

CLIENT CONDUCTED INVESTIGATIONS



Work Product and Privileges for Client Trial Preparation

THIS PRESENTATION

Includes: The client who assists in trial and litigation preparation.

Does not include: Client initial investigations to determine if claim exists or the need for any remedial measures.





HICKMAN V. TAYLOR (1947)

Witness statements and other information
secured by counsel



HICKMAN V. TAYLOR (1947)

Right of privacy



HICKMAN V. TAYLOR (1947)

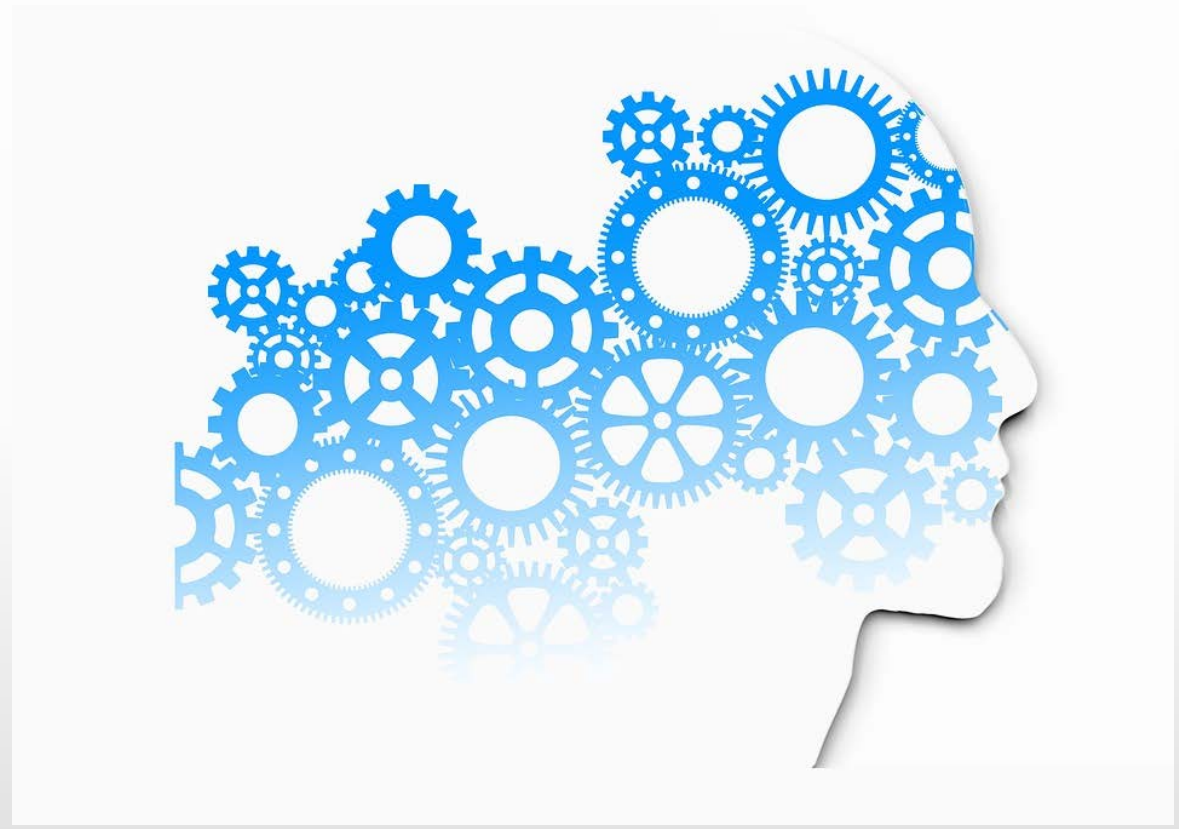
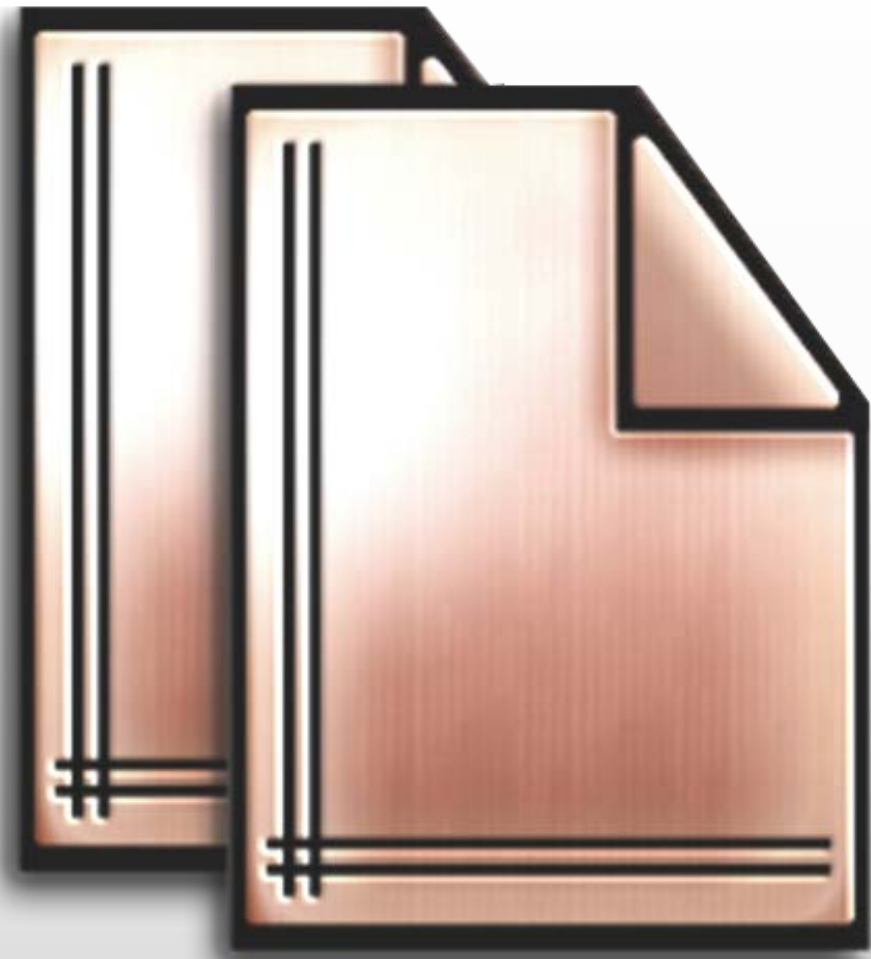
English Courts – all documents made for the purpose of “assisting deponent or his legal advisors” in anticipation of litigation.



