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Chapter 20

The Common Interest Doctrine and Protecting Against Inadvertent Waiver of the Attorney-Client Privilege in Oil and Gas Litigation

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Synopsis

§ 20.01. Introduction.

The common interest doctrine (also referred to and/or conceptually confused with the "community of interests doctrine," "joint defense privilege," and "allied lawyer doctrine") is based on the underlying principles of the attorney-client privilege. As Model Rule of Professional Conduct 1.6 — Confidentiality of Information Client-Lawyer Relationship states, "[a] lawyer shall not reveal information relating to the representation of a client . . . [and a] lawyer shall make reasonable efforts to prevent the inadvertent or

unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[1] Accordingly, the common interest doctrine has been developed through the common law to extend the attorney-client privilege to situations concerning communications between parties sharing common legal, and sometimes business, interests. While this area of law is in no way specific to the oil and gas industry, it does present unique scenarios in which attorney-client privilege becomes an issue because of the manner in which the oil and gas industry conducts business.

Unlike many other industries, the oil and gas industry often participates in collaborative-type business endeavors. These endeavors can occur between and among entities in their effort to develop leased acreage; between and among entities who elect to swap properties in an effort to organize more efficient units; between and among entities and third-party financiers and/or banks who can either be legitimate silent partners or simply loan sources; and countless other scenarios in which separate business entities and/or individuals enter into business relationships for the exploration, development and production of minerals, oil and/or gas.

Ultimately, the scenarios above, as well as many scenarios not specifically set forth in this chapter, result in the exchange of substantial amounts of information and documentation. Moreover, in an effort to maximize efficiencies, often times collaborating entities will elect to share costs for certain services and share certain information that is common to the business endeavor, or even as a precursor to entering into a long-term, business relationship. While often these relationships are memorialized either by a Joint Operating Agreement or a Joint Venture Agreement, these agreements are usually silent as to the treatment of attorney-client privileged materials and shared legal resources. Frequent examples of attorney-client privileged materials that are inadvertently disclosed in these relationships include: title opinions; e-mails from one entity's in-house counsel; and, legal opinions regarding risk/liability with regard to the endeavor.

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1 Model Rules of Prof'l Conduct R. 1.6 (a), (c) (2014).

The danger in not being able to adequately assess these risks are real. It is further complicated by the disconnect in time between when the disclosure(s) that may occur and the litigation in which the disclosure(s) becomes an issue. The waiver of the attorney-client privilege is a serious issue containing both ethical components and practical components. While the ethical implications are clear, the practical components can manifest themselves in varying ways depending on the complexity of the litigation, the amount at issue in the litigation, and the sophistication of the litigators on either side. At the end of the day, however, the most critical thing to remember is that there is no partial waiver of the attorney-client privilege.[2]

In the event of an inadvertent disclosure of attorney-client privilege during a cooperative business endeavor, the common interest doctrine may become one's last defense, although these authors would note that the common interest doctrine may not be a desirable default position. Unfortunately, the common interest doctrine is not applied or interpreted uniformly across the country, and, specifically, not in the jurisdictions, both state and federal, comprising the Appalachian Basin. This chapter seeks to provide a summary of the law as it currently exists in the jurisdictions comprising this specific geographic region.[3]

§ 20.02. Litigation on the Rise.

Before exploring the current state of the law on the common interest doctrine in the jurisdiction comprising the Appalachian Basin, it is important to note why these issues are becoming a concern for the industry. According to Fulbright's 9th Annual Litigation Trends Survey Report, the following trends were noted in the energy sector:

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2 *See* Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999).

3 While these authors sought merely to discuss the present state of the law in the Appalachian Basin concerning the Common Interests Doctrine, these authors would briefly note that protecting oneself from these issues can potentially be achieved by incorporating sufficient language into partnering documentation and, certainly, by entering into a Joint Defense Agreement at the start of litigation, or even prior if the parties are on notice of the same.