AUGUST 26, 2017

CLIENT CONDUCTED INVESTIGATIONS

WORK PRODUCT AND PRIVILEGES (AFTER ANTICIPATION OF LITIGATION)

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WHAT IF?

An attorney works for a law firm with over 50 employees. The attorney's child suffers serious injuries in a car wreck. The attorney requests one month leave to care for the child. The firm says no and terminates the attorney for poor performance.

The attorney files suit pro se for violation of the FMLA. During the discovery phase, the attorney interviews witnesses in preparation for trial. In the deposition of the attorney, the law firm's counsel questions the attorney about which witnesses were interviewed, the information learned, and any notes taken. The attorney objects on the grounds of work product.

Is this information protected? Would it make a difference if the attorney was represented by separate counsel? Would it make a difference if the person terminated was not an attorney?

After a lawsuit is filed, a corporation's managers discuss the claims among themselves without an attorney present. One of the managers then interviews witnesses, some of whom are current employees and some are not.

Is this information protected as work product?

HICKMAN V. TAYLOR, 329 U.S. 495 (1947)

- In *Hickman v. Taylor,* a tugboat capsized resulting in wrongful death claims. *Hickman v. Taylor*, 329 U.S. 495, 498 (1947). The defense attorney interviewed witnesses, making notes of the conversations and obtaining signed written statements from some of them. The Supreme Court held that the statements and notes were protected under the newly named work product doctrine.
- The central issue determined "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." 329 U.S. at 497.
- Although the particular facts in *Hickman* concerned the attorney's notes and witness statements obtained by the attorney, the underlying principles and protections applied to the parties' investigation, not just the attorneys. "Examination into **a person's files and records**, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work." 329 U.S. at 497. (emphasis added).
- The Supreme Court referred to the English courts who recognized a privilege for: "'All documents which are called into existence for the purpose—but not necessarily the sole

purpose—**of assisting the deponent or his legal advisers** in any actual or anticipated litigation are privileged from production." *Hickman* at 510 n.9 (quoting Odgers on Pleading and Practice (12th ed., 1939), p. 264.). (emphasis added).

FEDERAL RULES

- FED. R. CIV. P. 26(b)(3) ***Trial Preparation: Materials*.**

  (A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial **by or for another party or its representative** (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). . . (emphasis added)

  (B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a **party's attorney or other representative** concerning the litigation. (emphasis added).

- Prior to the 1970 amendment to Rule 26, some cases found that a party's own investigation was not protected but the new Rule 23(b)(3) made it clear that the work product protection extended "to documents and things prepared for litigation or trial by or for the adverse party or its agent." 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024 at 528-29 (3d ed. 2010).

- The question is not who created the document or how they are related to the party asserting work-product protection, but whether the document contains work product. *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010) (construing work product of attorney contained in client's documents). The work product privilege does not depend on whether the thoughts and opinions were communicated orally or in writing, but on whether they were prepared in anticipation of litigation. *Id.* at 36.

- *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 (D.D.C. 2003)

  > Plaintiff appears to argue that the work product privilege applies only to materials prepared by an attorney and that it "has *not* been extended to the preparatory work of non-lawyers." Pl.'s Mot. at 7 (emphasis in original). To the extent that it rests on this narrow interpretation of the work product privilege, plaintiff's objection must fail. Rule 26(b)(3) of the Federal Rules of Civil Procedure expressly provides that the attorney work product doctrine applies to materials prepared "by or for another party or by or for that other party's representative (including the other party's attorney, consultant ... or agent)." FED. R. CIV. P. 26(b)(3). By its own terms, then, the work product privilege covers materials prepared by or for *any party or by or for its representative;* they need not be prepared by an attorney or even for an attorney. *See id.* "While the 'work

product' may be, and often is, that of an attorney, the concept of 'work product' is not confined to information or materials gathered or assembled by a lawyer." *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 603 (8th Cir. 1977); *see also United States v. Nobles,* 422 U.S. 225, 238–39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (In light of "the realities of litigation," it is "necessary that the [work product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself."). (footnote omitted).

. . .

