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**PRIVILEGES AND WORK PRODUCT – HOW TO GET  
INFORMATION AND HOW TO PROTECT IT**

**Presented by:**

**David M. Bond**

**Boyar & Miller  
4265 San Felipe, Suite 1200  
Houston, Texas 77027  
[www.boyarmiller.com](http://www.boyarmiller.com)**



## PRIVILEGES AND WORK PRODUCT

### Opposing Sides – Same Justification. Who is Right?

Discovery privileges promote effective legal services, which leads to the promotion of a “broader societal interest of the effective administration of justice.”

*and*

“The truth is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise.”

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The result is an unconscionable increase in the costs of litigation, an unreasonable delay in pretrial matters, and protracted litigation.



# PRIVILEGES AND WORK PRODUCT

## Scope of Presentation

The proper assertion of the more common privileges and, conversely, the methods available to determine the appropriateness and the scope of the privilege asserted including:

- party communications
- consulting experts
- witness statements
- attorney-client privilege
- right against self-incrimination



# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

### *When does it apply?*

Communications between:

- The client (or the client's representative) and the lawyer (or the lawyer's representative)
- Between the lawyer and the lawyer's representative
- Between representatives of the client or between the client and a representative of the client



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# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

How to Protect Privileged Documents





# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

Weave the Facts into  
Advice, Opinions or Analysis

***Pittsburgh Corning Corp. v. Caldwell,***

861 S.W.2d 423

(Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, orig. proceeding)



# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

### *Pittsburgh Corning Corp. v. Caldwell*

The documents were the product of a meeting between the company's representatives and its lawyers to discuss defense strategies for asbestos-related personal injury lawsuits.

“[F]acts are the lifeblood of legal opinions.”



## PRIVILEGES AND WORK PRODUCT

### ATTORNEY CLIENT PRIVILEGE

#### *Pittsburgh Corning Corp. v. Caldwell*

“Once it is established that a document contains a confidential communication, the privilege extends to the *entire* document, and not merely the specific portions relating to legal advice, opinions, or mental analysis.”

“It is inconceivable that an attorney could give sound legal advice on a client's case if he or she did not include an application of the law or opinion to the specific facts of that case.”



## PRIVILEGES AND WORK PRODUCT

### ATTORNEY CLIENT PRIVILEGE

#### *Pittsburgh Corning Corp. v. Caldwell*

“The ultimate effect of such a holding would be that clients would be reluctant to give their attorneys any factual information for fear that it would be subject to discovery.”

“Such a chilling intervention into the attorney-client relationship under the guise of ‘looking for facts,’ pierces the core of a critical privilege to carve out limited and usually superfluous morsels of discovery otherwise obtainable.”

“In our opinion, the cost is too great.”



# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

### How to Get Privileged Documents

#### *Republic Ins. Co. v. Davis*

856 S.W.2d 158, 163 (Tex. 1993)

If the privilege is used as a sword rather than a shield, the privilege may be waived.



# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

### *Republic Ins. Co. v. Davis*

#### **Offensive Use Test:**

- (1) the party asserting the privilege must seek affirmative relief
- (2) the privileged information, if believed by the fact finder, must be outcome determinative
- (3) disclosure must be the only means by which the aggrieved party may obtain the evidence



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# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

Common Traps and Action Steps to Avoid Them





## PRIVILEGES AND WORK PRODUCT

### ATTORNEY CLIENT PRIVILEGE

The Attorney-Client privilege belongs to the company.

Communications in the presence of third parties are generally not privileged.

Only communications regarding legal advice are privileged.



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# PRIVILEGES AND WORK PRODUCT

## ATTORNEY CLIENT PRIVILEGE

### Permissive and Mandatory Disclosures

The Texas Disciplinary Rules

The Texas Rules of Evidence

SEC Regulations



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# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

You Can't Buy Their Silence . . .





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# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

***Tom L. Scott, Inc. v. McIlhany***  
**798 S.W.2d 556 (Tex.1990)**

Involved the largest gas well blowout in United States history - it was not brought under control for over a year



# PRIVILEGES AND WORK PRODUCT CONSULTING EXPERTS

## ***Tom L. Scott, Inc. v. McIlhany***

The initial plaintiffs and third-party defendants designated six experts as *testifying* experts.

Allegedly, these experts were prepared to deliver damaging testimony against Apache and El Paso.



# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

### ***Tom L. Scott, Inc. v. McIlhany***

On the morning the expert witnesses' depositions were scheduled, Apache and El Paso settled with these parties on the condition that Apache and El Paso gain control of the experts.

Following execution of the settlement, Apache and El Paso, along with the settling parties, re-designated all six as *consulting-only* experts.



# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

### *Tom L. Scott, Inc. v. McIlhany*

The “protection afforded by the consulting expert privilege is intended to be only ‘a shield to prevent a litigant from taking undue advantage of his adversary’s industry and effort, not a sword to be used to thwart justice or to defeat the salutary objects’ of discovery.”

The redesignation of the experts in this case was an offensive and unacceptable use of discovery mechanisms intended to defeat the salutary objectives of discovery.”



# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

### *Tom L. Scott, Inc. v. McIlhany*

“If we were to hold otherwise, nothing would preclude a party in a multi-party case from in effect auctioning off a witness’ testimony to the highest bidder.”



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# PRIVILEGES AND WORK PRODUCT CONSULTING EXPERTS

**How to Protect Their  
Disclosure?**

**Opposing Counsel Can't  
Plead Poverty**





# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

***Gen. Motors Corp. v. Gayle***  
951 S.W.2d 469 (Tex. 1997)

Case involved injuries sustained when a General Motors pickup truck collided with another car driven.

Plaintiffs sued General Motors alleging, among other things, that General Motors defectively designed the seat belts in the pickup truck.



# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

### *Gen. Motors Corp. v. Gayle*

Plaintiffs argued it was unfair to allow General Motors to conduct multiple crash tests, varying the parameters until it achieves a result favorable to its theory of the case, and then shield the earlier unfavorable tests.



# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

### *Gen. Motors Corp. v. Gayle*

The Court responded that there is no limit to the number of tests that may be run by a consulting expert.

“Nor should any such limit be imposed. The consulting-expert privilege is intended to allow a party to develop its factual theories fully. Any tests that a party does offer at trial will be admissible only if the trial court determines that there is a substantial similarity between the test conditions and the accident conditions. Thus, a party may not ‘rig’ a test by unilaterally selecting parameters which are dissimilar from those surrounding the underlying accident.”



# PRIVILEGES AND WORK PRODUCT

## CONSULTING EXPERTS

### *Gen. Motors Corp. v. Gayle*

Plaintiffs also argued that because they did not possess the resources to perform their own crash tests, they should have access to General Motors' tests.

The Court responded that because the consulting expert privilege protects the very core of a party's thought processes and strategy regarding the litigation, there is no substantial hardship exception, such as that which exists for witness statements and party communications.



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# PRIVILEGES AND WORK PRODUCT

## WITNESS STATEMENTS

### How to Protect Them?

Bury Them





# PRIVILEGES AND WORK PRODUCT

## WITNESS STATEMENTS

*In re ExxonMobil Corp.*

97 S.W.3d 353

Tex. App.—Houston [14th Dist.] 2003, orig. Proceeding)

Witness statements contained within a confidential communication between attorney and client are privileged.



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# PRIVILEGES AND WORK PRODUCT

## WITNESS STATEMENTS



### How to Get Them?

### Straight from the Horses Mouth!



# PRIVILEGES AND WORK PRODUCT

## WITNESS STATEMENTS

*In re Fontenot*

13 S.W.3d 111

(Tex.App. —Forth Worth 2000, orig. proceeding)

The plaintiff/claimant in these types of cases can still discovery of the facts known to the [witness] without invading the protection afforded by the attorney-client privilege.



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# PRIVILEGES AND WORK PRODUCT

## SELF-INCRIMINATION

**How to Protect It?**

Step by Step





# PRIVILEGES AND WORK PRODUCT

## SELF-INCRIMINATION

*In re Verbois*

10 S.W.3d 825

(Tex.App.—Waco 2000, no pet.)

The privilege must be asserted on a question-by-question basis.



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# PRIVILEGES AND WORK PRODUCT

## SELF-INCRIMINATION

Corporations Can't Run or Hide





# PRIVILEGES AND WORK PRODUCT

## SELF-INCRIMINATION

*Super X Drugs of Tex., Inc. v. State*

505 S.W.2d 333

(Tex. Civ. App.—Houston [14th Dist.] 1974, no writ)

The privilege is a personal one and may not be used on behalf of a business entity.



# PRIVILEGES AND WORK PRODUCT

## SELF-INCRIMINATION

### Feel Free to Infer

Juries in civil cases are allowed to make negative inferences based upon the assertion of the privilege.



# PRIVILEGES AND WORK PRODUCT

## SELF-INCRIMINATION

### The “Offensive Use” Doctrine Again

The “offensive use” doctrine provides that even when a party has a valid basis to avoid discovery, that party must decide whether to maintain the privilege or risk suffering a sanction, including possible dismissal, if and when ordered by the trial court.



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## **David M. Bond**

**Chairman, Litigation Group**  
**832.615.4290 (direct line)**  
**dbond@boyarmiller.com**

**Boyar & Miller**  
**4265 San Felipe, Suite 1200**  
**Houston, Texas 77027**  
**www.boyarmiller.com**