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Attorney-Client Privilege vs. Work Product vs. Duty of Confidentiality

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I. Attorney–Client Privilege, Work Product and Obligation to Maintain Confidentiality Distinguished

The attorney-client privilege is often confused with both the work-product doctrine and the lawyer's professional obligation not to reveal confidential information. Despite some overlap, these are distinct doctrines. The boundaries of each must be carefully demarcated; whether information may or must be disclosed in a particular situation will often depend on which of the three doctrines applies.[1]

The attorney-client privilege is an evidentiary privilege, designed to encourage the client to communicate freely with her attorney. It protects against compelled disclosure, in judicial[2] and administrative[3] proceedings, of communications meeting the requirements set forth in Rule 503(b). Rule 101(c) explicitly provides that the privilege rules apply to all stages of a case or proceeding. In addition, the Texas Rules of Civil Procedure[4] place privileged matter outside the scope of discovery.

Work product in civil cases. In contrast to the attorney-client privilege, the work-product privilege is designed for the attorney's sake.[5] Premised on the belief that an attorney must have "a privileged area within which [he or she] can analyze and prepare his or her case,"[6] Rule 192.5 of

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[1] See, e.g., Pope v. State, 161 S.W.3d 114, 119 n.3 (Tex. App.—Fort Worth 2004) (pointing out that attorney mistakenly referred to work-product as a "component" of the attorney-client privilege), aff'd, 207 S.W.3d 352 (Tex. Crim. App. 2006); Henderson v. State, 962 S.W.2d 544 (Tex. Crim. App. 1997); Sanford v. State, 21 S.W.3d 337 (Tex. App.—El Paso 2000, no pet.); Pittsburgh Corning Corp. v. Caldwell, 861 S.W.2d 423 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (court's opinion appears at times to suffer from failure to delineate attorney-client privilege from work product).

Cf. Hoggard v. Snodgrass, 770 S.W.2d 577, 582–86 (Tex. App.—Dallas 1989, orig. proceeding) (motion to disqualify attorney for child in suit against mother where attorney had previously represented entire family against third parties in suit arising out of same accident; held, fact that joint-client exception to attorney-client privilege might render communications from mother non-privileged did not negate attorney's ethical obligation to preserve the confidences and secrets of mother and that attorney should therefore be disqualified).

[2] Tex. R. Evid. 101 (rules of evidence apply to proceedings in Texas courts, with exceptions listed in Tex. R. Evid.101(d)-(f).

[3] Tex,Gov't Code § 2001.083.

[4] Tex. R. Civ. P. 192.3(a). Rule 193 details the procedures that must be followed by parties invoking and challenging assertions of the privilege to written discovery. See also Tex. R. Civ. P. 199 (oral depositions) and 200 (written depositions).

[5] Pope v. State, 207 S.W.3d 352, 357–58 (Tex. Crim. App. 2006) ("The attorney work-product doctrine, while not a true evidentiary privilege, belongs to and protects the attorney. Its purpose is to stimulate the production of information for trials * * * "); National Tank Co. v. Brotherton, 851 S.W.2d 193, 200 (Tex. 1993) ("Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.") (quoting Hickman v. Taylor, 329 U.S. 495, 511, 67 S. Ct. 385, 393 (1947)).

[6] Owens–Corning Fiberglas Corp. v. Caldwell, 818 S.W.2d 749, 750 (Tex. 1991); In re Bexar County Criminal Dist. Attorney's Office, 224 S.W.3d 182, 186 (Tex. 2007) ("The primary purpose of the work product rule is to

the Texas Rules of Civil Procedure defines work product and exempts it from discovery. [7] According to Rule 192.5(a), 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; and (2) communications made in anticipation of litigation or for trial between a party and the party's representatives or among the party's representatives.[8]

Rule 192.5(b) then distinguishes between "core work product" and "other work product." "Core work product" is the work product of an attorney or an attorney's representative that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or representative.[9] Core work product is not discoverable, unless it falls within an enumerated exception.[10] Work product thus protects an attorney from having to disclose the contents of a litigation binder, even though the documents contained in the binder themselves may not be privileged.[11]

Non-core work product is "other work product," and is subject to discovery upon a showing of substantial need and undue hardship.[12] The danger that disclosure of "other work product" might implicitly reveal some "core work product," such as an attorney's mental impressions, is not grounds for denying discovery. But in such instances the trial court must endeavor, to the extent possible, to protect against the implicit disclosure of "core work product."[13]

In several substantial respects, the attorney-client privilege is broader than the work-

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shelter the mental processes, conclusions, and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case.").

Cf. Pope v. State, 207 S.W.3d 352, 358 (Tex. Crim. App. 2006) ("It is premised on the notion that an attorney should not be compelled to disclose the fruits of his labor to his adversary.").

See generally 47 Texas Practice, Albright, Herring and Pemberton, Handbook on Texas Discovery Practice §§ 6:14 – 6:17 (2014-15 ed.).

[7] Tex. R. Civ. P. 192.5(b).

[8] A party's representatives include the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. Tex. R. Civ. P. 192.5(a).

[9] Tex. R. Civ. P. 192.5(b)(1).

[10] Tex. R. Civ. P. 192.5(c).

[11] In re Toyota Motor Corp., 94 S.W.3d 819, 825 (Tex. App.—San Antonio 2002, orig. proceeding) (notebook "is clearly a litigation binder prepared by or at the direction of an attorney, and despite the fact that certain documents contained therein may be subject to discovery in response to appropriate requests, the binder as a whole should be protected as work product"). See In re Bexar County Criminal Dist. Attorney's Office, 224 S.W.3d 182, 193 (Tex. 2007) ("[a]n attorney's litigation file goes to the heart of the privileged work area guaranteed by the work product exemption. The organization of the file, as well as the decision as to what to include in it, necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case") (quoting National Union Fire Insurance Co. v. Valdez, 863 S.W.2d 458, 460 (Tex.1993, orig. proceeding).

[12] Tex. R. Civ. P. 192.5(b)(2).

[13] Tex. R. Civ. P. 192.5(b)(3)-(4).

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