Under the amended Rule, "materials prepared by *any* representative of the client are protected, regardless of whether the representative is acting for the attorney," so long as they were clearly prepared in anticipation of litigation. Epstein, *supra,* at 545 (emphasis in original) [Edna Selan Epstein, The Attorney–Client Privilege and the Work Product Doctrine 483 (4th ed.2001)]. *See, e.g., In re Copper Market Antitrust Litigation,* 200 F.R.D. 213, 221 (S.D.N.Y. 2001) ("[D]ocuments prepared in anticipation of litigation need not be created at the request of an attorney."); *Occidental Chemical Corp. v. OHM Remediation Services Corp.,* 175 F.R.D. 431, 434 (W.D.N.Y. 1997) ("[W]ork product immunity extends to documents prepared by or for a representative of a party, including his or her agent."); *Briggs & Stratton Corp. v. Concrete Sales & Servs.,* 174 F.R.D. 506, 508–09 (M.D.Ga. 1997) (materials need not have been prepared by attorney or attorney's agent to enjoy work product protection, so long as prepared in anticipation of litigation); *Bank of New York v. Meridien Biao Corp.,* No. 95 Civ. 4856, 1996 WL 490710, 1996 U.S. Dist. LEXIS 12377 (S.D.N.Y. Aug. 27, 1996) (document prepared in anticipation of litigation need not have been created at behest of counsel; work product doctrine "encompasses documents prepared by [or for] the party, whether or not it is done for the party's attorney"); *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.,* 125 F.R.D. 578, 586–87 (N.D.N.Y. 1989) (work product protection exists for work of consultants acting as representative of plaintiffs); *Westhemeco Ltd. v. New Hampshire Ins. Co.,* 82 F.R.D. 702, 708 (S.D.N.Y. 1979) (work product doctrine protects material prepared by defendant's surveyor and investigator).

- The work-product doctrine is "distinct from and broader than the attorney-client privilege." *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975). FED. R. CIV. P. 26(b)(3) protects against the discovery of "work product," defined as documents and tangible things that have been prepared in anticipation of litigation or for trial by or for a party or a party's representative, including the party's consultant. *Boze Mem'l, Inc. v. The Travelers Lloyds Ins. Co.*, 2013 WL 12123898 *2 (N.D.Tex. 2013). Documents created for the litigation by either plaintiff or plaintiff's counsel are protected. *Id.* at *5.

- *Hickman* continues to provide protection for intangible things independent of Rule 26(b)(3). *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010); see also *Bear Republic Brewing Co. v. Cent. City Brewing Co.*, 275 F.R.D. 43, 45 (D. Mass. 2011).
- In ***Hickman*****,** the Court was concerned with an attorney's privacy in his or her own thoughts and impressions, ***id.*** **at 510-12,** but as an attorney is merely an agent for his or her client, the more serious invasion to be guarded against is unnecessary intrusions into the client's privacy. Bruce E. Boyden, Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law, 65 Ark. L. Rev. 39, 73 (2012).
- The focus is not on who created the document or how they are related to the party asserting the work product protection, but whether the document actually contains work product. *See* ***Hickman v. Taylor*****, supra;** Cheryl C. Magat, How Attorney-Client Privilege and the Work Product Doctrine May Apply to Third Parties in Tax Law Sometimes the Only Correct Answer Is, "Actually, No - You Can't See It.", Prac. Tax Law. 21, 26 (2011).
- There is no viable argument that the pro se defendant's litigation preparation should not be covered by the work product privilege because the accused lacks the formal training and experience of a member of the bar. J. Vincent Aprile II, The Pro Se Litigant and the Work Product Privilege, Crim. Just. 35 (2016).
- The work product doctrine is not limited to documents prepared by or even reviewed by counsel. Rather, the protection is afforded to materials prepared by a party or its representative. David A. Wollin, Esq. & Jamal Burk, In-House Counsel: Protecting Confidential Communications and Work Product, R.I.B.J. 5, 33 (2015).
- The work product privilege “is important not only for attorneys, but also for litigants acting in propria persona. A litigant needs the same opportunity to research relevant law and to prepare his or her case without then having to give that research to an adversary making a discovery request.” (*Dowden v. Superior Court*, 86 Cal. Rptr. 2d 180, 185-86 (Ct. App. 1999).)

TEXAS RULES

- TEX. R. CIV. P. 192.5

(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.

- Rules pertaining to privileges under the 1999 amendments to the Texas Rules of Civil Procedure changed dramatically. “Proposed Civil Procedure Rule 192.5's new definition of

"work product" replaced the undefined term "attorney work product" in former Civil Procedure Rule 166b(3)(a) and the "case specific definition" of "party communications" under the earlier rules. The term "work product" was redefined to include materials, mental impressions, and communications created by the party or his representatives, including attorneys." William V. Dorsaneo, III, The History of Texas Civil Procedure, 65 Baylor L. Rev. 713, 803 (2013) (footnotes omitted).

