

**WHO IS THE CLIENT? OPERATIVE DOCUMENTS, NECESSARY  
PARTIES, AND KNOWING YOUR LIMITS**

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**HANDLING YOUR FIRST (OR NEXT)  
OIL AND GAS CASE**  
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**CHAPTER 1**

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The Federal Circuit Rules that the Assertion of the Advice-of-Counsel Defense Does Not Waive the Privilege for Trial Counsel Communications and Work Product and Adopts New Willfulness Standard  
The Southern District of Texas Adopts Local Patent Rules  
Lessons Learned from a Patent Infringement Trial in the Eastern District of Texas

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. GETTING STARTED ..... 1

III. WHO IS THE CLIENT?..... 1

IV. OPERATIVE DOCUMENTS..... 3

V. NECESSARY PARTIES ..... 4

VI. KNOWING YOUR LIMITS ..... 4

VII. FINAL THOUGHTS ..... 5

## WHO IS THE CLIENT? OPERATIVE DOCUMENTS, NECESSARY PARTIES, AND KNOWING YOUR LIMITS

### I. INTRODUCTION

The focus of this paper is how to approach an oil and gas case when it first lands on your desk. This article is directed at new attorneys that may feel intimidated by handling their first oil and gas case and are mainly looking for instruction on how to eat that elephant one bite at a time. My approach is aimed toward general litigators that do not have an extensive background in the oil and gas field and are wanting to know, step by step, how to handle an oil and gas dispute on a more general level. This is not a case law intensive paper; rather, it is a more “hands on” practical guide to learning your way around an oil and gas dispute.

### II. GETTING STARTED

In Texas you can find yourself involved in an oil and gas case at the drop of a hat. When I moved here fifteen years ago from Nebraska, I had no real appreciation for what was involved in “an oil and gas dispute.” Where I grew up, you use your land for growing corn to feed your cattle – corn and cattle are a way of life. In Nebraska, you own smaller parcels of land with more fertile soil for growing crops – corn-fed beef is the state’s most important commodity. Nebraska’s patch-work quilt of farmland, fed by the Ogallala Aquifer, is a far cry from the far-reaching ranchland found in Texas. The much more expansive Texas land, spread over the top of rich oil and gas reserves, lends itself to both oil and gas production and raising cattle that graze for their dinner right up next to pad sites. Essentially – it is the difference between a farmer and a cowboy/cowgirl. I have come to understand the differences between the two well, and how those differences impact the economic priorities of a state and, consequently, its litigation.

Fifteen years ago, I had never heard of a nodding donkey, an oil patch, a landman, a company man, a roughneck, or spudding a well and fracking was a thing of the future. Most of my knowledge about Texas, and the oil and gas business for that matter, came from the nights my mom let me stay up late to watch *Dallas* with her. And it did not take me long to figure out that, if I was going to practice in Texas, I was going to need to learn more about handling the litigation that arose from one of the state’s most valued resources. Being hired to work on your first oil and gas case can be intimidating at first and below are a few things I did to make the journey more manageable.

- **Buy a copy of Williams & Meyers Manual of Oil & Gas Terms.** It is a desk reference that defines the words and phrases most useful to lawyers and others involved in the industry. It is currently in its 16<sup>th</sup> edition and you can find it on Amazon for around \$200 (also check with your firm librarian); however, you can also order an older edition for less if you just want to use it as a dictionary and are not relying on the case law.
- From your first meeting about the case forward, **make yourself a list of terms you hear.** Not all of the terms I listed above are found in the Manual of Oil & Gas Terms – many of them you will hear as you interview fact witnesses, your client, and conduct depositions. Jot down the terms and their meanings and keep this list to refer to as you continue your practice. Many of the best explanations/definitions come from your fact witnesses, deponents, and your client – do not be afraid to ask them to explain the terms because you will learn a lot and many of the persons with knowledge you interview will welcome the opportunity to explain their specific line of work for the end purpose of resolving a dispute. A word-searchable document can be invaluable and you can tailor the same basic list for each subsequent oil and gas case you handle.
- **Buy a pair of boots** – you will need them if your case requires you to go out and inspect a pad site, trust me on this one – this is not just fashion advice. In Nebraska farmers wear work boots. In Texas the similar, but more flashy, cowboy boot is the ticket. Either will work and you will be glad you have them when it is time to leave the office and investigate the background facts of the case. Not all experts agree that the boots will save you from an angry snake; but, I promise you will be glad you have them in your closet when you are stomping around in the tall grass of a staked pad site and pontificating on the accommodation doctrine.

