DISCOVERY ISSUES IN OIL & GAS LITIGATION

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State Bar of Texas
OIL & GAS DISPUTES COURSE
January 8-9, 2015
Houston

CHAPTER 15

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Jordan K. Mullins[1]

I. INTRODUCTION

Today, lawyers find themselves traversing a field without a sufficient footpath showing how lawyers before handled certain discovery issues. Certainly, in some rare instances, discovery issues are the subject matter of detailed analysis and preserved in case law (often unpublished), but on a day-to-day basis, the discovery issues an oil and gas lawyer is faced with remain with the inherent practice of litigators before him.

The paper provides an overview of basic discovery issues relevant to oil and gas litigation and offers suggestions which may help the oil and gas litigator be more effective for his or her clients.

II. THE LITIGATION HOLD LETTER V. THE PRESERVATION LETTER

In practice, there really isn't a distinction between a "litigation hold letter" and a "preservation letter" — both notify parties of their duty to avoid destruction/loss of information and documents that may be relevant to an ongoing or anticipated lawsuit. But for me, and for purposes of this paper, I like to view a litigation hold letter as one sent by an attorney to his own client(s) or sent by the client itself and the preservation letter as one sent by an attorney to the opposition.

Thus, a litigation hold letter is a notice sent by an attorney to his own client(s) or a notice generated by the client itself, notifying all appropriate persons or departments of a lawsuit (or anticipated lawsuit) and the duty to preserve relevant information, particularly as it relates to the preservation of electronically stored information ("ESI"). The preservation letter, on the other hand, is normally sent to opponents, notifying them to preserve evidence to ensure it doesn't disappear. The preservation letter is important to send as it can serve as the basis for a spoliation claim.

[1] This paper and presentation represents the individual opinion of the author and should not be construed to reflect the view of his respective firm. This paper touches on many issues, necessarily omitting a multitude of nuances, qualifications, and exceptions. Additionally, except where specified, the legal concepts herein are discussed generally, without regard to differences across jurisdictions, and case holdings are described without reference to specific factual circumstances, sometimes material or dispositive, discussed in the course of each opinion.

III. THE LITIGATION HOLD LETTER

A litigation hold is a written letter to a client, notifying them of the duty to preserve certain information and tangible things (no matter the media or method of storage) as a result of a lawsuit or anticipated lawsuit. The letter itself, while typically addressed to the main client contact or in-house counsel, is the tool utilized for communicating to all persons and departments within the client organization the importance of preserving certain information and the types of information to be preserved.

A. What's the Need?

Failure to preserve evidence when the duty to do so arises may lead to a claim for spoliation. In spoliation cases, the party advancing the spoliation claim has the burden of proving that the spoliating party was under a duty to preserve evidence. *Trevino v. Ortega*, 969 S.W.2d 950, 956 (Tex. 1998). Many of these cases hinge on whether the spoliating party anticipated litigation and, therefore, was under the duty to preserve evidence. If found to have spoliated evidence, the spoliating party is usually sanctioned, often times quite severely. *Id.*

A client's duty to preserve can be burdensome and, at first, may appear to only help the opponent pursue claims. However, the litigation hold is also important for preserving evidence favorable to disproving any claims or establishing defenses. One would hate, for example, in defending a land contamination claim, to have a video tape deleted which documents a landowner purposely contaminating his land as a result of a policy of reusing archived storage tapes from well pad sites. The litigation hold, if timely sent, will supersede such previous reuse/destruction policies and preserve the evidence in the client's favor.

While the breadth of a party's duty to preserve can be immense, it is critical the duty is taken and handled seriously. Court-imposed sanctions for a failure to preserve ESI or other tangible documents, even as the result of an automated or regular deletion protocol, can be severe.

B. When the Duty to Preserve Evidence is "Triggered"

While a litigation hold letter should be sent to your client once a lawsuit commences, the duty to preserve information may also exist when a lawsuit is anticipated. Generally, a party has a duty to preserve evidence when the party knows or has reason to know that evidence may be relevant to ongoing or anticipated litigation. *Clark v. Randalls Food*, 317 S.W.3d 351, 356-57 (Tex.App.—2010, pet. denied). The duty to preserve evidence may arise before (and does arise without) the sending of a litigation hold letter to your client. *Nat'l Tank Co. v. Brotherton*, 851

S.W.2d 193, 204 (Tex. 1993). Thus, any party anticipating a claim or lawsuit must take affirmative steps in ceasing the destruction of potential evidence.

Some courts describe the "anticipation of litigation" standard as more of a reasonably foreseeable view—that is, they impose a duty to preserve evidence when litigation is reasonably foreseeable. *See Blinzler v. Marriott Int'l, Inc*., 81 F.3d 1148, 1159 (1st Cir. 1996) (stating defendant was aware of circumstances likely to give rise to future litigation and a reasonable fact finder could find that defendant was on notice evidence was relevant to likely litigation); *Rice v. United States*, 917 F.Supp 17, 20 (D.D.C. 1996) (holding defendant on notice of potential litigation because it was aware of circumstances likely to give rise to litigation); *White v. Office of the Public Defender*, 170 F.R.D. 138, 148 (D.Md. 1997) (finding parties to have knowledge that documents are relevant to litigation when reasonably foreseeable a lawsuit will ensue); *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y. 1996) (finding sanctions to be appropriate where defendant "knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation.").

