Investigative Privileges

Presented by:

JERRY FAZIO

7557 Rambler Road, Suite 1465
Dallas, Texas 75231
(214) 891-5960 - Telephone
(214) 891-5966 – Facsimile
jfazio@owenfazio.com

Section I

Witness Statements

I. **The Witness Statement Rule,** officially known as Texas Rule of Civil Procedure 192.3(h), states:

a. 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. Tex. R. Civ. P. 192.3(h).

b. A "witness statement" is defined as either (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Tex. R. Civ. P. 192.3(h).

c. **Notes** taken during a conversation or interview with a witness **are not considered witness statements**. Tex. R. Civ. P. 192.3(h).

II. **Case Law – When Witness Statements Are Discoverable in Litigation.**

a. Matagorda County Hospital District v. Burwell, 94 S.W.3d 75 (Tex. App.—Corpus Christi 2002, pet denied).

i. Plaintiff employee successfully sued defendant hospital for wrongful termination. The hospital appealed the trial court's judgment in favor of the Plaintiff, arguing that the trial court improperly excluded witness statements that would have shown the hospital had just cause for the termination of the Plaintiff employee.

ii. The court of appeals state that "under the 'new' rules of discovery, effective January 1, 1999, certain information or documents are discoverable, **even if prepared in anticipation of litigation**. These include 'information discoverable under Rule 192.3 concerning witness statements.'"

iii. The court of appeals held that the statements as issue fell within the description of witness statements that are not protected by the work product privilege, citing *In Re Jimenez,* for the proposition that witness statements are not "work product" and are generally not protected from discovery as such. Accordingly, the court of appeals ruled that the statements were discoverable.

b. In Re Urinda Jimenez and Marcelo Jimenez, 4 S.W.3d 894 (Tex. App.—Houston [1st Dist.] 1999, org. proceeding).

i. The parties sought a writ of mandamus from the court of appeals, complaining about an order from the trial court which held that the plaintiffs were not entitled to obtain defendant's statements to his insurance carrier as they were not discoverable as work product. The parties were involved in a traffic accident, from which Plaintiff sued Defendant for personal injury. Plaintiff served Defendant with a Request for Disclosure of information and material under Tex. R. Civ. P. 194.2(i).

ii. Defendant claimed that his statements, made to his insurance carrier, constituted work product because it was made in anticipation of litigation and therefore was not discoverable under Tex. R. Civ. P. 192.5(a) and (b)(2) and Tex. R. Civ. P. 192 comments 8 & 9.

iii. Tex. R. Civ. P. 192.5(a)(2) defines work product as, "a communication made in anticipation of litigation between a party and the party's representatives including the party's insurers." Tex. R. Civ. P. 192.5(a)(2).

iv. Tex. R. Civ. P. 192.5(b)(2) provides that such 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.

v. There are five types of information or documents that, even if prepared in anticipation of litigation, are not considered "work product" and are not protected from discovery. Tex. R. Civ. P. 192.5(c). They include information discoverable under Tex. R. Civ. P. 192.3 concerning witness statements. Tex. R. Civ. P. 192.5(c)(1).

vi. The Houston Court of Appeals held that given Tex. R. Civ. P. 192.5(c) and the undisputed fact that defendant's statement was a "witness statement," the court concluded that defendant's statement was not protected "work product" and therefore, not protected from discovery.

c. In Re Team Transport Inc., 996 S.W.2d 256 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

i. The Defendant objected when the Plaintiff moved to compel production of investigative reports after the Defendant's employee negligently dumped a container full of tires on the Plaintiff. The court reviewed *in camera* a

letter sent by a company officer to the company's insurer. The first paragraph contained a witness's accident description, while the second contained a corporate officer's statement on procedures used at the warehouse as they related to the accident.

ii. The trial court found that although the letter was prepared in anticipation of litigation, it was discoverable as a witness statement. In denying the writ of mandamus, the Houston Court of Appeals concluded that the letter was discoverable in its entirety. Under Tex. R. Civ. P. 192.3(h), 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.

