



The Attorney-Client Privilege and Mineral Title Opinions

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The ethics rules in most Rocky Mountain jurisdictions contain a version of Model Rule of Professional Conduct 1.6 (“Rule 1.6”), which requires an attorney to keep a client’s information confidential. Information provided to a client in a title opinion falls under Rule 1.6. Therefore, such information remains confidential between the preparing law firm and the client that requested the title opinion, and is generally inadmissible in a court proceeding pursuant to the attorney-client privilege doctrine. However, the attorney-client privilege belongs to the client, not the attorney, and as such, the client may expressly or impliedly waive that privilege. One form of implied waiver of the attorney-client privilege is by disclosure of the privileged information to a third party who is not a client of the preparing law firm.

In the context of mineral title opinions, their preparation is often requested by the operator of an oil and gas property alone, rather than collectively by several of the various parties to a given joint operating or other drilling agreement. Therefore, in most cases, the only client of a law firm regarding the preparation of a title opinion is the party with whom the firm has entered into an attorney-client relationship via an engagement agreement – typically the operator. There is no attorney-client relationship between the preparing law firm and a third party who merely contracts for development with the operator. This result obtains despite the fact that a party to a joint operating or other drilling agreement generally contributes some proportional amount of funds towards the preparation of title opinions. Likewise, there is no attorney-client relationship with other third parties to whom the title opinion may be disseminated, such as title curative companies, financing companies, or others requiring access to the title opinion.

The attorney-client privilege issue arises as the operator distributes the

prepared title opinion to all one or more of the third parties indicated above. In doing so, the operator is impliedly waiving its attorney-client privilege with the preparing law firm, by disclosing the title opinion to third parties with whom the preparing law firm has no attorney-client relationship. Subsequently, introduction of the privilege-free title opinion in a court proceeding then becomes possible, and may be used by an opposing party as a “sword” against the operator, most often to show a lack of diligence in address title opinion requirements.

It is important for operators, therefore, to understand the ways in which its attorney-client privilege with respect to title opinions may be impliedly waived, and to consider the same before disclosing any portion of a title opinion to third parties with whom the preparing law firm does not have an attorney-client relationship.



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