How does one know when they should "anticipate litigation" and, therefore, consider themselves bound by a duty to preserve information? Or, on the other hand, how does one asserting a spoliation claim prove that the spoliating party anticipated litigation? Must they show a subjective belief? Courts have answered this question and held that it's not the alleged spoliating party's subjective belief that controls, rather, a party will be found to be on notice of potential litigation when, "after viewing the totality of the circumstances, the party either actually anticipated litigation or a reasonable person in the party's position would have anticipated litigation." *Trevino*, 969 S.W.2d at 956. Thus, there may be times when certain independent facts might put a party on notice of potential litigation and, therefore, be deemed that they should have anticipated litigation. Whether a party actually did or reasonably should have anticipated litigation is a fact issue for the court to decide by viewing the totality of the circumstances.

C. Events that should be Automatic Triggers

Figuring out when a lawsuit should be anticipated and, therefore, a litigation hold letter should be generated can be difficult to determine. However, in the oil and gas context, some events that should trigger the litigation hold process are:

- service of pre-suit discovery;
- request for pre-suit mediation;
- pre-suit notice to inspect land;
- repudiation of an oil and gas lease;
- receipt of a demand letter;
- receipt of a preservation letter;
- retention of outside counsel or experts in anticipation of suit;
- knowledge of litigation in an industry in which your client is involved and, therefore, may be susceptible to being sued;
- knowledge of well control incidents (*i.e*., well blow out);
- correspondence from a landowner requesting an explanation for how royalty is being calculated;
- correspondence from a joint-interest owner notifying you of default of a JOA and opportunity to cure;
- partial settlement of a claim;
- informal settlement negotiations, discussions, demands, or mediation; or
- deposition testimony from other lawsuits.

While this list is not exclusive, it is illustrative of some scenarios which would likely trigger the litigation hold process. If you're an attorney who regularly represents oil and gas clients, it's smart to educate the client and its employees about the various triggering events and their significance in triggering a need to preserve information.

D. Duty Triggered, So Preserve What?

When the duty to preserve evidence has arisen, what evidence must a party actually preserve? A party on notice of anticipated or pending litigation only has an obligation to preserve evidence relevant to the litigation. *Trevino*, 969 S.W.2d at 957. A party need not take extraordinary efforts to preserve evidence, a party should only exercise reasonable care in preserving the evidence. *Id.*

The duty does not require a person to keep or retain every document in its possession, only to preserve "what it knows or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, or is the subject of a pending discovery sanction." *Id.* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. EVID. 401. If there is a logical connection directly or by inference between evidence and a fact to be proved, the evidence is relevant. *See Serv. Lloyds Ins. Co. v. Martin*, 855 S.W.2d 816, 822 (Tex.App.—Dallas 1993, no writ).

E. What Goes Into the Litigation Hold Letter?

Once a party is on notice, the duty to preserve evidence is triggered. Failure to preserve any evidence after this point likely triggers a claim for spoliation of evidence.

Preservation requires identifying, locating, and preserving relevant ESI and other tangible documents. To be effective, a litigation hold letter should identify:

- the lawsuit (if filed);
- your name and contact information;
- the facts of the lawsuit or anticipated lawsuit;
- types of documents/records to be preserved;
- individuals/departments to which the litigation hold applies;
- date range of ESI/documents that must be preserved;
- individuals/departments who may possess or control the types of documents/information to be preserved;
- possible locations where the documents/information to be preserved could be stored;
- instructions not to create any documents related to the lawsuit (or potential lawsuit) as a result of the litigation hold;
- a warning, set out conspicuously, explaining the importance of the litigation hold and preserving information;
- a warning to suspend any current retention or destruction of information/documents policies;
- a warning not to alter any records; and
- a warning that failure to adhere to the instruction of the litigation hold could result in sanctions.

See Appendix A.

F. Preserving ESI

We live in a world dominated by electronic information. Every day you send, receive, and even delete e-mails and text messages, you make phone calls, or you may even store documents or photos in "the cloud." Electronic information is everywhere, and it's evidence in almost every lawsuit. Lawyers, clients, and in-house counsel are often clueless when it comes to ESI or electronically stored records management systems.

If your client is a major oil and gas operator, odds are they have massive amounts of ESI. Many major operators have even begun scanning and electronically storing old well files, division order files, and landowner correspondence files, sending the original files to storage or to be destroyed. Figuring out what ESI is out there, how to filter through it, and how it all may apply to the duty to preserve and produce information is never a small task.