iii. The Court of Appeals found that the second paragraph was related to normal procedures for warehousemen; because they were pertinent to the accident, they were included as a follow-up to the witness statement. As such, they were part and parcel of the statement. Further, the Defendant Company tried to argue that the paragraph describing the warehouse procedures could not be a "witness statement" because the company officer was not a witness to the accident. The Court of Appeals held that the Texas Rules of Civil Procedure do not mandate this requirement. Further, it held that the statement of *any person* with knowledge of relevant facts is discoverable.

iv. The Court of Appeals held that while the officer was not a witness, he had knowledge of relevant facts and his statement was thus discoverable under Tex. R. Civ. P. 192.5(h).

d. In Re Learjet, Inc., 59 S.W.3d 842 (Tex. App.—Texarkana 2001, no pet.)

i. The Plaintiff sued the Defendant aircraft manufacturer, claiming that aircraft delivered by the manufacturer did not meet contract specifications. Statements made by the Defendant manufacturer's employees regarding the aircraft were videotaped and played for the parties during mediation. The Plaintiff asked the trial court to order the production of those videotapes.

ii. At the hearing, the Defendant manufacturer argued that since the videotapes were created for mediation, they were not discoverable. Although the videotapes were prepared for mediation, the Court of Appeals ruled that they were not protected from discovery by the attorney-client privilege as they were not made to facilitate the rendition of legal services, instead they were made to present factual information to the opposing parties.

iii. Furthermore, the Defendant manufacturer did not show the videotapes related to trial strategy, legal analysis or to anything that indicated the attorney-client privilege. The Court of Appeals designated the employees in the videotape as expert witnesses, and the material involved as the type of information that was discoverable under Tex. R. Civ. P. 192.3(e).

III. **Case Law – When Witness Statement Are Not Discoverable In Litigation.**.

a. In Re James N. Fontenot, Jr., M.D. and James N. Fontenot, Jr., M.D., P.A., 13 S.W.3d 111 (Tex. App.—Fort Worth 2000, no pet.).

i. The Defendant sought a writ of mandamus from the court of appeals, arguing the trial court clearly abused its discretion by compelling them to produce two documents: a written narrative provided to one of the defendant's attorneys in another lawsuit and a **confidential insurance claim questionnaire** with the same narrative attached. The case involved a wrongful death and medical malpractice suit against a physician and his physician's association by the surviving relatives of a former patient. The Plaintiffs served a Request for Disclosure on Defendant asking for witness statements under Tex. R. Civ. P. 194.2(i). In response, Defendant filed a Motion for Protective Order, withholding both the letter and the claim form, asserting the attorney-client privilege applied to them. Plaintiffs argued that the Witness Statement Rule trumps the attorney-client privilege, and therefore the documents should be produced.

ii. The court of appeals held that this broad rule applies only to non-privileged statements: elimination of the "witness statement" exemption does not render all witness statements automatically discoverable but subjects them to the same rules concerning the scope of discovery and privileges applicable to other documents or tangible things.

iii. The Fort Worth Court of Appeals found that the **rule did not include the communications between the defendant physician and his attorneys and malpractice insurers**, *because such an interpretation would vitiate the attorney-client privilege*. The Court held that if the Texas Supreme Court had intended to eliminate the attorney-client privilege as it applied to witness statements it would have expressly done so.

b. In Re Matthew Arden, 2004 Tex. App. LEXIS 2596 (Tex. App.—El Paso March 24, 2004).

i. The driver argued that the trial court abused its discretion by allowing discovery of the witness statement, because it was protected by the attorney-client privilege. The appellate court found that the driver established a prima facie claim of attorney-client privilege and producing

the insurance adjuster's affidavit necessary to support the contention that the communication between the driver and the adjuster was protected by the attorney-client privilege. **The adjuster's role in collecting the driver's witness statement was as a representative acting with the purpose of obtaining and facilitating the driver's legal representation, rendering their communication protected by the attorney-client privilege.**

ii. The discovery rules allow a party to obtain discovery of the statement of any person with knowledge of relevant facts, a witness statement, regardless of when the statement was made and such statements are not protected by the work-product privilege. Tex. R. Civ. P. 192, however, instructed that this broad rule applies **only to non-privileged statements**: elimination of the witness statement exemption does not render all witness statements automatically discoverable but subjects them to the same rules concerning the scope of discovery and privileges applicable to other documents or tangible things.