### III. WHO IS THE CLIENT?

The first question to ask when you receive an oil and gas case is what role does your client have in the dispute? The best way to make this determination is to set up a meeting with your client as soon as possible to go over the background of the dispute. This can be in person or over the telephone – but make sure you set aside a time that the two of you can discuss the details necessary for you to begin your work. If you are under the pressure of an answer deadline, then a telephone meeting may be the best approach to start. You usually need an hour for this initial meeting

– there will likely be more work to do as far as follow-up, but an hour is about the longest amount of time that an initial productive exchange of information takes.

**Questions to ask during your initial call:**

- What is your role on the project? Find out if your client is the operator, drilling company, company man, drilling consultant/engineer, farmor, farmee, or a third party contractor brought in for a specific portion of the drilling process.
  - Do not be afraid to ask questions and have your client explain to you what his/her role was in the drilling process or the role of his/her company. Many of us feel hesitant to reveal that we are not oil and gas experts and we may feel like we should already know the answers to these questions. However, as litigators, it is our job to learn the subject matter we will be litigating. We cannot be an expert in the subject matter of every possible type of dispute. Remember that your client is often the best source of information when it comes to the dispute because s/he has been living it on a daily basis and knows the history of the parties' relationship.
- How was your relationship/role in this project established? Almost always, the answer will be through a contract. Make sure you get copies of that contract.
- Oftentimes the relationship between your client and the other party has gone on for some time and included many wells that may have been grouped together under one contract. It is also common that the parties worked together on an initial set of wells under one contract and, based upon that prior relationship, formed a contract to drill another set of wells together. Make sure you start to form an understanding of the projects the parties have worked on together, the timeframe those projects have covered, and the contracts involved. This will be important later to determine the parties' prior established practices, particular contract provisions that were changed to accommodate issues that may have come up as the relationship evolved, and ultimately interpret the contract and argue the current dispute.
- If it is a dispute over a particular well, make sure you understand the name of the well in question and the status of that well currently.
  - Is the well currently producing?
  - If there was an issue with damage to the well – was remediation necessary, was it successful, cost, could original well be saved. If it is a question of accommodating surface use – determine where the drilling company is in the process of drilling the well – pad site staked out?; pad site built out?; well spudded? Do not feel you need to determine every detail at this point, just get a feel for current status.
- Always get copies of the service documents – I have my clients pdf me exactly what the process server handed them or their registered agent. Also clarify when they were served so that you can establish your answer deadline if you are a defendant. Check with the court for a return of service for confirmation.
- Know your client. If you are dealing with in-house counsel then your next step will be different than if you are dealing directly with the named party/business owner.
  - If working with in-house counsel, clarify next steps and who will contact the business people that have knowledge regarding underlying facts to prepare your answer.
  - If you are working directly with the business owner or consultant, then it is important to assess whether they have ever been involved in a lawsuit before and, based upon their answer, explain the process in broad strokes.
- If you are representing a party that plans to file a lawsuit. Clarify timeframe for filing the suit, potential for injunctive relief, and manage expectations over timeline for getting the suit on file.
- Whether working with in-house counsel or directly with the business owner(s), it is always important to manage expectations and maintain clear and consistent communication as the case unfolds.
- You will also want to clarify your client's relationship with the other parties named in the suit and determine who hired each party and who was responsible for what. Oftentimes, you will find that you need to file a counterclaim or crossclaim and you need to keep that in the back of your mind so that you can include it in your answer if you are a defendant.

**Real life example:**

Potential client calls and has been named as a third-party defendant in a case pending in federal court. PC's answer date is approaching and it is important to set up the initial background call. Since this case was already pending, I went on Pacer and reviewed the pleadings prior to the call. I determined it was essentially a collection dispute between a drilling company and an operator. The drilling company filed suit against the operator, as well as an oil and gas lien on the well in question, for non-payment on its drilling job for the well. The operator counterclaimed for damages exceeding the amount owed on the drilling job claiming that the drilling company had left a drill pipe screen downhole during the drilling process, which led to the well having to be abandoned and remediated. My client was the drilling engineer and project manager for the well at issue and the drilling company had named it as a third-party defendant, alleging that, if the drilling company was negligent, then it was my client's fault because it had just followed my client's instructions. The hotly contested contract at issue between the drilling company and the operator was a form contract called the International Association of Drilling Contractors ("IADC") daywork drilling contract. However, in my initial interview with my client I was able to determine that he was part of this project via a consulting agreement he signed with the operator. That consulting agreement contained an indemnification clause and that ultimately led me to file, on behalf of my client, not only an answer to the third-party complaint filed against my client by the drilling company; but, also crossclaims against the operator for breach of contract and declaratory judgment. My client's answer also included crossclaims for negligence against another consultant and counterclaims for negligence against the drilling company. The case ultimately involved interwoven disputes between the parties involving these two contracts.