The litigation hold letter to your client should include the client's Information Technology department and staff and any third-party vendors utilized for storing ESI. Oftentimes, major oil and gas operators will utilize outside vendors for scanning tangible documents and storing it into a database which makes the documents and information within them searchable and reviewable. ESI preservation obligations may also extend to electronic storage devices such as iPhones or other PDAs, or even to copy machines which store information in their memory. The litigation hold should specifically address ESI and be clear that ESI may not be deleted or altered in any way.

It's important that the litigation hold letter be over inclusive when it comes to identifying and locating ESI. Courts tend to ignore a party's claim of ignorance, no matter the party's size or level of sophistication, when it comes to the duty to preserve.

G. Summary Points About Litigation Holds

1. Timely Issue the Litigation Hold Letter

As discussed, a duty to issue a litigation hold may arise prior to litigation. Courts have established that the duty to preserve evidence arises once a party "is on notice of potential litigation." *Trevino*, 969 S.W.2d at 955.

2. Identify Key Players to the Litigation

It's important to gather and preserve potential relevant evidence from all key employees and departments. If representing an oil and gas company, it's likely relevant information, especially tangible documents, may be located in different geographic locations. For example, in defending a well blow out matter, inspection reports, emails, invoices for third party services, etc., could be located at the company's headquarters while others may be physically located at the company's field office.

Also, the duty may extend to former employees. If relevant information remains in a former employee's possession, custody, or control, one court has found a duty to preserve that evidence. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Securities, LLC*, 685 F.Supp.2d 456 (S.D.N.Y. 2010, *rev'd on other grounds*)

3. Appoint Someone to Supervise Collection Efforts

Having employees perform their own searches and determine on their own what is relevant is a bad practice. Supervision by legal counsel should be required to ensure thorough collection of potentially relevant information.

4. Suspend Routine Retention/Destruction Practices

Most companies have policies in place to destroy records after a certain amount of time has passed. It is

imperative that routine practices for the maintenance of documents be suspended once the duty to preserve has been triggered. Some courts may consider the automatic deletion of ESI or destruction of tangible documents as spoliation, despite an assertion of ignorance or mistake.

IV. THE PRESERVATION LETTER

The preservation letter, in my view, is a letter sent by an attorney, typically representing a plaintiff, notifying a party or potential party not to destroy relevant evidence as part of a pending or likely lawsuit. The preservation letter may be the catalyst that triggers the litigation hold letter, requiring everyone from the office supply room to the management committee to take action.

A. The Purpose of the Preservation Letter

As discussed above, a duty to preserve evidence is triggered at a certain point—when a party knows or has reason to know that evidence may be relevant to ongoing or anticipated litigation. Failure to preserve evidence after the duty has arisen may lead to a claim of spoliation of evidence. Determining when the duty to preserve arises is a fact question.

While the duty to preserve may arise before a preservation letter is received, the essential purpose is to put a receiving party on notice that the duty exists if it hadn't earlier. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993) ("[C]ommon sense dictates that a party may reasonably anticipate suit being filed. . .[even] before the plaintiff manifests an intent to sue."). Once the preservation letter is received, it's unlikely a fact finder would find that the duty to preserve evidence had not been triggered. Thus, the destruction of any evidence after receipt of a preservation letter is now squarely within the target of a spoliation claim.

Another leading purpose of a preservation letter is to educate the recipient of the many types of ESI and the importance of maintaining such information. Spoliation claims are often defended with the claim of, "but, Your Honor, I didn't know I needed to save that information." Thus, use the preservation letter to educate the recipient of the types of media storage important to preserve. For example, clearly identify that voicemails or tape recordings need to be retained if relevant to your claim(s). If you are clear and concise in your letter, you have a better chance of defeating the recipient's claim of ignorance.

B. The Problem with Preservation Letters

A preservation letter must be reasonable on its face. It's unlikely that a court would sanction a party for not complying with a preservation letter that is broadly drafted, requesting preservation of a large variety of potential evidence. But, because preservation letters are often sent at the beginning of a lawsuit or even at the very beginning of investigating potential claims, it follows that they're often sent with little-to-no knowledge of the recipient's information systems. Blanket demands to preserve "any and all electronic communications" are probably not sufficiently tailored to subject the receiving party to sanctions if they were to fail to tape some phone calls, for example.

C. Preservation Letter Essentials

1. Be Specific

It's important to be specific in your preservation letter. If you're asking your opponent not to destroy emails or text messages, then specifically make these requests in your letter. Requests prefaced with "any and all" are usually presumed to be overbroad unless you can convince the court otherwise. *In re Patel*, 218 S.W.3d 911, 915 (Tex.App.—Corpus Christi, 2007, no pet.)

Figure out what information bears on the lawsuit. If your preservation letter is full of boilerplate nonsense, a court is unlikely to enforce it and may even consider it an abuse of discovery. Specifically tailor your requests to preserve information. Who are the key players? What are the relevant time intervals? What activities are relevant to the claim?

