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The construction industry, like most industries in the United States, is increasingly dynamic. The workforce has more mobility, and the methods by which companies pursue work are more numerous, and more complex. As construction lawyers we must, of course, have a highly developed understanding of substantive construction law in order to serve our clients. However, because the industry is so dynamic, we must also be able to anticipate and understand non-construction law issues that impact our clients. Understanding attorney-client and attorney work-product issues, and how those issues are dealt with from the inception of an assignment, can be as important as substantive construction law, as those issues, and the strategy and tactics to address them, will inform a representation through its conclusion.

For example, imagine that you have been retained by a joint venture (JV) to represent it in a multi-million dollar delay/impact claim brought by an owner, with a fact pattern stretching over years. There are a myriad of issues that could arise, including the following:

1. How do you address the issue of departing employees who are important witnesses?

2. How do you protect these privileges, when a departing employee is disgruntled and wants to talk with the other side?

3. If you are opposing counsel, are there any ethical considerations concerning a former employee of the opposing party who possesses privileged information and wants to talk to you?

4. What if the employees are leaving because one of the JV members is selling the business unit that was involved in the project?

5. What if one of the JV member’s insurance carriers imposes reasonable reporting requirements with regard to the defense, is that reporting subject to the attorney-client or attorney work-product privilege?

Answers to these questions are important because, in many instances, a former employee may possess important attorney-client or attorney work-product information, regardless of whether that person was a senior executive or a lower-level employee. As a result, it is critical that counsel have a strategy for addressing these issues from the inception of the representation, so that all of the necessary meeting or other communications remain protected throughout the representation.

I. General Law

A. Attorney-Client Privilege

There are two types of privileges that may be applicable in the above situations: the attorney-client privilege and the work-product privilege. Federal courts have held that the scope of the attorney-client privilege is shaped by its purposes. The fulcrum of this privilege is whether the communications were made in confidence.

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1. United States v. El Paso Co., 682 F.2d 536, 538 (5th Cir. 1982) (citing United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976));
2. Id.
3. United States v. Dennis, 843 F.2d 652, 656 (2d Cir. 1988).
for the purpose of obtaining legal advice from a lawyer.\textsuperscript{5} Additionally, statements made while intending to employ a lawyer are privileged, even if that lawyer is ultimately not retained.\textsuperscript{4} In Texas, the attorney-client privilege protects not only confidential communications between the lawyer and the client, but also the discourse among their representatives.\textsuperscript{5}

A party asserting the attorney-client privilege bears the burden to demonstrate the following:

1. The asserted holder of the privilege is or sought to become a client;
2. The person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
3. The communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purposes of securing primarily either (i) an opinion on law, (ii) legal services, or (iii) assistance in some legal proceeding and not (d) for the purposes of committing a crime or tort; and
4. The privilege has been (a) claimed and (b) not waived by the client.\textsuperscript{6}

The Supreme Court has held that a corporation's attorneys' conversations with corporate employees are privileged if:

(1) [t]he communications concern matters within the scope of the employees' corporate duties, (2) the employees themselves [are] sufficiently aware that they [are] being questioned in order that the corporation [can] obtain legal advice, and (3) the communications [are] considered "confidential" when made, and have been kept confidential by the company.\textsuperscript{7}

B. Work-Product Privilege

The attorney work-product privilege\textsuperscript{8} is broader than the attorney-client privilege in this context because it includes all communications made in preparation for trial, including an attorney's interviews with party and nonparty witnesses.\textsuperscript{9} The privilege covers more than mere documents; it extends to an attorney's mental impressions, opinions, conclusions, legal theories, and even includes an attorney's selection and ordering of documents.\textsuperscript{10}

The privilege applies long before suit is filed and even before another party manifests any intent to sue.\textsuperscript{11} Once a party reasonably anticipates a suit being filed, any information gathered in preparation for the anticipated litigation is privileged.\textsuperscript{12} Actual notice of the suit is not required.\textsuperscript{13}

