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***Attorney-Client Privilege and Expert Testimony*: When the client also serves as an expert, even information that is used to formulate the client-expert's opinion is shielded by the attorney-client privilege.**

***Discovery Snap-Back*: Snap-Back is an appropriate remedy for the inadvertent disclosure of attorney-client privileged communications.**

Ordinarily, communications between a lawyer and a testifying expert are discoverable under Texas Rule of Civil Procedure 192.3(e). *In re City of Dickinson* was an original proceeding to determine whether those communications were discoverable even if the testifying expert was also a client with whom communications would ordinarily shielded by attorney-client privilege. In a unanimous opinion by Justice Devine, the court held those communications remained privileged notwithstanding the recipient's testifying expert designation.

The opinion relied on selected language from the civil procedure rules governing discovery to arrive at its conclusion. It pointed to the wording of rule 192.3(e) that a party "may discover" all the information "provided to, reviewed by or for the expert in anticipation of a testifying expert's testimony" did not mean "must." Therefore, the opinion reasoned, it did not authorize an exception to the attorney-client privilege. Similarly, the opinion pointed out that rule 194.2 only allowed a party to "request" disclosure of the information and data an expert considers in reaching her opinion. It did not require disclosure. Moreover, the opinion relied on comments to rule 194.2 stating that a party "may assert" any applicable privilege except work product to requests for disclosure.

The current Texas rules concerning expert discovery were based on the pre-2010 federal rules which allowed disclosure of attorney-client privilege when the privileged information was provided to an expert. However, the opinion found solace from the fact that the comments to rule 194.2 rejected the approach of the erstwhile version of the federal rules because the commentary to the Texas rule permitted a responding party to assert privilege.

The opinion did not appear to consider the logical fallacy that the general right to assert a privilege did not necessarily mean the assertion was valid. Although the opinion emphasized a textual approach, it did not address rules of construction – such as the presumption that the drafters are not presumed to do a useless act – or what effect the decision would have on public confidence in the fairness of litigation if attorney-client privilege could shielded communications with an expert witness.

Neither did the opinion address the possibility of subterfuge: that the client might hire an expert as an employee for the duration of the litigation solely to cloak attorney-expert communications with attorney-client privilege. No overt consideration was given to the possibility that the entire basis of the client expert's opinion might be shielded entirely merely by passing all information through the attorney.

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If considered *sub silentio*, the opinion deemed preservation of the attorney-client privilege paramount to these concerns. The opinion distinguished its *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437 (Tex. 2007) (orig. proceeding) decision requiring production of an investigator's report when supplied to an expert. The opinion explained that *Christus Spohn* did not involve an attorney-client communication, but an assertion of the work product privilege. After distinguishing *Christus Spohn*, the court pointed to a series of intermediate appellate decisions upholding assertions of privilege in information provided to testifying experts. At bottom, the opinion decided that "[a] lawyer's candid advice and counseling is no less important when a client also testifies as an expert." Accordingly, preservation of attorney-client privilege prevails over the ability to discover the bases for the client-expert's opinions or the need for a vouchsafe that the opinion was not influenced by improper attorney suggestions.

Whether this declared primacy of privilege over probing the basis of expert conclusions will be more nuanced in other factual scenarios remains open to question. *City of Dickinson* offered no explicit limitation on its rationale. For instance, on its face the opinion treats the attorney-client privilege as protecting communications beyond those necessary to provide legal advice to the client and includes those communications that inform the client of information that may only be germane to the client's task as an expert witness.

The attorney-client privilege is not absolute; it can be waived. A reasonable argument can be made that litigation may force the difficult choice of waiving the privilege with respect to communications with a client as an expert witness, just as the privilege may be waived if used for an improper purpose.

If an advocate wishes in future litigation to challenge *City of Dickinson*'s seeming absolutist approach to attorney-client privilege, it may be worth considering detailed cross-examination about the client-expert's communications with his or her counsel and the role they played in the expert's opinion formulation. Even if questioning does not reveal the substance of those communications, it sets the stage for the argument on appeal that the privilege has been improperly or over-broadly applied while possibly creating the appearance that information is being withheld.

Finally, the opinion held that the timely request for the inadvertent production of the communications between counsel and the client expert was an appropriate application of the "snap-back" remedy under rule 193.3(d). The opinion noted that snap-back would be *in*appropriate for the disclosure of work product, but was appropriate for communications that were attorney-client privilege.

***Attorney Disqualification*: Motions to disqualify opposing counsel for the receipt of an opposing party's confidential information must be urged promptly for the appropriate reasons or it is likely to be deemed waived.**

When *non-attorney legal staff* switches sides, disqualification of the new employer-lawyer depends on whether the non-movant rebuts the presumption that client confidences were shared with the staff member. *In re American Home Prods. Corp*., 985 S.W.2d 68, 74 (Tex. 1998)(orig. proceeding). When *legal counsel* obtains privileged information from someone other than a person previously supervised by opposing counsel, the need for disqualification is determined by the test specified by *In re Meador* test, 968 S.W.2d 346 (Tex. 1998) (orig. proceeding): (1) whether the attorney knew or should have known the material was privileged; (2) how promptly the attorney notified the opponent; (3) the extent of the attorney's analysis of that information; (4) the relative prejudice from the disclosure after any efforts to reverse the disclosure; (5) the movant's fault, if any; and (6) the prejudice to the nonmovant if counsel is disqualified.

