

Chapter 4

Evidentiary Privileges Applicable to Title Opinions of Counsel

Blair M. Gardner¹

Dale Harrison

Jackson Kelly PLLC

Charleston, West Virginia

Lee A. Floyd

Jackson Kelly PLLC

Clarksburg, West Virginia

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¹ Blair M. Gardner is a member of Jackson Kelly PLLC’s Environmental Practice Group. Mr. Gardner is a graduate of Brown University and the University of Virginia School of Law. Dale Harrison is an associate in Jackson Kelly’s Land and Natural Resources Development Practice Group in Clarksburg, West Virginia. He is a graduate of Shepherd University and the West Virginia University College of Law. Lee A. Floyd is an associate in Jackson Kelly’s Industrial, Environmental and Complex Litigation Group in Charleston. She is a graduate of the University of Virginia, and the West Virginia University School of Law. All of the authors would like to thank Gabrielle R. Neal, 3L University of Dayton School of Law, for her invaluable assistance with this chapter.

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§ 4.01. Introduction.

The development of the common law with respect to mineral property reflects an uneven progression. Historically, development of the law occurs during periods of economic activity generally, or the development of a particular resource specifically. The United States currently is witnessing the development of shale gas in states from Pennsylvania, Ohio and West Virginia to Texas and Colorado. The activity associated with the development of shale gas has risen to a level not witnessed in the country since the energy disruptions during the decade of the 1970s.

The development of these new resources is normally accompanied by a re-examination of traditional legal principles by which mineral titles are established and maintained. In 2013, the supreme courts of Pennsylvania² and West Virginia³ have each considered challenges to old severance

² Butler v. Charles Power Estate, 65 A.3d 885 (Pa. 2013).

³ Faith United Methodist Church v. Morgan, 745 S.E.2d 461 (W. Va. 2013).

deeds by which traditional canons of mineral deed construction were contested. Although the courts differed in their outcomes,⁴ they agreed upon common objectives: certainty of title and avoiding the disruption of settled expectations.⁵

The determination of what ownership one has in a given mineral property begins with the examination of title. An opinion of title is a communication from an attorney to a client. Like any attorney-client communication, it is afforded the privilege of confidentiality from disclosure that protects all such communications. Like all privileges, it may be waived. Because litigation over the scope of property rights that one possesses under mineral deeds is likely to increase in the coming years, the attempt to secure mineral title opinions in discovery is probable. It is the purpose of this paper to explore the scope of evidentiary privileges afforded mineral title opinions, to examine the use made of such opinions, and to suggest ways in which privilege may be maintained.

§ 4.02. **The Meaning of Title.**

The word “title,” when used in reference to real estate, is generally defined “as the means whereby the owner of land has just possession of property.”⁶ “In contemporary jurisprudence, ‘property’ refers to both the actual physical object and the various incorporeal ownership rights in the

⁴ The Pennsylvania Supreme Court upheld the *Dunham* rule which provides that the term “mineral” contained in a deed does not include oil or gas absent evidence of a contrary intent on the parties to the deed at the time of its execution. *Dunham & Shortt v. Kirkpatrick*, 101 Pa. 36 (Pa. 1882). The West Virginia Supreme Court overturned one point of law in *Ramage v. South Penn Oil Co.*, 118 S.E. 162 (W. Va. 1923) to the effect that the words “surface” found in a deed does have a definite and ascertainable meaning and is not ambiguous and which will not be overturned by means of extrinsic evidence.

⁵ “This Court’s goal in the area of land ownership is to avoid bringing “upon the people interminable confusion of land titles[;]” instead, we must “endeavor[] to prevent and eradicate uncertainty of such titles.” *Faith United Methodist Church*, 745 S.E.2d at 461 (quoting *Toothman v. Courtney*, 58 S.E. 915, 921 (W. Va. 1907)). “since *Dunham* has effectively served to establish a governing rule of property law in Pennsylvania for over a century, too many settled expectations rest upon it for the courts to upset it retroactively.” *Butler* at 900; concurring opinion of Justice Saylor.

⁶ *Guier v. Bridges*, 70 S.W. 288, 289 (Ky. 1902).