To determine if the work-product privilege applies, a

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8. The definition of "work product" and the extent to which work product is protected are set out in Texas Rule of Civil Procedure 192.5:
(a) Work Product Defined. Work product comprises:
   (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
   (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.
(b) Protection of Work Product.
   (1) Protection of core work product—attorney mental processes. Core work product—the work product of an attorney or an attorney’s representative that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories—is not discoverable.
   (2) Protection of other work product. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.
   (3) Incidental disclosure of attorney mental processes. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).
   (4) Limiting disclosure of mental processes. If a court orders discovery of work product pursuant to subparagraph (2), the court must—insofar as possible—protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.
10. Id.
12. Id.
13. See Trevino v. Ortega, 969 S.W.2d 950, 957 (Tex. 1998) (noting that in National Tank, the court did not require actual notice of potential litigation for a party to anticipate litigation).
15. In re Monsanto Co., 998 S.W.2d 917, 923–24 (Tex. App.—Waco 1999, no pet.).
trial court must look to the totality of the circumstances in each case in which it has been asserted. The fact finder is charged with determining whether a reasonable person in the party's position would have anticipated litigation and whether the party itself actually anticipated litigation. The objective prong requires an examination of the facts with consideration being given to outward manifestations that indicate litigation is imminent. The subjective prong requires the fact finder to determine if the party asserting the privilege had a good faith belief that litigation would ensue.

II. Former Employees

The first and trickiest question regarding former employees is how a company protects information and communications obtained from a former employee about the former employee's knowledge of the dispute. The seminal case on the attorney-client privilege as it applies to corporations is the Supreme Court's 1981 decision in Upjohn v. United States, in which the Court applied the "subject matter test" to determine if a communication is protected by the attorney-client privilege. Under this test, the privilege extends to any employee of a corporation as long as the communication was made at the direction of corporate superiors, the information is within the employee's scope of employment, and the employee is aware the communication is for the purpose of enabling corporate counsel to provide legal advice to the corporation. The majority opinion did not address the application of the privilege to former employees, however Justice Burger stated in his concurrence that he would extend the majority's rule to when "an employee or former employee speaks at the direction of management with an attorney regarding conduct or proposed conduct within the scope of employment."

The privilege for organizational clients can be asserted and waived only by a responsible person acting for the organization for this purpose. Therefore, a disgruntled former employee may not waive the privilege on behalf of the corporation. It should also be noted that the attorney-client privilege does not apply retroactively. Thus, if a company's counsel communicates with a former employee on a subject not otherwise protected by an applicable privilege, then the former employee later agreeing to be represented by corporate counsel will not protect prior communications.

A. Former Employees and the Attorney-Client Privilege

A recent federal district court addressing the question of whether the attorney-client privilege extends to communications with former employees had this to say regarding the national landscape of rulings on the issue: "[A] relatively small number of federal courts have considered whether to extend Upjohn to former employees. Indeed, only two circuit courts have addressed the issue. Both the Ninth and the Fourth Circuits adopted the Burger concurrence." The same court also noted that just about every federal district court that has addressed the issue "has held that the privilege extends to former employees in certain contexts.

The case law in Texas state courts on this issue is extremely sparse; thus, this section will focus primarily on federal courts holdings on this topic. The general rule in federal courts is that communications between corporate counsel and a former employee will be subject to the attorney-client privilege if they relate to knowledge or information the former employee obtained during the time of employment and that is within the scope of his or her employment.

"[I]f the communication sought to be elicited relates to [the former employee's] knowledge during her employment with [defendant], or if it concerns conversations with corporate counsel that occurred during her employment, the communication is privileged; if not, the attorney-client privilege does not apply."

1. Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 40–1 (Tex. 1989).
2. Id.
4. See id. at 394.
5. Id. at 403 (Burger, J., concurring).
6. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (2000) ("The privilege for organizational clients can be asserted and waived only by a responsible person acting for the organization for this purpose.").
8. Id.
communications involve some matters that occurred during employment and some matters that occurred after employment, the attorney-client privilege likely will not extend to any of the communications.26

In deciding to extend the attorney-client privilege to communications with former employees, the Fourth Circuit reasoned that "the attorney-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."27 The court pointed out that the privilege exists to protect not only the giving of professional advice by the attorney but also to protect "the giving of information to the lawyer to enable him to give sound and informed advice."28

However, one should be aware not all courts uniformly agree on the subject. One court has held that a company can assert privilege over communications between a former employee and corporate counsel that occurred during the term of employment but communications occurring after the term of employment "which bear on or otherwise potentially affect the witness' testimony" would not be privileged.29 Another court completely declined to extend the attorney-client privilege to former employees.30 Another court interpreted Upjohn strictly and ruled that a conversation about the facts of the dispute prior to a former employee's deposition was not protected.31

In Nakajima v. General Motors Corp., the plaintiffs moved to compel testimony from a former employee of the defendant regarding the substance of conversations that took place at a 1990 meeting between defendant's legal counsel and the former employee.32 The defendant objected on the grounds that the conversations were protected by the attorney-client privilege, while plaintiffs contended the privilege was waived by the former employee's presence at the meeting.

The Nakajima court determined that while some of the communications at the meeting may have included matters within the scope of the former employee's corporate duties when he was employed by defendant (specifically, knowledge about the prior incident), the meeting also included discussions about a specific incident that occurred after the former employee's employment, which the former employee had been hired to investigate by a different party. Thus, the investigation of the post-employment incident was not done within the scope of employment for the defendant. Additionally, the defendant failed to allege that the former employee was aware he was being questioned at the meeting in order for the defendant to obtain legal advice or that the communications were considered confidential when made. Therefore, the Nakajima court reasoned the attorney-client privilege did not protect communications made at the meeting.33

The Fourth Circuit's opinion in In re Allen is also instructive.34 In re Allen involved a dispute between a public advocacy organization and the West Virginia Attorney General. Apparently, the advocacy group was not a domestic West Virginia organization and had been critical of the attorney general. The attorney general allegedly retaliated by seeking to prevent the group from domesticating in West Virginia. The advocacy group discovered the retaliation through a leaked memo. In response, the attorney general hired outside counsel to investigate the leak.

Outside counsel conducted an investigation, including interviews of current and former employees. The advocacy group moved the court to require outside counsel to disclose its interview notes and other related documents relating to the former employee. The Fourth Circuit relied on four specific factors that it held supported the application of the privilege:

1. the former employee had been employed in the attorney general's office during the period relevant to [outside counsel's investigation];
2. the former employee possessed knowledge relevant to outside counsel's investigation;
3. outside counsel interviewed the former employee at the direction of her client;

31. Id. at 104.
32. In re Allen, 106 F.3d 582, 606 (4th Cir. 1997).
4. The purpose of the interview was to enable outside counsel to provide legal advice to her client.  

Thus, corporate counsel should exercise caution, and think through the issues in the context of the factors described above before interviewing former employees, weighing the importance of the information to be gained from the employee with the risk of the communications becoming discoverable. Further, counsel should carefully consider the style of meeting, who will be present, craft questions with limited scope, and control the discussion so that matters that do not relate to the former employee’s knowledge gained within the scope of employment are not discussed.

In addition, counsel should do what it can to ensure no interruption in the attorney-client relationship with the former employee. For example, ensuring that a non-disclosure agreement is in place could be important prior to or at termination, as could execution of a consulting agreement by the company and former employee at the termination of the employment. Last, if the employee is leaving as a result of a business unit sale or the like, that transaction should include a secondment agreement between purchaser and seller, whereby the former employee is “seconded” back to the former employee for purposes of the representation. The employee should execute such an agreement, in order to acknowledge intent and understanding regarding the relationship.