2. Suspend Routine Retention/Destruction Practices

It's important to notify the recipient of your preservation letter of their retention obligations and point out that they must suspend any automatic/routine destruction of evidence. For example, some companies may have systems in place to delete emails after six months or shred documents after five years. The preservation letter should call for a suspension of such practices. This is particularly important for ESI which can take up massive amounts of storage data and is often subject to routine electronic data shredding.

3. Don't Forget About the Paper!

While a massive amount of information is now stored electronically, some information may exist in paper form only. Don't be so focused on preserving and retaining electronic information that you forget to notify the recipient of your preservation letter to retain any relevant paper documents. For example, in a well blow out case, you would want your opponent to retain documents evidencing any well completion plans, casing plans, or invoices for materials ordered/used in the drilling and completion of the well.

See Appendix B.

D. Preserving Metadata

Metadata is data about data. As clear as mud, right? Metadata is the properties of the digital source. In a Microsoft Word document, for example, the metadata is the document's properties such as the create date, file type, file locations, last date modified, total size of document, tracked changes, and revision histories. As opposed to the text of the document you can see on your computer screen, this information cannot be seen. It stays with the digital document and is used by your computer and other software as a reference guide.

Some metadata, such as revision history and tracked changes, is stored with the document and moves with it when it is copied. However, some of the file's metadata resides on the computer system where the document is stored and normally does not attach to the electronic document when it is copied. Examples of this are file creation date, file size, file name, and file location. So, when a file is burned to a CD for production purposes in a lawsuit, potentially relevant evidence may not be in that production.

1. Why Preserve Metadata?

Preserving metadata may be critical in some cases. An issue about when an electronic file was created or modified could be an issue in some matters, maybe even the critical issue. Thus, if you anticipate that metadata will be important, be sure to include a preservation instruction in your preservation letter. While your letter serves as the warning to the other side not to destroy the metadata, oftentimes, your letter also serves as the basis for educating the other side about the existence of metadata. After all, there aren't many people aware of the concept of metadata. This is why it's important to clearly draft your preservation letter and define the types of metadata which must be preserved. A suggestion is to not only identify the types of metadata you deem relevant but to include information on where the metadata might be stored, how to find it, and how to best preserve it.

E. Other Considerations

1. Who Receives the Letter?

Absent an ongoing lawsuit, there's probably not an attorney to send the preservation letter to on behalf of your opponent. So, who should receive it? Typically, you will be in a situation where the preservation letter is sent to multiple individuals. Try to identify as many appropriate individuals as possible. A list of persons who are appropriate depends on the type of claims you will be asserting. A possible list of people to consider are:

- any individual the subject of your lawsuit;
- any potential witnesses;
- third parties who may have performed work relevant to your lawsuit;
- employers;
- accountants;
- bankers;
- guardians;
- department heads within a corporation (*e.g.*, Head of IT); and,
- officers of an organization

The goal is to preserve as much physical and electronic information as you can. Be sure to send the letter in a way where you can confirm its receipt. Sending the preservation letter via certified mail is probably the most common method for achieving this.

2. When to Send?

Most often, preservation letters should be sent when you are aware of an existing or potential claim and have identified the potential entities or individuals who may possess information relevant to your claim(s). However, situations may arise where you want to delay sending a preservation letter. For example, information may exist which is unfavorable to your position and an entity or individual's routine destruction of information could be helpful to your client. I am unaware of any obligation that a party take steps to preserve relevant information unfavorable to his case.

F. Summary

It's guaranteed your name is being Googled and your website biography reviewed by anyone that receives a preservation letter from you which is why it's important that you give your best effort. The preservation letter it is the "shot across the bow," warning your opponent that an actionable claim may exist against them and not to destroy relevant evidence. It is also the first impression your opponent forms about you and your legal savvy. The letter will be a vital piece of evidence in lodging any spoliation claim, so make sure it's given your best attention to detail.

V. DISCOVERY FROM NONPARTIES

A nonparty's willingness to participate is a lawsuit is typically low. In some cases, a nonparty's electronic records, like emails and text messages, may be critical to your case. This section will explore some of the issues related to securing documents and eliciting testimony from unwilling nonparties.

A. Who Pays for Nonparty Production?

There is a general presumption that a responding party must bear the expense of complying with discovery requests. *Oppenheimer Fund, Inc. v.*

Sanders, 437 U.S. 340, 358 (1978). Under the rules, however, the presumption does not apply when the responding party is a nonparty. TEX. R. CIV. P. 176.7.

In Texas, courts may exercise discretion in limiting the scope of nonparty discovery. TEX. R. CIV. P. 192.4 (up to discretion of courts to limit discovery). And, in Texas, the party requiring a nonparty to produce documents must reimburse the nonparty's reasonable costs of production. TEX. R. CIV. P. 205.3; *Compare W. Benefit Solutions, LLC v. Gustin*, 1:11-CV-00099-EJL-DWD, 2012 WL 4417190 (D. Idaho Sept. 24, 2012) (granting nonparty's request for reimbursement of reasonable cost of production) *with In re Law Firms of McCourts & McGrigor Donald*, M. 19-96 (JSM), 2001 WL 345233 (S.D.N.Y. Apr. 9, 2001) and selecting documents to be produced). Additionally, any party obtaining production from a nonparty must make all the production available for inspection by any other party with reasonable notice and must furnish copies of the nonparty production to any party who requests at that party's expense. TEX. R. CIV. P. 205.3.

