

Investigations, Attorneys and Privileged Communications

Wes Bearden, Attorney

Texas Certified Investigator; TALI General Counsel

Dallas, Texas

Region 1 Meeting; April 2014

Are your communications confidential?

- Disclosure v. Privilege
 - Disclosure – DPS PSB Rules
 - Privilege – TRE, TRCP, evidentiary claim.
 - Work Product – Attorney or Investigators claims
- Great legal resource for this history exists in Dorsaneo's Texas Litigation Guide § 90.06. Discusses all privileges in law and good go to resources for civil lawyers.

Confidentiality

Sec. 1702.133. CONFIDENTIALITY; INFORMATION RELATING TO CRIMINAL OFFENSE.

(a) A license holder or an officer, director, partner, or manager of a license holder may not disclose to another information obtained by the person for an employer or client except:

- (1) at the direction of the employer or client; or
- (2) as required by state law or court order.

(b) A license holder or an officer, director, partner, or manager of a license holder shall disclose to a law enforcement officer or a district attorney, or that individual's representative, information the person obtains that relates to a criminal offense. A private investigator who is working under the direct supervision of a licensed attorney satisfies this requirement by disclosing the information to the supervising attorney.

Attorney Client Privilege

- Protection of *communications* only between lawyer, client and representatives.
 - Held by the client, not the lawyer or investigator, and can be waived at their direction.
 - Codified under TRE of 503. Realize that there are several exceptions. Not ever absolute and this is an evidentiary protection. Can be claimed perpetually.

Attorney – Work Product Doctrine

- Established in *Hickman v. Taylor*, 329 U.S. 495 (1946).
 - Boat accident where attorney took statements from witnesses and Supremes found that they should be protected from discovery. Why?

Protect strategy, protects opinions and protects the mental thought processes of the attorney.

But...we've come a long way.

- In Texas, TRCP W.P. exceptions were added in the early 1970s.
- Since that time, in the 1990s (and really even before that, 70s and 80s), the TRCP privileges were amended in wholesale and included, in my opinion, an eroding of the work product privilege in part to stop trial by ambush.

Investigators got Both

- **Bearden v. Boone, 693 SW 2d 25 (1985).**
 - **Held that lawyers representative can be protected by privilege AND work product protection.**
 - **Representative of lawyer can claim. But, you are only claiming for client and they can still waive.**
 - **May include your reports, notes and evidence...**

WELL MAYBE>>>>

Work Product Today

- Codified under TRCP 192.5. Basically, now acknowledges 2 types of work product:
 - 1. Core Work Product – Opinion work product. Mental process, strategy, credibility, presentation.
 - 2. Non-Core Work Product – Mere compilation of facts, significant products.

Work Product Doctrine

- TRCP 192.5 Work Product
- (a) Work Product Defined. --Work product comprises:
 - (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
 - (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.
- (b) Protection of Work Product.
 - (1) Protection of Core Work Product--Attorney Mental Processes. --Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable.
 - (2) Protection of Other Work Product. --Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.
 - (3) Incidental Disclosure of Attorney Mental Processes. --It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).
 - (4) Limiting Disclosure of Mental Processes. --If a court orders discovery of work product pursuant to subparagraph (2), the court must - insofar as possible - protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.
- (c) Exceptions. --Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:
 - (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions;
 - (2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4;
 - (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;
 - (4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and
 - (5) any work product created under circumstances within an exception to the attorney-client privilege in [Rule 503\(d\) of the Rules of Evidence](#).
- (d) Privilege. --For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.