**IV. OPERATIVE DOCUMENTS**

After the initial phone call, there is usually an initial influx of documents. This can be overwhelming and there is oftentimes a tendency for the client to provide everything that may be relevant to the dispute initially. In going through this information, the first thing you need to do, after reading through the initial pleading if there is one, is to read the relevant contracts, the contracts will provide the framework of your case and oftentimes, oil and gas disputes boil down to contract disputes.

As you begin work on your client's initial pleading, keep a running list of additional information you will need from your client for the discovery portion of the case, as well as a running list of discovery requests to the other parties. Keeping this running list will save you anxiety and stress later and you will already be starting the discovery portion of your case while doing the work on the pleading stage.

**List of documents:**

- Well file(s).
- All relevant contracts, i.e., farmout agreement, drilling contract, consulting agreements, lease, etc.
- Contracts with any third-parties (these are contracts that may come into play later or you may need them right away to assert a counter or crossclaim when you file your answer if you are a defendant). Sometimes there are no actual contracts, you will just need copies of invoices, etc.
- Litigation hold to your client (if in-house make sure you have knowledge regarding their initial litigation hold in case you have to explain it later in a discovery dispute) if dealing with the business owner clearly explain that s/he needs to retain all documents relating to the case – do so in writing so you have something for your file and if it is done over the phone follow-up with a clarifying email.
- If you are dealing with a smaller business, make sure you understand how many people were involved in the project on your client's side, how they communicated, and ensure that any relevant communications are held for possible production. You can easily collect this information by explaining that it will be part of initial disclosures – initial disclosures are a great way to start a list of persons with relevant knowledge.
- Emails, text messages, and find out if there is any other way the parties communicated.
- Determine what type of operative document you are dealing with and then determine if there are other steps you need to take. Example from one of my cases: consulting agreement described above.

**Budget:**

Start to think about the case budget. If you are dealing with a larger company, then make sure you understand whether the company requires a quarterly case budget and get a copy of the form as soon as possible so that you can

start filling it out and think about how your time will be allotted on the case. If you are representing a smaller company or consultant then this process will likely be more informal and should take place early on to determine if a retainer is necessary. I usually like to discuss the budget with smaller business clients before entering an appearance in the case to make sure there is a mutual understanding of potential expense and the complications that can arise once litigation takes on a life of its own.

## V. NECESSARY PARTIES

This leads us into the next topic – necessary parties. When you sit down to review the documents involved in the dispute, you may find that in order for the case to be fully determined, additional parties need to be added or your client may actually be that added party. This is often a well site consultant/company man, a drilling engineer or project manager, or perhaps a service provider for some portion of the drilling project. Oftentimes, when these parties are added, additional contracts come into play – like in the example I provided in Section III. above. In that case, my client was the drilling consultant/engineer and, when the company was named as a third-party, its contract with the operator became an issue in the case. However, my client was not the only party to be added to the case. It is important to make an early determination so that there is not an empty seat when it comes time to determine responsibility in the case.

Each case will require its own analysis regarding “required joinder” under Rule 19 of the Federal Rules of Civil Procedure or “joinder of persons needed for just adjudication” under Rule 39 of the Texas Rules of Civil Procedure. Both the federal and Texas rule focus on parties required to be joined “if feasible.” However, an analysis under these Rules is not part of this paper. In reality, oftentimes a controversy between two or more main parties when a drilling operation goes bad trickles down to other parties involved in the project – whether those parties technically fall under Rule 19 or Rule 39. In my case involving a drilling engineer/consultant, the client was brought in as a third-party, along with another consultant, via Rule 14(b) of the Federal Rules of Civil Procedure. The analysis can be a complicated one and there are many factors that go into the names that end up listed in a case-style as parties.