B. Nonparty Subpoena for Documents or Testimony

Different rules and procedures apply for securing documents and testimony from a nonparty witness. A subpoena is issued by the court clerk compelling a nonparty witness to appear for deposition, produce documents, or both. One must determine the venue and the location of the unwilling nonparty witness and/or the documents to know which rules/procedures must be followed.

1. Litigation in Texas State Court with Nonparty Texas Witness

A nonparty witness may not be required to appear or produce documents under subpoena in a county that is more than 150 miles from where the person resides or is served. TEX. R. CIV. P. 176.3. If you're requesting a nonparty to produce documents, a notice requesting issuance of the subpoena must be filed and served on the nonparty 10 days before the subpoena compelling production is served and the subpoena must be served a reasonable time before the requested document production. TEX. R. CIV. P. 199.2, 205.3. If one is only requesting a nonparty to appear for deposition, the notice of subpoena and the subpoena itself may be served simultaneously, a reasonable time before the deposition. TEX. R. CIV. P. 199.2. Note that the form of a subpoena may be found under Tex. R. Civ. P. 176.1.

All discovery requests, deposition notices, and subpoenas required to be served on nonparties must be filed. TEX. R. CIV. P. 191.4(b)(1). However, any responses and objections to the subpoena itself or discovery requests need not be filed by a nonparty. *Id*. Responses may only be filed when the party issuing the discovery seeks to compel production of documents from the nonparty or seeks to compel the nonparty witness to sit for a deposition. *Id*.

A subpoena can be enforced by the issuing court or a district court in the county in which the subpoena was served. TEX. R. CIV. P. 176.8. The remedy for enforcement is to hold the nonparty resisting production or appearance in contempt. *See* TEX. R. CIV. P. 215.2 (authorizing contempt as only sanction against nonparty); *see also In re Suarez and Texas Dep't of Family and Protective Serv's*., 261 S.W.3d 880, 883 (Tex.App.—Dallas 2008, orig. proceeding) (stating rule provides for subpoena enforcement through contempt, not sanctions); *Jefa Co., Inc. v. Mustang Tractor and Equip. Co*., 868 S.W.2d 905, 908 (Tex.App.—Houston [14th Dist] 1994, writ denied) (nonparty's noncompliance with discovery rendered nonparty in contempt of court). When found guilty of contempt, a court is limited to a monetary fine not to exceed $500, or incarceration. TEX. GOV'T CODE ANN. § 21.002(b) (West); *see also City of Houston v. Chambers*, 899 S.W.2d 306 (Tex.App.—Houston [14th Dist.] 1995, no writ) (court could not require nonparty City of Houston to pay court reporter's fees as sanctions); *Pope v. Davidson*, 849 S.W.2d 916 (Tex.App.—Houston [14th Dist.] 1993, no writ) (court could not require nonparty to perform community service).

2. Litigation in Texas State Court with Out-of-State Nonparty Witness

Texas courts typically lack jurisdiction over an out-of-state witnesses. In some instances, an exception may apply, like when the witness is employed in Texas or regularly transacts business in Texas. *See*, *e.g.*, *In re Bannum, Inc.*, No. 03-09-00512-CV, 2009 WL 8599250 (Tex.App.—Austin Oct. 30, 2009, no pet.) (mem. op.) (nonparty Florida resident could not be compelled to appear in Texas for deposition because nonparty resided in Florida and did not routinely conduct business in Texas); *In re Wells Fargo Bank*, No. 03-10-00469-CV, 2010 WL 3271159 (Tex.App.—Austin Aug. 16, 2010, no pet) (mem. op.) (nonparty's in-house attorney unable to be deposed in Texas because attorney worked and lived in Iowa, was not a party to the case, had not been designated as corporate representative of nonparty, and was not served with subpoena in Texas).

If a Texas court doesn't have jurisdiction over a nonparty out-of-state witness, then the laws and procedure of the state where the nonparty witness is located will govern. *In re Prince*, No. 14-06-00895, 2006 WL 3589484 (Tex.App.—Houston [14th Dist.] Dec. 12, 2006, no pet.) (mem. op.).

3. Unwilling Nonparty Texas Resident in Sister Court Proceedings.

Texas rules govern discovery requests from another state as though the out-of-state proceeding were pending in Texas. *See* id. (Texas court without authority to order nonparty witness to appear and produce documents in California for California divorce proceeding). The nonparty Texas witness may be compelled to testify in the same manner and process used for taking testimony before a Texas proceeding. TEX. R. CIV. P. 201.2; TEX. CIV. PRAC. & REM. CODE § 20.002.