Finally, prior to conducting any interviews with a former employee, counsel should provide an “Upjohn Warning” to the interviewee. The White Collar Crime Committee of the American Bar Association’s Criminal Justice Section has recommended best practices for both the procedure and the content of Upjohn warnings, including a complete sample warning. The suggested Upjohn warning is:

1. I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.

2. I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.

3. Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussions to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

4. In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside the company. You may discuss the facts of what happened but you may not discuss this discussion.

5. Do you have any questions?

6. Are you willing to proceed?

B. Opposing Counsel Restrictions on Contact with a Former Employee

The ABA Model Code of Professional Responsibility rule on contacting former employees states:

During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
The question, then, is how does counsel navigate an approach to a former employee of an opposing party, if at all. The United States District Court for Massachusetts opinion in Amarin Plastics, Inc. v. Maryland Cup Corp. is informative. In Amarin, Maryland Cup moved for a protective order to prevent Amarin's counsel from using information that counsel had obtained from a senior Maryland Cup officer, during ex parte interviews. Maryland Cup alleged two bases for its request. The first basis was that opposing counsel violated DR 7-104, and the second was that the allegedly impermissible contacts violated Maryland Cup's attorney-client privilege with the witness.

With regard to the first basis, the court relied on the comment to Rule 4.2 of the ABA Rules of Professional Responsibility, noting that Rule 4.2 and DR 7-104 were essentially indistinguishable, which prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The court noted that the movant, Maryland Cup, had failed to carry its burden of demonstrating that any act or omission of the witness could be imputed to the company. The court distinguished the facts before it from two other cases, where violations were found. In Sperber v. Washington Heights-West Harlem-Inwood Mental Health Council, a Title VII case, plaintiff's attorney engaged in ex parte interviews with former managers who had both been directly involved with defendant's alleged discriminatory discharge of plaintiff. In American Protection Insurance Co. v. MGM Grand Hotel—Las Vegas, Inc., opposing counsel contacted opposing party's vice president. The court noted that even if that officer had been a former employee, DR 7-104 would still have applied because of the manner and scope of that vice president's employment, and that the vice president signed a consulting agreement, to assist with the litigation, with his employer at the time of termination.

While the Amarin court denied the Motion for Protective Order, it did note that it would reconsider the motion "[i]f the communications between Shapiro and Maryland Cup's attorneys revealed facts which Maryland Cup's attorneys disclosed for the purpose of securing legal assistance, or if these communications disclosed legal opinions, impressions or strategies formulated by Maryland Cup's attorneys."  

C. Former Employees as Consultants

Some federal courts have extended the attorney-client privilege to non-employees who serve in an advisory role to the client. One court has held that the attorney-client privilege protects communications between the company's counsel and former employees if the former employee remained a trusted advisor even after he was no longer an employee of the company. However, the court declined to extend the privilege in that case because the former employee had already obtained immunity from the government to testify adverse to the company and had hired her own counsel in regard to the matter. The court reasoned that the company had sufficient notice to know their interests were not aligned and any conversations would not be intended to be confidential. Another case extended the privilege to a former company president who played a "significant role" as a "trusted advisor" after

40. Id. at 40–41.
41. Id. at 40 (emphasis added).
42. Id.
43. Id. (citing Sperber v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., No. 82 Civ 7428, slip op. at 4–8 (S.D.N.Y. Nov. 21, 1983) (vacated and withdrawn)).
44. Id. (citing Am. Protection Ins. Co. v. MGM Grand Hotel—Las Vegas, Inc., Nos. 83–2674, 83–2728 (9th Cir. Dec. 3, 1984) (withdrawn)).
45. Id. at 41.
46. Texas state law has not broached the topic of former employees as advisors. However, Texas courts have extended the attorney-client privilege to consultants brought in to assist with litigation in very limited circumstances. See, e.g., Sims v. Kaneb Servs., Inc., No. B14–87–00608–CV, 1988 WL 62294 (Tex. App.—Houston [14th Dist.] June 16, 1988, no writ); Parker v. Camahan, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, no writ). The limited application by Texas courts indicates that state law would align with federal law, which construes the privilege to consultants very strictly. See, e.g., Grand Jury Proceedings under Seal v. United States, 947 F.2d 1188, 1191 (4th Cir. 1991).
47. See United States v. King, 536 F. Supp. 253, 260 n.10 (C.D. Cal. 1982) (disapproved of on other grounds by United States v. Zolin, 842 F.2d 1135 (9th Cir. 1988)).
48. Id. at 260.
49. Id.
his employment with the company ended.\textsuperscript{50}