iii. A witness statement contained within a confidential communication between attorney and client is privileged and protected from discovery. The attorney-client privilege is one of the oldest privileges recognized by the common law, and if the Texas Supreme Court had intended to eliminate the attorney-client privilege as it applies to witness statements, it would have expressly done so.

iv. A "representative of the client," for purposes of the attorney-client privilege, is a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client.

v. Any party who seeks to exclude documents, records, or other matters from the discovery process has the affirmative duty to specifically plead the particular privilege or immunity claimed. Moreover, to object to a discovery request, the responding party must make a timely objection in writing and state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request.

vi. A party who claims that material or information responsive to written discovery is privilege may withhold the privileged material or information from the response but must state – in the response (or an amended or supplemental response) or in a separate document – that: (1) information or material responsive to the request has been withheld, (2) the request to which the information or material relates, and (3) the privilege or privileges asserted. Tex. R. Civ. P. 193.3(a). Rule 193.3 does permit the party to withhold privileged material, however, the rule also requires the

party to advise the other side that he has withheld material, tell them what request is involved, and set out the privilege asserted.

IV. **Work Product May Not Be Discoverable In Litigation.**

a. Defined as:

i. **Material prepared or mental impressions developed** *in anticipation of litigation* or for trial by or for a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, **insurers**, employees, or agents; or

ii. **Communications made** *in anticipation of litigation* or for trial between a party and the party's representatives, including the party's attorneys, consultants, sureties, indemnitors, **insurers**, employees, or agents.

b. Two types of Work Product

i. **Core Work Product – Not Discoverable.** Tex. R. Civ. P. 192.5(b)(1).

1. The work product of an attorney or an attorney's representatives that contain the attorney's or the representative's *mental impressions, opinions, conclusions, or legal theories*.

a. Example of a case where work product was held not to be discoverable:

i. Reports to clients or other in-house counsel regarding analysis of facts of the cases, strengths and weaknesses and recommendation of whether litigation is appropriate were recently held to be core work product.

ii. In re Equal Employment Opportunity Commission, No. 06-60969, 2006 WL 3420135 (5th Cir. 2006).

ii. **Other Work Product – May Be Discoverable.** Tex. R. Civ. P. 192.5(b)(2).

1. Only upon a showing that the party seeking discovery has **substantial need** of the materials and that the party is unable without **undue hardship to obtain the substantial equivalent of the material by other means.**

a. Issues of credibility and failing memory have been held to satisfy the substantial need and undue hardship exception. Dillard Dept. Stores, Inc. v. Sanderson, 928 S.W.2d 319 (Tex. App.—Beaumont 1996, no pet.).

c. Exceptions – *even if made or prepared in anticipation of litigation* or for trial, the following is **work product not protected from discovery.** Tex. R. Civ. P. 192.5(c).

i. **Information** discoverable under Rule 192.3 **concerning experts, trial witnesses, witness statements, and contentions**;

ii. **Trial exhibits** ordered disclosed under Rule 166 or Rule 190.4;

iii. The name, address, and telephone number of any **potential parties** or any **person with knowledge of relevant facts**;

iv. **Any photographs or electronic imaging of underlying facts** (e.g., a photograph of the accident scene), or a photograph or electronic imaging of any sort that a party **intends to offer into evidence**; and

1. Example: Lopez v. La Madeleine, 200 S.W.3d 854 (Tex. App.—Dallas 2006, no pet. h.).

Facts: Employee sued his employer after the employee alleged that his foot slipped on a damaged drain cover and fell. The employee sued his employer for negligence. During the discovery period, the employee requested that the employer produce "any tape recordings, pictures or videos of Plaintiff or any witness in this case." The employer's counsel failed to produce these items as it stated that it was not currently in possession of any documents that met the request. A pretrial order stated that evidence not produced would not be admitted. Despite this order, the Trial Court admitted a surveillance videotape and photos at trial that showed the employee had testified falsely about the extent of his injuries. The issue before the Court of Appeals was whether the discovery rules allowed a party to impeach a witness and refute possible perjured testimony by introducing evidence that was intentionally withheld from the Plaintiff.