Strategically, it can be helpful to secure an order from the sister court where the matter is pending. *See Union Carbide Corp.*, 349 S.W.3d 137 (Tex.App.—Dallas 2011, no pet) (issuance of letters rogatory from Mississippi state court to Dallas County District Court requesting Dallas court's assistance in issuing subpoena duces tecum on expert witness for production of information for use in Mississippi proceeding).

VI. THE OUTSIDE COUNSEL/IN-HOUSE COUNSEL RELATIONSHIP: ASSERTING THE ATTORNEY-CLIENT PRIVILEGE

The oldest and most well-established protection of confidentiality, the attorney-client privilege is a rule of evidence that protects confidential communications between a client and his attorney from disclosure. *Upjohn v. United States*, 449 U.S. 383, 389 (1981). A creation of common law, the privilege is now codified in Tex. R. Evid. 503(b).

The attorney-client privilege makes effective legal representation possible by allowing open communication and full disclosure. Though the protection the privilege offers is strong, how it actually applies to the representation of large institutional oil and gas clients is not understood very well. What is the scope? What is protected? How is it waived? This section will explore those issues.

A. What is Protected?

1. A Confidential Communication Between Attorney and Client

The privilege applies to a communication between privileged persons in confidence for the purpose of obtaining or providing legal assistance to the client. A "communication" includes verbal statements, documents, or electronic files along with video and audio recordings. The privilege applies to the complete communication and includes any legal advice, opinion, mental analysis, and specific facts on which they are based. *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex.App.—Houston [14th Dist.] 1993, orig. proceeding) (attorney-client privilege covers whole documents, not just parts relating to legal advice).

Not all communications made between a client and an attorney are privileged, however. A communication is not privileged if not made in confidence. TEX. R. EVID. 503(b)(1). Thus, privilege does not attach to communications made knowingly before non-privileged persons. *United States v. Evans*, 113 F.3d 1457 (7th Cir. 1997). Communicators must intend for their communication to remain undisclosed to third parties and act reasonably to achieve nondisclosure. *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 226 (Tex. 1992). Generally, the identity of the client, the fact that a consultation occurred between an attorney and the client, and fee agreements are not protected by the attorney-client privilege. *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160 (10th Cir. 2007); *United States v. Bauer*, 132 F.3d 504 (9th Cir. 1997). Likewise, a communication made to an attorney after a person was told that no attorney-client relationship existed is not a privileged communication. *McGrede v. Rembert Nat'l Bank*, 147 S.W.2d 580 (Tex.App.—Texarkana 1941, writ dism'd). The privilege also only protects the content of the communication rather than the underlying information disclosed. *Upjohn*, 449 U.S. at 395-96. A client may not protect a preexisting document from disclosure by merely sending it to his or her attorney. *U.S. v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997).

2. For Legal Assistance

The confidential communication must be made for the rendition of professional legal services. TEX. R. EVID. 503(b)(1). If it is not intended to be disclosed to third persons (excluding any representatives of the attorney or client), then the communication is confidential. TEX. R. EVID. 503(a)(5); *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996) (trustee had expectation that communication to attorney would be kept confidential).

B. Who May Assert the Privilege?

The attorney-client privilege must be affirmatively asserted to receive the advantage the privilege provides. TEX. R. CIV. P. 193.3. This normally occurs by asserting the privilege in response to written discovery or when objecting to evidence at trial.

The privilege belongs to the client, not the attorney, but may be asserted on behalf of the client. *West v. Solito*, 563 S.W.2d 240, 244 (Tex. 1978). An attorney is presumed to have the authority to assert the privilege on his client's behalf. *Id.*; *cf. Cole v. Gabriel*, 822 S.W.2d 296 (Tex.App.—Fort Worth 1991, orig. proceeding) (attorney without authority to assert attorney-client privilege in his individual capacity).

C. Who is Protected?

Privileged persons protected from having their communications disclosed are the client, his or her lawyer, and any agents/representatives of either. Secretaries, paralegals, accounts, and investigators are included as representatives. *Bearden v. Boone*, 693 S.W.2d 25, 27-28 (Tex.App.—Amarillo 1985, orig. proceeding). Where the client is a corporate entity with an in-house legal department, application of the privilege is not as clear.

D. Application to Corporations

Corporate entities, like any individual, are entitled to assert the attorney-client privilege. *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963), cert. denied, 375 U.S. 929 (1963). Yet applying rules stated in terms of individual actors to the abstract corporate concept raises unique issues.

1. The Privilege Belongs to the Corporation, Not Officers or Employees

The attorney-client privilege belongs to the corporation and not any corporate officers, employees, or agents. A corporation may assert the attorney-client privilege over "any person, who, for the purpose of effectuating legal representation for the [corporation], makes or receives a confidential communication while acting in the scope of employment for the [corporation]." TEX. R. EVID. 503(a)(2). Known as the "subject matter" test, it applies to almost any employee or agent of the corporation who could initiate a communication for the purpose of making or receiving legal advice/services.