- "Rule 192.5 protects all materials developed and all communications made by a party's employees in anticipation of litigation." *In re Fairway Methanol LLC*, 515 S.W.3d 480, 490 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
- The work product privilege extends both to documents actually created by the attorney and to memoranda, reports, notes, or summaries prepared by other individuals for the attorney's use. *In re Fairway Methanol LLC*, 515 S.W.3d 480, 490–91 (Tex. App.—Houston [14th Dist.] 2017, no pet.). *See also GAF Corp. v. Caldwell*, 839 S.W.2d 149, 151 (Tex. App.–Houston [14th Dist.] 1992, orig. proceeding); *In re McDaniel*, No. 14–13–00127–CV, 2013 WL 1279454, at *3 (Tex. App.–Houston [14th Dist.] Mar. 28, 2013, orig. proceeding) (per curiam) (mem. op.) (rejecting argument that data created by a third party cannot be considered attorney work product).
- *In re Arpin Am. Moving Sys., LLC*, 416 S.W.3d 927, 929 (Tex. App.—Dallas 2013, no pet.)

  > As to request 15, discovery regarding the methods of document collection and production invades the work-product privilege. *In re Exxon Corp.,* 208 S.W.3d 70, 76 (Tex.App.—Beaumont 2006, orig. proceeding). In *Exxon,* the plaintiffs sought "to depose an Exxon representative for the purpose of inquiring specifically into the process by which Exxon's representative responded to the requests for production." *Id.* at 75. The court concluded that this request "necessarily and almost exclusively concerns the 'mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives'" subject to protection as work product under Rule 192.5, Texas Rules of Civil Procedure. *Id.*

- Under Rule 192.5(a)(1), a party's mental impressions developed in anticipation of litigation are protected from discovery. An attorney's mental impressions appear to have an absolute privilege under Rule 192.5(b)(1). However, a party's mental impressions would fall under Rule 192.5(b)(2) as "other work product" and are discoverable upon a showing of "substantial need" and "undue hardship."

WAIVER

Boze Mem'l, Inc v. The Travelers Lloyds Ins. Co., 3:12-CV-669-P, 2013 WL 12123898, at *5 (N.D. Tex. Aug. 16, 2013).

> The work product privilege is very different from the attorney-client privilege. Although the attorney-client privilege exists to protect the confidential communications between an attorney and client and, thus, is generally waived by disclosure of confidential communications to third parties, the work product protection exists to "promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent." *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989). "Therefore, the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege." *Id.* Such a disclosure only waives the work product privilege if it is given to adversaries or is "treated in a manner that substantially increases the likelihood that an adversary will come into possession of the material." *Advance Technology Incubator, Inc. v. Sharp Corp.*, 2009 WL 4432569, at *2 (E.D. Tex. 2009) (citing *Ferko v. NASCAR*, 219 F.R.D. 396, 400-01 (E.D. Tex. 2003); *S.E.C. v. Brady*, 238 F.R.D. 429, 444 (N.D. Tex. 2006)). The burden of proving waiver of the work product doctrine falls on the party asserting waiver. *See Wi-Lan, Inc. v. Acer, Inc.*, No. 2:07-cv-473, 2010 WL 4118625, at *5 (E.D. Tex. Oct. 18, 2010). For example, in *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285 (D.C. Cir. 1980), the Court of Appeals held that information shared with a government agency having a common interest against a third party did not constitute waiver of the work product privilege because the governmental agency was not an adversary and the disclosure of the information to the governmental agency did not substantially increase the likelihood that an adversary would come into possession of the information. 642 F. 2d at 1299-1301.
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> Here, there is no indication that Plaintiff's sharing of documents with Fulgham, an individual aligned with Plaintiff, substantially increased the likelihood that Travelers would come into possession of the information. Therefore, documents created in anticipation of the instant litigation by Plaintiff or Plaintiff's counsel, even if disclosed to Fulgham, may properly be withheld under the work product doctrine.

CONCLUSIONS

- An individual party's investigation of his or her claim or defenses after anticipating litigation is protected work product.
- An individual party's communications with witnesses after anticipating litigation is protected work product.
- Witness statements obtained by individual parties after anticipating litigation is protected work product, unless the case is pending in a Texas state court and is in writing.
- An individual party's notes of the case, including notes of communications with witnesses, prepared in anticipation of litigation are protected as work product.
- A party's work product is not easily waived.
- A party can obtain another party's work product upon a showing of substantial need and undue hardship.

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