Here, the movant-defendant urged plaintiff's counsel should be disqualified for allegedly receiving defendant's confidential information from defendant's former employee. In that proceeding, the movant initially urged that the *Meador* test applied but later supplemented its arguments with reliance on the *American Home* presumption. In light of the presumption of sharing, the movant declined the opportunity to conduct discovery on the *Meadors* factors. The trial court's order disqualifying plaintiff's counsel was vacated because the Texas Supreme Court disapproved reliance on the *American Home* presumption for non-lawyer staff and directed re-evaluation by instead applying the *Meador* test for lawyers.

Back in the trial court, the movant sought discovery on the *Meadors* factors. The trial court denied this request and the motion to disqualify because: 1) it would unduly delay trial and 2) the movant had previously bypassed the opportunity following its rejection of the *Meadors* test as the correct legal talisman for the motion to disqualify.

In re RSR Corp. et al., the second original proceeding spawned by the motion to disqualify, the court in a *per curiam* opinion sided with the trial court and overturned as an abuse of discretion the writ of mandamus granted by the court of appeals directing the trial court to vacate its order. "This case lies at the intersection of dilatoriness and waiver," the opinion declared. It emphasized that belated motions to disqualify are especially suspect as a dilatory tactic, and the same rationale that eases the path to treating an untimely motion as having been waived applies to untimely changes in the legal underpinnings of the motion. A litigant can change the grounds for a motion, the opinion acknowledged. But, it cannot do so after the issue has one been litigated when there was no change in circumstance other than declared disapproval of the previous basis as legally erroneous.

In re RSR forms an interesting contrast with *In re City of Dickinson*. In *Dickinson*, preserving the attorney-client *privilege* was deemed more important than discovering the bases of an expert witness's opinions. Indeed, the person receiving privileged information was required to return it after an inadvertent disclosure. In *RSR*, however, judicial efficiency and avoiding possible abuse of the motion to disqualify was of higher priority than avoiding a waiver that might permit opposing counsel's client to benefit from disclosure of a client *confidence*.

***Insurance - Waivers of Subrogation*: The effect of collateral contracts on the scope of subrogation waivers in insurance policies is strictly limited to the extent the insurance policy incorporates the terms of the collateral contract.**

At issue in *Exxon Mobil Corp. v. Insurance Co. of State of Pennsylvania* was the extent to which the scope of a waiver-of-subrogation endorsement was affected by the terms of a different contract between the insured contractor and its customer. In Texas, the general rule is that the terms and conditions of an insurance policy are unaffected by other contracts unless the insurance policy incorporates the terms of such other – i.e., "collateral" – contract. Here, the court upheld this general rule and limited the effect of the collateral contract strictly to the extent specified in the waiver-of-subrogation endorsement.

The insured contractor entered into a service contract to perform work at an Exxon refinery. The *service contract* required the contractor to obtain worker's compensation insurance and to obtain the insurer's agreement to waive subrogation and contribution rights against Exxon to the extent the contractor assumed Exxon's liabilities – i.e., to the extent that the contractor agreed to indemnify Exxon.

In accordance with the requirements of the service contract, the worker's compensation insurance policy contained the Texas standard form "blanket" waiver-of-subrogation endorsement. It applied if the operations were described in the endorsement and the contractor agreed in a written contract to furnish the waiver of subrogation. The schedule included in the waiver-of-subrogation endorsement designated that the waiver was "blanket" in that it applied to all persons that the insured contractor "agreed by written contract to furnish this waiver."

Two of the insured contractor's employees were injured and asserted claims which Exxon settled. Exxon never asserted that the injuries were within the scope of the contractor's agreement in the service contract to indemnify Exxon, but sued for declaratory judgment that the contractor's insurer had waived its rights of subrogation against Exxon for the sums paid to the injured employees as worker's compensation.

In this case, it was undisputed that the loss arose from bodily injuries in the course of the insured's "Texas operations" and, therefore, satisfied the endorsement's "described operations" requirement. There was also no disagreement the contractor had agreed in the services contract to furnish Exxon with a waiver of subrogation. But the disputed issue was whether the scope of the waiver-of-subrogation endorsement was further narrowed by the term in the service contract that limited the obligation to obtain the endorsement *to the extent the contractor had agreed to indemnify Exxon.*

A unanimous court held in an opinion penned by Justice Guzman that the waiver-of-subrogation endorsement only incorporated two aspects of the service contract: 1) the *identity* of the person against whom subrogation rights were waived and 2) the *operations* for which those rights were waived. The endorsement did not incorporate the further

limitation in the service contract that the waiver-of-subrogation endorsement was only required if the insured contractor had also agreed to indemnify Exxon for the loss. It was on this basis that the opinion distinguished contrary results in *Ken Petroleum Corp. v. Questor Drilling Corp.* and *In re Deepwater Horizon*. In those cases, the terms of the policy made it necessary to examine the collateral contract to determine the scope of application of the insurance provision in question. The insured contractor's policy, however, did not expressly or implicitly limit the waiver to situations where the insured contractor was contractually obligated to indemnify Exxon.