

# INVESTIGATIONS, ATTORNEYS & PRIVILEGED COMMUNICATIONS

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# PRIVILEGE

## KEY POINTS WE ALL KNOW...RIGHT?

- ▶ Purpose is to protect client confidences.
  - ▶ Codified in Tex. Rules of Evid. 503 and Federal Rules of Evidence 501.
  - ▶ Qualified protection of communications between a lawyer and his client
  - ▶ Held and claimed by the Client, Protects the openness in attorney-client relations.
  - ▶ Can be waived...
    - ▶ Lots of law here we don't have time to cover.
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# WORK PRODUCT

## KEY POINTS WE ALL KNOW...RIGHT?

- ▶ Purpose is to shelter the mental processes of the attorney.
  - ▶ Codified under Fed. R. Civ. P. 26(b)(3) and Tex. R. Civ. P. 192.5.
  - ▶ Provides a qualified protection for documents and tangible things prepared by a party or party's representative "in anticipation of litigation"
  - ▶ Core (Sacrosanct "mental impressions, conclusions, opinions or legal theories") v. Non-Core work product (May be had by showing of undue hardship or substantial need).
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# IN ANTICIPATION OF LITIGATION REQUIREMENT

- ▶ Claiming party bears the burden showing that the document was prepared in anticipation of litigation.
- ▶ Generally, courts look at the following factors when determining when a document may be considered work product:
  - a. the retention of legal counsel (though no dispositive);
  - b. legal counsel's involvement in the creation of the documents;
  - c. whether it was routine practice to prepare the document or whether the document was prepared in response to a particular circumstance.

*OneBeacon Ins. Co. v. Welch*, 2013 WL 600216 (S.D. Tex., Nov. 12, 2013).

# SO IT HAS TO BE DONE BY A LAWYER?

- ▶ These documents get created many times, an many times more effectively, by representatives, employees and agents of the client.
- ▶ Not necessarily. In protecting the document (which is what most really want), it is not dispositive that the documents were prepared by a client and not by the lawyer for the privilege protects “documents prepared by or for a party as long as they are prepared in anticipation of litigation.” *Dinh v. Samsung Fire & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 55152, 2013 WL 1625184 (S.D. Tex. Apr. 12, 2013).


# SO, IS MY INVESTIGATOR UNDER THE ATTORNEY CLIENT PRIVILEGE?

- ▶ Generally, Yes, communications and between a lawyer and his representative or a client and the lawyer's representative are clearly covered by T.R.E. 503(b)
  - ▶ *Bearden v. Boone*, 693 S.W.2d 25 (Tex. App. Amarillo 1985) (holding that an investigator is an attorney's representative and as such is presumed to have the authority to claim the attorney-client privilege on behalf of the client).
  - ▶ *IMC Fertilizer, Inc. v. O'Neill*, 846 S.W.2d 590 (Tex. App. Houston 14th Dist. 1993) (investigators hired by counsel were lawyer's representatives to whom privilege applied).

# WHAT ABOUT THE WORK PRODUCT PRIVILEGE?

- ▶ Yes, same analysis. The Court has interpreted the reference to a party's attorneys and agents to include agents and investigators hired to assist attorneys. *United States v. Nobles*, 422 U.S. 225, 238–239 n. 13 (1975) (“It is ... necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney ... .”); see also *Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App.—Houston [1st Dist.] 1997, orig. proceeding) (notes made by attorney's employees during conversation with witness intended to assist attorney in deciding whether to depose witnesses were protected work product)].

# OK, SO MY CLIENT WANTS TO USE AN INVESTIGATOR... I HAVE TO HIRE THEM TO KEEP IT PRIVILEGED, RIGHT?


- ▶ Under TRE 503 it is anyone employed by the lawyer in rendition of legal services.
  - ▶ Clearly investigators. *IMC Fertilizer, Inc. v. O'Neill*, 846 S.W.2d 590 (Tex. App. Houston 14th Dist. 1993).
  - ▶ It matters very little how that representative is compensated.
  - ▶ It matter immensely the circumstances surrounding the retention of an outside investigator.
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# CRIMINAL REPORTING AND THE CRIME FRAUD EXCEPTION

- ▶ Try to avoid the hiring of an investigator directly by the client because of the crime reporting requirement.
- ▶ Tex. Occupations Code Sec.1702.133 requires an investigator to disclose information regarding and criminal offense he obtains. That includes past information. So, always, place a licensed attorney between the investigator and the client.
- ▶ Realize that the crime-fraud exception is still valid under TRE 503(d)(1). Very rare that a court would find additional waiver. But, be aware of your consulting a client how to “fix” the situation

# WELL...WHAT SHOULD I DO WHEN I HIRE THEM?

- ▶ Memorialize the retention.
  - ▶ Name a client, name a billing party and name the client's lawyer.
  - ▶ Clearly explain the scope of the investigation.
  - ▶ Call his file work product from the get go.
  - ▶ Deal with criminal reporting elements if necessary.
  - ▶ Make the letter unique.
  - ▶ Discuss reports, findings and other documents you want or don't want.
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# WELL WHAT ABOUT THE NON-LAWYER LAWYER?