Holding: The Court of Appeals held that there was no evidence to support the Trial Court's implied finding that the employer met its burden to establish lack of unfair surprise or unfair prejudice to Lopez regarding the introduction of the undisclosed videotape and photographs and that error in admitting this evidence probably

caused the rendition of an improper judgment. Further, the Court of Appeals held that the Trial Court's error of admitting the intentionally withheld videotape and photos constituted reversible error.

v. Any work product created under circumstances **within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.**

1. **Furtherance of a crime or fraud;**

   a. The crime-fraud exception applies only if a prima facie case is made of contemplated fraud. Additionally, there must be a relationship between the document for which the privilege is challenged and the prima facie proof offered. Granada Corp. v. 1st Ct. of Appeals, 844 S.W. 3d 223, 227 (Tex. 1992).

   b. To meet the prima facie case requirement, the proponent must offer evidence establishing the elements of fraud and that the fraud was ongoing or about to be committed when the document was prepared. In re AEP Tex. Cent. Co., 128 S.W.3d 687 (Tex. App.—San Antonio 2003, orig. proceeding).

   c. Mere allegations of fraud are insufficient; the fraud alleged to have occurred must have occurred at or during the time the document was prepared and in order to perpetrate the fraud. The fact that the plaintiff's cause of action involves fraudulent conduct is insufficient. In re AEP Tex. Cent. Co., 128 S.W.3d 687 (Tex. App.—San Antonio 2003, orig. proceeding).

2. **Deceased client;**
   a. A communication relevant to an issue between parties who claim through the same deceased client; regardless of whether the claims are be testate or intestate succession or by inter vivos transactions.

3. **Breach of duty by a lawyer or client**;

   a. A communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.

   b. When an attorney is sued by his own client, the attorney is permitted to reveal confidential information **so far as**

necessary to defend himself. Vinson & Elkins v. Moran, 946 S.W. 2d 381, 394 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd).

4. **Document attested by a lawyer;** or

    a. A communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

5. **Joint clients**

    a. A communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

V. Conclusions and Thoughts

a. If we can establish the witness statement was made in anticipation of litigation, it may not necessarily be discoverable.

b. You may need to execute an affidavit establishing that you are retained as a representative of the client and you had a subjective belief that litigation was imminent when you took the witness statement.

c. Example: An unsuccessful attempt to keep an adjuster file privileged

    i. In re Petitta, No. 13-06-452-CV, 2006 WL 3365548 (Tex. App.—Corpus Christi Nov. 20, 2006, no pet. h.).

        1. Here, the trial court ordered the production of the entire pre-suit claims file from an insurance company.

        2. A claim of privilege was made. However, the Court held mere conclusory allegations that documents are "confidential" or "privileged" are insufficient to support a claim of privilege.

        3. Here, neither a supporting affidavit nor any other evidence to support the claim of privilege was produced beyond the objection of privilege. The Court held that the party claiming privilege has a burden to tender appropriate evidence of the privilege at the ensuing hearing.

d. Example: A successful attempt to keep an adjuster file privileged

i. In re Horizon Offshore Contractors, Inc., No. 09-06-561-CV (Tex. App.—Beaumont January 18, 2007, no pet. h.)(mem. op.).

1. The plaintiff sought to obtain the entire claims adjuster file of the persons responsible for paying his maintenance and care so that he could argue an issue relating to the defending of the violation of the statute of limitations before he filed his lawsuit. The defendant argued that the material sought was protected work product and made in anticipation of litigation.

2. The plaintiff contended that the claim file was discoverable because it was not prepared in anticipation of litigation. The Court stated the objective inquiry as to whether the file was prepared in anticipation of litigation was whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly. Further, the Court said the subjective inquiry was whether the party involving the privilege believes in good faith that there is a substantial chance that litigation will ensue."

3. The plaintiff was relying on a document regarding settlement negotiations. It was an email where the claims adjuster expressed his opinion that the case would be settled and felt the claimant would not retain an attorney. The plaintiff argued that this was the belief of the adjuster that litigation would be avoided.