The corporation's attorney-client privilege applies not only to an employee's communication with in-house counsel but also to communications made to outside counsel. *See Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1326 (8th Cir. 1986). This brings up an interesting point about ownership of the privilege. The attorney speaking to the employee represents the corporation and not the employee. Thus, anything revealed by employees to in-house or outside counsel is only privileged on the corporation's behalf. The employee will not control whether the corporation waives or asserts the privilege. If you're an in-house or outside counsel soliciting information from an employee pursuant to a legal claim or in anticipation of a lawsuit, it's wise to warn the employee that you represent the corporation only and obtain their consent to solicit information.

Model *Upjohn* Warning

We represent the company alone. We do not have an attorney-client relationship with you.

This interview is part of an information-gathering effort. The information obtained in this interview is for the purpose of providing legal services to our client, the company. The interview is therefore protected by the attorney-client privilege.

The privilege is held by the company alone, and the company alone will decide whether to waive or assert this privilege. Accordingly, the company may choose to share information learned in this interview with other persons, the government, or in a court proceeding. This may be done without your consent or notice.

However, you must keep the matters discussed in this interview confidential. Please do not discuss these matters with anyone, including other employees. Doing so would destroy the privilege protection over this interview.

Please feel free to consult your own lawyer at any time. If you feel you should consult your own lawyer before participating in this interview, please inform us.

Please complete and sign the following statement:
I, _____ have read and understand the warning above.
Signed_____Date_____

It's important to also obtain the employee's consent in order to cure any potential conflicts. If you believe a conflict can't be cured, it's imperative to recommend to the employee that they engage separate counsel. In some instances, even if the employee is willing to waive a conflict, the conflict won't be cured without representation by separate counsel. *See United States v. Linton*, 502 F. Supp. 871 (D. Nev. 1980).

2. Individuals Acting on Behalf of the Corporation Must Assert the Privilege

Even though the privilege belongs to the corporation and information given by employees to in-house or outside counsel are only protected if the corporation asserts the privilege, then who asserts it on behalf of the corporation? Individuals acting on behalf of the corporation still must assert the privilege. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). Typically, it will be corporate officers, directors, and in-house/outside counsel that will assert the privilege on behalf of the corporation.

This reveals the double-edged sword—any individual that may assert the privilege may also waive it, whether purposefully or not. Generally, where a privileged communication is disclosed, it is waived. *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999). Where the privilege is waived with respect to a communication it may also be waived as to all other communications on the same subject. *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989). However, by taking certain precautions the risk of waiver can be minimized. When privileged communications are disclosed by an employee without authority, the corporation must take action to promptly assert the privilege or otherwise attempt to protect the communication or else it will be waived. *Bus. Integ. Svc's v. AT&T*, 251 F.R.D. 121, 125-27 (S.D.N.Y. 2008).

3. Inadvertent Disclosure

Where privileged information or documents have been inadvertently disclosed to an adversary, courts look to see whether the disclosure was sufficiently involuntary for the privilege to be retained. The party who inadvertently disclosed the privileged information bears the burden or establishing that, under the circumstances, the disclosure was involuntary and the privilege should be retained. *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 226 (Tex. 1992). "Disclosure is involuntary only if efforts reasonably calculated to prevent the disclosure were unavailing." *Id*. Texas courts consider several factors to determine whether the disclosing party met its burden of proving the disclosure was involuntary: a) delay in rectifying the error; b) precautionary measures taken to prevent the disclosure; c) extent of the inadvertent disclosure; and, 4) the scope of discovery.

Id.

A "clawback agreement" provides the best protection against inadvertent disclosure of privileged information. With such an agreement, opposing parties agree to return inadvertently produced privileged information once notified by the producing party of the mistaken disclosure. In addition to protecting against waiver, entering into a clawback agreement can facilitate prompt and economical discovery by reducing delay in receiving documents and reducing the cost and burden of document review.

One concern to be aware of is that the agreements only bind those who are a party to them, so complete reliance on them should be discouraged, especially in cases dealing with high volume productions where privilege review is essential. Third parties remain free to assert waiver of privilege if disclosure of protected information is received.

VII. CONCLUSION

As an oil and gas litigator, the discovery issues you may face don't differ all that much from any other civil litigator. We all deal with a duty to preserve evidence, obtaining discovery from nonparties, and making determinations about privilege. However, the above discussed topics may be more prevalent in the oil and gas context. I hope the topics presented in this paper provide a basic understanding of these issues and enable you to make better decisions on behalf of your clients.

APPENDICES

APPENDIX A

LAW OFFICES
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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

LITIGATION HOLD/PRESERVATION NOTICE

January 9, 2015

ABC Drilling Company
Attn: Mr. Joe Smith
1111 New Year Avenue
Houston, TX 77777

E-Mail at MrJoeSmith@abcdrilling.com

Re: Civil Action No. 1:15:CV001; *Doe v. ABC Drilling Co.*; in the United States District Court for the Western District of Texas, Austin Division

Dear Mr. Smith:

As you know, Ms. Doe has sued the ABC Drilling Company ("ABC") alleging claims of lease termination and underpayment of royalty. To confirm ABC's obligations to preserve relevant documents and other materials in connection with this litigation, we are providing you with this Litigation Hold/Preservation Notice ("Notice").