- ▶ Attorney-client privilege does not apply to communications between a client and an attorney where the attorney is employed in a non-legal capacity. *Clayton v. Canida*, 223 S.W.2d 264, 266 (Tex. Civ. App.--Texarkana 1949, no writ).
- ▶ However, the attorney-client privilege applies when the investigation was related to the rendition of legal services. *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, (Tex. App. Austin 2000). See also *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) (fact-finding that pertains to the rendition of legal advice qualifies as professional legal services); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 599-601 (N.D. Tex. 1981) (same with regard to Texas law).

# CAN A NON-LAWYER, ACTING AS A LAWYER, BE COVERED BY THE PRIVILEGE ?

- ▶ Maybe so. In *Optimize Tech. Solutions, LLC v. Staples, Inc.*, 2014 U.S. Dist. LEXIS 81807, 2014 WL 2728596 (E.D. Tex. June 16, 2014) the court held that it was sufficient if the client reasonably believed that the person consulted was a lawyer even if they were not. CEO of IP acquisition company told party he was a lawyer but, wasn't licensed. CEO provided lawyer like advice to Plaintiff. Plaintiff communicated and relied on it. Basically, the court is protecting the client and relying on the belief of the client.


# TO WHAT DEGREE CAN I KEEP MY INVESTIGATOR SECRET...?

- ▶ Texas Occupations Code Section 1702.133 provides for confidentiality unless by court order. Held by the client or employer.
  - ▶ Prepare for the discovery order. Consider have your investigator named as a consulting expert under TRCP 192.3(e). Good to do in your letter retaining him.
  - ▶ Rethink the reports you are getting but, be mindful of the benefit of a report.
  - ▶ Realize that if you have a fact witness you plan to call. Eventually, you will have to admit the existence of that witness:
    - ▶ TRCP 192.3 Witnesses, Recordings and Statements. Except impeachment.
    - ▶ Surveillance orders.
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# OK, SO CAN A CLIENT'S IDENTITY BE PROTECTED?

- ▶ A client's identity is not material prepared or a mental impressions developed in anticipation of litigation so as to be considered work product. *Landry v. Burge*, 2000 Tex. App. LEXIS 6606, 2000 WL 1456471 (Tex. App. Dallas Oct. 2, 2000).
- ▶ As a general rule, client identity is not protected by the attorney-client privilege. See *In re Grand Jury Subpoena*, 926 F.2d 1423, 1431 (5th Cir. 1991); *Simpson v. Tennant*, 871 S.W.2d 301, 309 (Tex. App.-Houston [14th Dist.] 1994, no writ). An attorney's client does not usually harbor an expectation that his identity will be protected indefinitely. See *Simpson*, 871 S.W.2d at 309.
- ▶ However, if the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged. *In re Grand Jury Subpoena etc.*, 926 F.2d 1423, 1991 U.S. App. LEXIS 3685, 32 Fed. R. Evid. Serv. (Callaghan) 472 (5th Cir. Tex. 1991).

# TIPS

- ▶ From the outset, realize that at least parts of the investigation are going to be discovered.
  - ▶ Have some type of contingency and think through contact and document preparation.
  - ▶ Have a timing plan. When can you take some information and use it to make an admission. Learn the bluff. Play the poker game.
  - ▶ Be realistic that a fact witness is going to be discovered.
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# REPORTS.

- ▶ Reports will follow the same “in anticipation of litigation” requirements that are listed above. But, here are some thoughts to get that report into the work product category:
  1. Clearly intertwine the report with legal analysis. Usually, in the corporate context is not terribly hard to do. Consider a pass through if using an investigator.
  2. Consider using a scope (why are you doing the report you are writing) and direct the report to only those individuals that are the client or his representatives.
  3. Avoid the presentation issues.
  4. Consider waiving a report. Might get that in writing in your initial retention letter if using an investigator. Particularly where your investigation may create a fact witness. (Surveillance).

However, weigh the benefit of a report v. the benefit of waving, even if limited.



# BUT REMEMBER, IT IS DISCOVERABLE IF RELIED UPON BY EXPERT.

- ▶ If you provide facts, data or assumptions in a protected work product document to a testifying expert, then that is going to be discoverable. Fed. R. Civ. P. 26(b)(4)(C) and *Innovative Sonic Ltd. v. Research in Motion, Ltd.*
- ▶ Remember, under Texas law, a consulting expert's identity, mental impressions, and opinions are generally not discoverable unless relied upon by expert. Tex. R. Civ. P. 192.3(e). If possible, name your investigator as a consulting witness in your original retention letter.

# WITNESS STATEMENTS.

- ▶ In 1999, a number of changes were made to the TRCP altering privilege and discovery. In particular
- ▶ TRCP 192.3(h) **Statements of persons with knowledge of relevant facts.** A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement"--regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.

# TO RECORD OR NOT RECORD.

- ▶ What is an investigator to do? Record or not? Covertly or Overtly?
  - ▶ Why do we record to begin with?
  - ▶ Have we eroded the privilege to a point that we are now without a privilege and without the encouragement of ascertaining the truth? See *Upjohn*, 449 U.S. at 389. (balancing privileged communication against the societal goal of ascertaining the truth).
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