The Attorney-Client Privilege: A Primer for Landmen

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Your attorney has finally sent you a title opinion advising you that some of your leases may be dead. Management decides to drill anyway. It's a gusher and the lessors sue. Can you prevent the title opinion from being given to the lessors' attorneys? What if you previously gave a copy of the opinion to an independent contractor landman to work on curative for you? What if you gave it to other working interest owners in the drillsite? The attorney-client privilege may protect confidential information from disclosure in a lawsuit, but the privilege does not apply in all instances.[1]

The attorney-client privilege applies to confidential communications between attorneys and their clients, or their respective representatives, for the purpose of obtaining legal advice. If the privilege applies, it can protect such communications from mandatory disclosure in a lawsuit or other legal proceeding. The privilege may apply to oral or written communications. There is no "blanket" privilege for title opinions or any other type of attorney-client communication. Rather, whether the privilege applies to a communication is determined on a case-by-case basis.

The confidentiality of the communication is key. A confidential communication is one that the client reasonably expects will be kept confidential and that is not disclosed, or intended to be disclosed, to persons other than the attorney and client or their respective representatives. If a client discloses, or consents to the disclosure of, the communication to a third party, then the privilege may be lost. So, is the privilege lost when an operator gives a copy of a title opinion received from an attorney to participating working interest owners? There does not appear to be any case law addressing this situation, but it is possible that the operator's disclosure of the title opinion to those third parties might be viewed as a waiver of the privilege, and the title opinion might be admitted as evidence in a lawsuit or other legal proceeding against the operator, such as in a lawsuit alleging a title defect that invalidates the operator's oil and gas lease(s) and that was discussed in the title opinion.

Generally, if disclosure to a third party serves the interests of the client, or if the third party's presence is necessary to accomplish the purposes of consulting the attorney, then disclosure to the third party might not waive the privilege. For example, if an operator's independent contractor, such as an independent landman who is working for the operator, learns of or participates in a confidential communication between an attorney and the operator, the privileged status of the communication might not be in jeopardy if the independent contractor is the "functional equivalent" of an employee of the operator.

What happens when only part of a privileged communication (for example, a single comment and requirement of a title opinion) is disclosed to a third party? Is the privilege lost for the entire communication? Some courts view disclosure of a single communication as waiving the privilege for all communications regarding the "same subject matter." In theory, a court could view the entire title opinion as one communication about a single subject matter—title to the subject lands—and require disclosure of the entire opinion. Other courts, however, take a more narrow approach and attempt to distinguish between what is privileged and what is not, finding that the privilege is lost only as to those portions of a communication that were disclosed to third parties. In short, if the privilege is lost for one comment and requirement, the privilege may still be intact as to a comment and requirement regarding a completely different subject matter, depending on the facts of the case and the court's approach to the scope of the waiver.[2]

Not all types of communications are privileged. To be privileged, the communication must relate to legal advice. For example, if an attorney-client communication relates to business advice, as opposed to advice regarding an operator's legal rights and obligations, then the privilege may not apply. In instances where the communication contains both legal and non-legal advice, then to the extent the non-legal advice can be separated from the legal advice, the privilege may not apply. Further, if an attorney has been hired to merely draft a document, such as a deed, as opposed to providing advice regarding a document's legal effect, then the privilege may not apply and the attorney may be required to testify in a legal proceeding as to communications regarding the drafting of the document.

In sum, if you disclose a confidential communication or legal advice that is covered by the attorney-client privilege to a third party, then you may be required to disclose it again, but this time in a lawsuit or other legal proceeding. If you must share the confidential communication or legal advice to a third party, then you should only disclose those portions of the communication that absolutely must be disclosed in an effort to preserve the privilege for as much of the communication as possible.

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[1]This article discusses certain aspects of the attorney-client privilege in general terms and is not intended to be a comprehensive analysis of the law of attorney-client privilege or the law of any particular jurisdiction. The reader should consult with competent legal counsel regarding the law that applies to any particular situation and jurisdiction.
[2]There are relatively few court cases that deal directly with title opinions and the attorney-client privilege. However, the Supreme Court of Colorado recently discussed the privilege in the context of title opinions and noted that if the parties cannot agree as to what title opinions, or portions of title opinions, are privileged, then the court can be requested to review the title opinions to determine what is privileged and what is not. *See DCP Midstream, LP v. Anadarko Petroleum Corporation*, 303 P.3d 1187, 1200

(Colo. 2013). Therefore, it appears that at least one court has recognized the possibility of having portions of a title opinion covered by the privilege, even if other portions are not.