4. The Court stated that the disputed documents revealed that the claims adjuster realized a suit might be filed and prepared the case accordingly. Further, the adjuster's file had a diary of activity on the claim and included speculation concerning what it would cost to settle the claim and the adequacy of reserve amounts. The Court found that the employee did not produce enough evidence that he had a substantial need for the documents.

Section II

What Can You Do to Assist Defense Counsel in Negligence Cases?

I. Review the incident report for inaccuracies and incomplete information. Make sure all blanks and spaces are properly filled in with pertinent information, contact manager to make corrections.

II. Take clear and complete witness statements.

a. Ask on the record if their statements are true and correct;

b. Ask these questions of the customer and/or witness;

1. Were you in the exact area before the accident? If so, how soon before the accident?
2. What did you fall/slip upon? What caused your accident? It's color, size, location.
3. Were any employees in the immediate area? If so, what were they doing and ask them to identify or describe them.
4. What was said between you and any employee? Be specific as to each and every conversation.
5. What were you doing when you the accident happened?
6. Have you talked to any other witnesses? If you have, what was the nature of that conversation? What are their names and addresses?

III. Talk to all employees that may have knowledge of this incident before you turn on the tape recorder.

a. Go over the accident and all conversations with the Plaintiff.

b. Find out if any problems exist from their rendition of the facts. Work on the wording of an answer to a problem area or avoid that question during the recorded statement.

c. Take notes of any problem areas as well as positive parts of the employee's statement. Transmit those notes to counsel as soon as possible.

IV. Review the recorded statement when it is transcribed. If blanks are in the statement, go back and have those blanks filled in by the customer, employee or witness.

V. Make sure all photographs that are taken are relevant.

VI. Find addresses of witnesses and/or former employees.

VII. Ascertain if a vendor or other responsible party can be blamed for the incident.

VIII. ISO Report.

IX. Notify counsel if insured has a problem.

Section III

Pending Litigation with a Potential Big Impact

1. Citibank v. Guzman: Motion For Summary Judgment Denied Because Pleadings Weren't In Spanish (www.freerepublic.com)

Judge D'Metria Benson is the new judge in County Court at Law, No. 1. Judge Benson was one of the judges swept into office last November when the Democrats won all of the county-wide contested elections in Dallas County.

Judge Benson recently denied an uncontested motion for summary judgment because the defendant did not speak English and the plaintiff's attorney did not send the summary judgment motion to the defendant in Spanish. As best we have been able to determine, this is the first time a judge in Dallas County has based a legal ruling denying summary judgment because of the failure of a party in the lawsuit to file pleadings in Spanish.

According to the transcript of the case of Citibank vs. Refugio Guzman, at the very beginning of the summary judgment hearing, Judge Benson complained to the plaintiff's attorney, Mark Palm, that the documents he had sent the defendant weren't in Spanish.

"Mr. Palm you may proceed, but I think we're going to have some problems if you've got a defendant here that doesn't speak English," Judge Benson said. "And *it doesn't appear that the documents that were sent to him were in Spanish*. I have some concerns about that."

Mr. Palm and Judge Benson then had the following exchange over his summary judgment motion:

"Well, Your Honor, this is a summary judgment," Mr. Palm said. "As you can see, they're based on deemed admissions. This is a credit card account. The defendant hasn't filed a response to the motion for summary judgment, hasn't filed a response to the

admissions; so based on those deemed admissions, I believe we're entitled to our summary judgment. He did file an answer; so, apparently, there is someone interpreting these documents for him."

"I'm not inclined to agree that there's somebody interpreting the documents for him," Judge Benson said. "He's obviously brought someone here with him today. That doesn't mean that he's been able to read or ascertain what was in the documents that were signed before."

Mr. Palm explained to the Court that he didn't know he was expected to provide the defendant with the documents in Spanish.

"I don't know how I was put on notice that the defendant didn't speak English," Mr. Palm said, "or was obligated to provide our motions in Spanish or whatever – whatever the language is that the defendant – is his native tongue."

Judge Benson denied the plaintiff's motion for summary judgment and ordered the case to mediation. The judge did not explain what legal basis she was relying on for ruling that the documents should have been provided to the defendant in Spanish. The judge then adjourned the hearing.