117] *Supra* Section II.C. and accompanying text noting that privilege generally does not protect underlying facts or strictly business matters.

debate."[118] Accordingly, practitioners should strive to protect confidential communications with consultants by making clear the connection between a consultant's services and the rendition of legal advice.

IV. CONCLUSION.

Privilege issues often appear clear in litigation but can quickly become murky in the brine of the oil patch. Jurisdictions vary wildly in the breadth of their privilege laws and application of the same. Careful oil and gas lawyers will know the privilege laws where deals are done and proactively protect their clients' communications.

[118] *Univ. of Tex. Sys.*, 675 S.W.3d at 303 (Devine, J., dissenting) (emphasis added).