Please provide a copy of this Notice to any internal ABC employees who (1) may be a custodian of any documents identified in this Notice and/or (2) may have knowledge of relevant facts. Please also provide a copy of this letter to the appropriate ABC Information Systems personnel, managers and/or supervisors.

In summary, your responsibilities under this Notice are to (A) preserve information as described herein, (B) follow instructions to preserve email and non-email and suspend routine records retention practices, (C) cooperate with legal counsel, (D) refrain from creating new documents regarding this litigation, and (E) identify other relevant custodians.

I. What Is Covered by This Notice

Ms. Jane Doe ("Doe") has sued ABC alleging claims of lease termination and underpayment of royalty.

The term "Materials," as used in this Notice, means documents, electronically-stored information, and tangible things potentially relevant to the issues described in this Notice, including but not limited to documents, notes, calendar entries, memorandum, letters, written communications, email, writings, drawings, graphs, charts, photographs, sound recordings, images, databases, and other data stored in any medium, whether such Materials exist at your office or home, including any laptop(s), computer(s), network servers, or storage devise(s). ABC's obligation to preserve Materials is independent of whether other copies of such Materials exist elsewhere within ABC.

II. What We Are Asking You to Do

A. Preserve Relevant Information

Effective immediately and until further notice, regardless of any past or existing policies or procedures, please retain and do not delete or destroy Materials that are related to the following, if created or edited between August 16, 2011 and continuing until further notice:

1. Any Materials that refer and/or relate to Doe;

2. Doe's well file;

3. Any Materials regarding payment of royalty to Doe;

4. Any Materials on how production from Doe's leases was marketed, gathered, sold, processed, or transported;

5. Any communications with Doe.

B. How to Preserve

To preserve email and non-email electronic documents on your computer(s) that may be relevant to the issues described above, please do not delete or modify such Materials.

Once you have preserved Materials within your possession or control, please do not take any other action, such as forwarding the Materials, until further notice. If necessary, you may receive additional information about any additional actions to take with regard to the preserved Materials.

THIS PRESERVATION NOTICE SUSPEND'S ABC's NORMAL RECORDS RETENTION PRACTICES FOR MATERIALS UNTIL FURTHER WRITTEN NOTICE.

C. Cooperate with Legal Counsel

Attorneys with the ABC Legal Department or McGinnis Lochridge & Kilgore, LLP may contact you to discuss Doe's lawsuit and/or the Materials. Please cooperate fully with them. Employee communications with ABC's lawyers regarding the issues covered by this Notice are privileged and confidential, and ABC has the sole right to decide whether to invoke the privilege. Therefore, please do not discuss the nature or substance of these conversations with **anyone** outside ABC. If you are contacted by anyone who is not affiliated with ABC or McGinnis Lochridge & Kilgore, LLP, please do not discuss Doe or Doe's lawsuit with such person(s).

D. Refrain from creating new documents regarding this litigation

Unless specifically asked to do so by the ABC Legal Department or McGinnis Lochridge & Kilgore, LLP, please do not create any Materials, timelines, statements, memoranda or notes concerning Ms. Doe and/or the lawsuit, as such Materials may have to be turned over to Doe and/or her attorneys in the future.

E. Identify Other Relevant Custodians

If you are aware of someone within or outside ABC who may possess Materials, such as third parties or affiliates, please notify Larry Lawyer, ABC Community Relations/Legal Services at (111) 222-3333 or larrylawyer@abcdrilling.com and provide him with that information. Please do not circulate or forward this Notice yourself.

If you have any questions about this Notice, please call me at (512) 495-6000.

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/s/ Jordan K. Mullins

Jordan K. Mullins

APPENDIX B

LAW OFFICES
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December 29, 2014

ABC Drilling Company
Attn: Mr. Joe Smith
1111New Year Avenue
Houston, TX 77777

Via Fax Only

Joe Lawyer
1000 McKinney, Suite 100
One Houston Center
Houston, TX 77777

Texas Railroad Commission
District Office, District Four
Cuero, Texas 55555

Re: Deep Well #1 Blowout — Request to Preserve Evidence

Dear All:

As you know, McGinnis, Lochridge & Kilgore, LLP represents John Blackacre, mineral owner under the Eagle Ford Lease where the Deep Well #1 blew out last month ("the well control incident").

Please consider this a formal request and demand to preserve all evidence and investigations related to the well control incident including, but not limited to, well design plans, casing design plans, invoices/orders for casing used on the well, well logs, investigations, incident reports, and daily drilling reports. This request includes any audio or other recordings whether recording information in audio, video, computer/electronic, e-mail, or other form, and all communications related to the well control incident.

You are advised that any routine policies/practices for the destruction of the above must be suspended and all identified information must be retained by you.

If you have any questions about this Notice, please call me at (512) 495-6000.

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/s/ Jordan K. Mullins

Jordan K. Mullins

JKM