Without getting into the weeds on the legal issues that dictate necessary parties, the purpose of this piece is to give some practical guidance on getting started that is oftentimes overlooked as basic and, I believe for that reason, done incorrectly. Here are some important factors to consider whether you are a plaintiff or defendant.

### Plaintiff:

- The easiest way to start is with a contract if you have one. While you may assert several causes of action, the most basic and easiest claims to litigate are breach of contract cases or cases requesting a declaratory judgment to enforce part of the contract.
- Review the contract and determine what rights your client has under that contract that need to be enforced. Determine also if there is a clause allowing for attorneys’ fees. Also, look for choice of law provisions and venue provisions.
- Be clear on the actual named parties to the contract – oftentimes, there are parent companies, holding companies, operating companies, etc. It is always surprising to me how many times parties are incorrectly named. Research the potential defendant(s) on the relevant secretary of state web site to make sure you understand the background of the company, where it is incorporated, and who you need to serve.

### Defendant:

- Make sure your client is correctly named. Check to make sure you are being sued by the correct party. I have had cases where the parent company sues my client on a contract that my client had with one of the plaintiff’s subsidiaries. That will need to be addressed.
- In oil and gas cases with multiple parties, one party can wear many hats in a case. When crossclaims and counterclaims are asserted, almost everyone ends up being a defendant. This means that other contracts, relationships, and causes of action come into play. If your client becomes any kind of a defendant in a case, carefully consider potential claims and parties you may want to involve to fully resolve the matter.

## VI. KNOWING YOUR LIMITS

Hire an expert early and consult with an oil and gas attorney at your firm. Your job is litigation; however, in this specialized area, you may quickly find yourself out of your depth and you will need to consult with someone that deals with oil and gas transactions on a daily basis as the bulk of their practice.

Meet with your client and expert in person. Get a room with a white board so that they can explain to you the crux of the dispute – if it is a mechanical issue dealing with well failure, you will need an engineer. If it has to do with a transaction, you will need an expert that deals with oil and gas contracts. In both instances, you will need an entire day and a large space to sketch out your discussion. You will need a separate expert to address damages – whether claiming or defending. The damages expert does not need to be brought in as quickly as the subject matter expert. When you are meeting with your client regarding background of the case, go to the client’s offices if you can. That allows you easier access to relevant case documents and fact witnesses. You will also want to assist your expert in gathering background facts – be cognizant of privilege issues.

### **The expert can help you:**

- Know what documents to request.
- Know what documents are missing from the other side’s production – prepare motions to compel.
- Retain expert(s) early enough to help you determine what to request in your requests for production and what is missing from the other side’s production. You need to get the expert early so that you have time to request the documents needed for a proper report and determine what is missing from the production so you can prepare a motion to compel if necessary.
- Interpret documents.
- Explain recent trends in drilling.
- Explain the “who’s who” of the drilling industry. There are many companies involved in the drilling industry and a good expert (this may be your client or client’s employee) can sit down and explain who the major players are when it comes to drilling companies, operators, fracking companies, and other energy industry service and product providers. It really takes someone that is involved in the industry on a day to day basis to explain some of the nuances regarding, for example, the approach of a particular operator – maybe this operator has a reputation for cutting corners to save costs. Or, when it comes to a drilling company, the company’s accident history may impact the case or the business factors impacting the cases pursuit or potential settlement of the case. All of these things will affect your case in both direct and non-direct ways.

In every oil and gas case I have handled I have worked with a transactional oil and gas attorney from my firm. This area of the law is complicated and, while you will be the expert on litigation and the courts, it requires someone with knowledge of the business to deliver the best representation to your client. Additionally, I have also always hired an expert early in my oil and gas disputes for cases where the client was not, or did not have an employee, that could provide necessary expertise. You can use the expert as a consulting expert if you decide you do not want them to testify.

Your client may be your best expert. If your client, or an employee of your business client, is going to offer opinion testimony, you will need to prepare a Rule 26(a)(2)(C) disclosure. *See* FED. R. CIV. P. 26(a)(2).

## **VII. FINAL THOUGHTS**

Using the appropriate resources can make handling your first (or next) oil and gas case an experience to build on. It is a chance to team with other attorneys that are experts in the field in a way that has the potential to forge a relationship with the prospect of delivering valuable representation to clients for years to come. It is also a chance to partner with your own client and other industry experts to learn more about the business and provide true business solutions to what, for our clients, is mainly perceived as a big problem: litigation. Being part of the solution when it comes to oil and gas litigation is an invaluable skill for any Texas litigator.