Thus, if a corporation has a pivotal employee leave the company during a project, it may want to consider offering to enter into an agreement with the former employee in which the former employee agrees to act as a consultant or advisor for the remainder of the project. However, be aware that attempts to bring in a former employee as a litigation consultant or advisor after the potential of litigation has already arisen will likely not protect communications made prior to the agreement.\textsuperscript{51}

D. Former Employees and the Work-Product Privilege

Finally, if a corporation finds itself in a dilemma because its counsel has had communications with a former employee that will likely not be protected by the attorney-client privilege, counsel may be able to assert the work-product privilege. One court held that an interview of a former employee was not protected by the attorney-client privilege but upheld the assertion of the work-product privilege in order to protect information regarding the type of questions asked by corporate counsel, facts to which counsel appeared to attach significance, or the "attorney's mental impressions, theories, conclusions, or opinions concerning the case."\textsuperscript{52}

Thus, the opposing party could ask questions about the former employee's knowledge of the facts of the dispute or the answers the former employee gave to corporate counsel but was not able to ask questions that were likely to elicit corporate counsel's opinions, thoughts, or impressions of the case.\textsuperscript{53}

A final example of the breadth of the work product privilege relates to deposition preparation of a witness by counsel. If an attorney-client relationship exists between counsel and a witness, the witness need not disclose the identity of documents shown to her during deposition preparation, because such a disclosure of documents selected by counsel for review could reveal counsel's thoughts, opinions, and preparation for the matter.\textsuperscript{54}

III. Insurers

A. Federal Attorney-Client Privilege

Federal district courts in Texas have found that the attorney-client privilege extends to communications between an insurer and its insured.\textsuperscript{55} This extension of the privilege is premised on the understanding that such communications are shared with counsel for the purposes of defending the legal interest of the insured.\textsuperscript{56}

In Metroflight, Inc. v. Argonaut Insurance Co., the court opined as follows:

"Liability insurance policies, like the one at hand, commonly obligate the insurer to defend actions against the insured within the policy coverage. Pursuant to that obligation the insurer ordinarily investigates the facts underlying any possible claim against the insured. The investigation file often includes statements from the insured concerning the facts of the claim. This court is of the opinion that Texas law recognizes a privilege for such communications when the court finds that communications were intended for the assistance of an attorney in the defense of a possible claim against the insured. A finding of such intent is a necessary limitation upon the privilege since the Texas courts have recognized that privileges are to be construed narrowly.\textsuperscript{57}

Thus, a company can share information with its insurer as long as the company makes clear the information is being shared in anticipation of litigation and all of the information being shared is relevant to the potential dispute.

B. Texas Attorney-Client Privilege

Under Texas Rule of Evidence 503(a)(2), if a person is authorized by the client to obtain legal services or act on
IV. Conclusion

In summary, the attorney-client and work-product privileges are potentially important to our clients in a myriad of ways. Forethought is critical in dealing with issues regarding these privileges before any activities occur that could jeopardize them. For counsel representing plaintiffs and defendants, thinking through who they speak with, when they speak with them, what they discuss, what documents they send to insurers, and who is present are just some of the questions that should be considered. Last, counsel should be aware when critical witnesses leave, either by termination or transaction, and should carefully document the ongoing relationship before any gaps in the referenced privileges occur.

defense of the insured.”); Emp’rs Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973).