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

Documents and tangible things by or for another **party** or its representative

If Court orders disclosure, cannot order mental impressions of attorney or other representative





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).



Who works for who?

Attorney is merely the agent for the party.



RELEVANT QUESTION

Who



How



Content





Boze Mem'l, Inc. v. The Travelers Lloyds Ins. Co.,
2013 WL 12123898 *5 (N.D.Tex. 2013)

Documents created for the litigation by either plaintiff or plaintiff's counsel are protected.

TEX. R. CIV. P. 192.5(a)(1)

Material prepared **or**
mental impressions

By or for **a party** or
a party's representative



Background for Texas Rule

- Before 1999: “attorney work product” and “party communications”
- 1999 Amendment: Major changes: work product and witness statements



In re Fairway Methanol LLC

515 S.W.3d 480, 490 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

“Rule 192.5 protects all materials developed and all communications made by a party's employees in anticipation of litigation.”

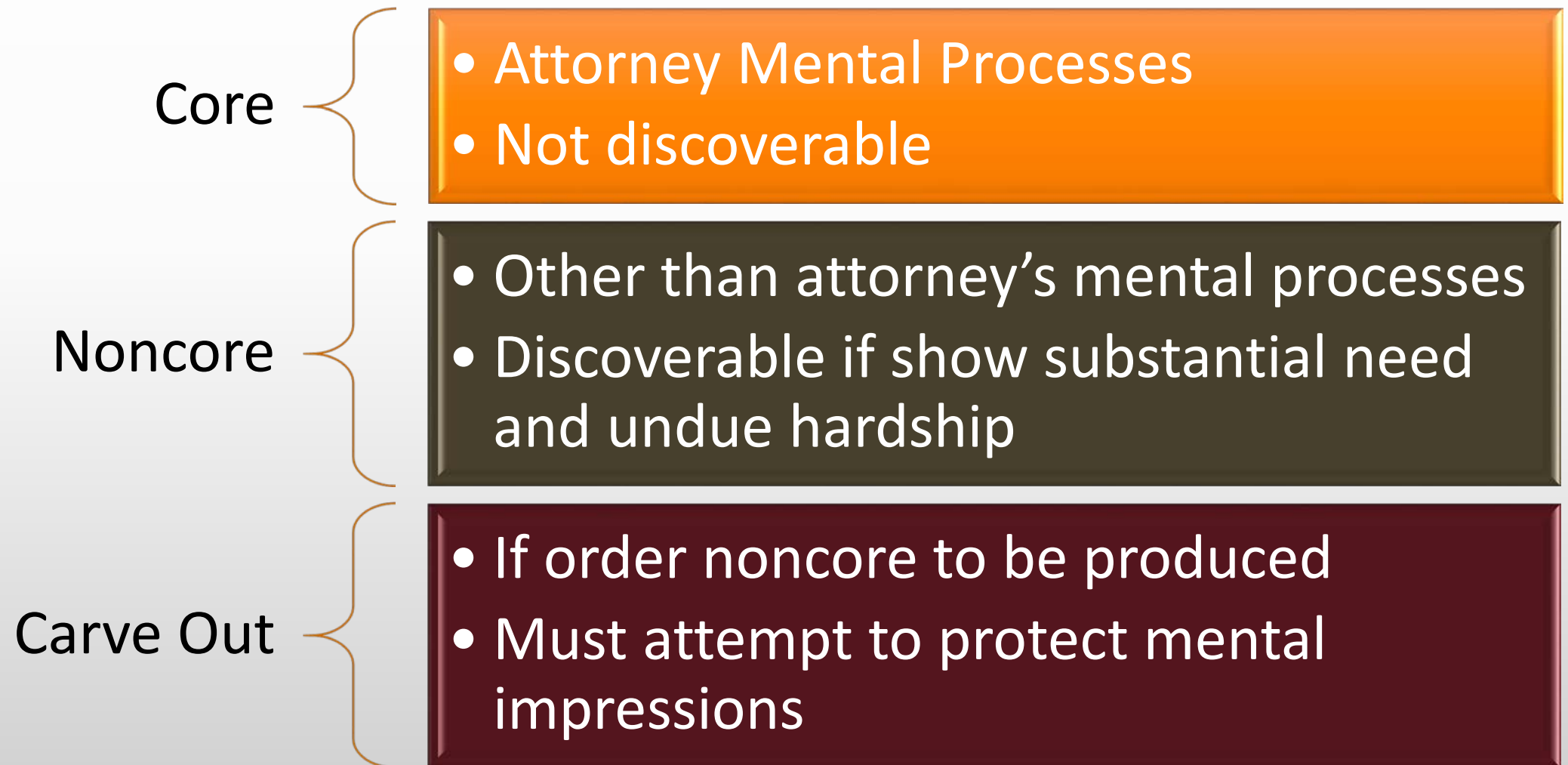


In re Arpin Am. Moving Sys., LLC

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.*

CORE AND NONCORE



EXCEPTIONS

Rule 192.3 Disclosures – Including written witness statements

Trial exhibits

Identity of potential parties

Photos

Exceptions to Attorney/Client privilege: crime-fraud



WAIVER

Work product is not easily waived

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.

CONCLUSIONS

- 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.