

Asserting and Defending Privilege

A New Era

Unfrozen Caveman Lawyer.wmv



Does client have any privileged documents?

- Other side sends discovery requests
- You forward to client immediately
- You calculate response deadline, putting on your calendar and docket system
- Client sends you documents
- You go through them—any privileged documents?
- Answer is almost always “yes”

Does client have any privileged documents *for which privilege must be asserted?*

- Exemption Rule--TRCP 193.3(c)
- Without having to assert privilege, party may withhold privileged communication to or from lawyer or lawyer's representative or privileged document of lawyer or lawyer's representative
 - (1) created or made from point at which party consults lawyer with view to obtaining professional legal services from lawyer in prosecution or defense of specific claim in litigation in which discovery is requested, and
 - (2) concerning litigation in which discovery is requested.
- **Materials created by or for attorneys in litigation**
- Answer is often "NO"

If answer is “no,” do nothing

- If you assert anyway, you may have waived exemption
- Other side may ask for privilege log, and TRCP 193.3(b) says you **MUST** provide one
- *In re Monsanto Co.*, 998 S.W.2d 917, 924 n.6 (Tex. App.—Waco 1999, orig. proceeding) (where many documents claimed as privileged were exempt from assertion procedure, because party listed documents in privilege logs and asserted proof, exemption had no applicability).

If answer is “yes,” assert privilege
and serve withholding statement

Do not “object” based on privilege

Rule 193.2(f): “A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.”

Unfrozen Caveman Lawyer:
“Let’s Object Anyway—It Can’t
Hurt”

Nightmare Scenario: Unfrozen Caveman Lawyer Meets Unfrozen Caveman Judge

- Opposing counsel sets hearing on your objections
- You show up expecting to fight about your *other* objections: not relevant, overly broad, fishing expedition, etc.
- Instead, opposing counsel wants to argue your *privilege* objections
- You protest:
 - I haven't asserted privilege (yet).
 - There's no such thing as privilege "objection"
 - I'm not ready to argue privilege—I don't have my evidence ready OR
 - There really aren't any docs outside exemption.
- Judge says "I am Unfrozen Caveman Judge. I overrule your objections of privilege."
- After hearing, opposing counsel sends you letter, asking you to produce privileged documents
- You refuse
- Opposing counsel files motion to compel
- At hearing on motion to compel, you argue you haven't yet had chance to prove up privilege OR, that there aren't any docs outside exemption
- Opposing counsel argues, "Judge, you've already ruled on this."
- Judge agrees, orders you to produce privileged documents

Now what?

- Beg
 - File motion for reconsideration
 - Do what you should have done originally
 - Assert privilege
 - Serve withholding statement
 - Set hearing
 - Prove up your claim
- If you lose, mandamus
- Cost to your client; cost to your case; cost to your relationship with judge; cost to your relationship with client; stress and feelings of worthlessness
- Possibly make new case law

When Is It Too Late to Assert?

- TRCP 193.3 and 193.4 set no deadline for asserting privilege
- *In re Learjet Inc.*, 59 S.W.3d 842, 846 (Tex. App.—Texarkana 2001, orig. proceeding) (though defendant did not raise privilege at hearing to compel, because defendant did assert privilege when it filed motion for reconsideration, defendant's assertion of attorney-client privilege was timely).
- *In re Graco Children's Prods., Inc.*, 173 S.W.3d 600, 604-05 (Tex. App.—Corpus Christi 2005, orig. proceeding) (rules set no time-limit for asserting privilege).
- *In re Lincoln Elec. Co.*, 91 S.W.3d 432, 437 (Tex. App.—Beaumont 2002, orig. proceeding) (rules permit party to make objections, have objections ruled upon, then make assertions of privilege at later time)

When Court Overrules Privilege “Objection,” Has It Overruled Privilege Assertion?

- *In re Shipmon*, 68 S.W.3d 815, 821-22 (Tex. App.—Amarillo 2001, orig. proceeding)
 - “Objection” based on privilege
 - Trial court overruled objections
 - On mandamus, court of appeals held:
 - Assertion of privilege is not ground for motion for protection or an objection. Instead party desiring to assert privilege must proceed as set out in Rules 193.3 and 193.4. Because question of work product privilege was not before [trial judge], those objections remain subject to presentation if [plaintiff] elects to proceed according to Rules 193.3 and 193.4. *Id.* at 822.
- *In re Lincoln Elec. Co.*, 91 S.W.3d 432, 437 (Tex. App.—Beaumont 2002, orig. proceeding)
 - [U]ntil trial court has made an **express** ruling on privilege assertion with said ruling pronounced **in context of proceedings contemplated by Rule 193.4**, with **evidence** on issue of privilege presented and/or an *in camera* inspection of information or materials claimed to be privileged, spirit, if not letter, of this prophylactic effort by [Rule 193.4’s] promulgators has not been met. *Id.* (emphasis in original).
- *In re TIG Ins. Co.*, 172 S.W.3d 160, 170 (Tex. App.—Beaumont 2005, orig. proceeding)
 - “Objection” based on work product privilege
 - Trial court overruled objections
 - **Motion to Compel and notice of hearing did not indicate that privilege assertions were to be subject of hearing.**
 - **At hearing, no party addressed specific subject of attorney work product privilege.**
 - On mandamus, court of appeals held: under these circumstances, issue of attorney work product was not properly before trial court.

Proper Procedure for Asserting

- Assert privilege and serve withholding statement
- TRCP 193.3(a)
 - (1) information or material responsive to request has been withheld,
 - (2) request to which information or material relates, and
 - (3) privilege or privileges asserted.

Privilege Log

- TRCP 193.3(b)
- After receiving response indicating that material or information has been withheld from production, party seeking discovery may serve written request that withholding party identify information and material withheld.
- Within 15 days of service of that request, withholding party **MUST** serve response that:
 - describes information or materials withheld that, without revealing privileged information itself or otherwise waiving privilege,
 - enables other parties to access applicability of privilege, and
 - asserts specific privilege for each item or group of items withheld.

Make Your Privilege Log Persuasive

- Put clearest cases of privilege up front
- Include not only privileges claimed, but basis for privilege, using language from rule(s), i.e., “confidential communications for purpose of facilitating rendition of professional legal services”
- Include **legend** to identify key players, relationship to your client, and e-mail addresses
- See sample

If you don't persuade other side,
other side will file motion to
compel and set it for hearing

Before hearing, file response

- Include privilege log and legend
- Affidavits
 - File 7 days before hearing. TRCP 193.4(a).
 - Craft carefully using language from privilege rules
 - Must describe factual basis for privilege either for groups of documents or each document individually.
In re E. I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding) (per curiam).
 - See sample

Proving up Privilege

- Party who seeks to limit discovery by asserting privilege has burden of proof. *In re E. I. DuPont de Nemours & Co.*, 136 S.W.3d at 223.
- Treat hearing like trial
- Introduce evidence

In camera documents

- Documents themselves may be sufficient. *DuPont*, 136 S.W.3d at 223.
- Must be presented in “sealed wrapper.” TRCP 193.4(a).
- Sealed boxes should be labeled with cause number, style, bates numbers, and stamped “PRIVILEGED, CONFIDENTIAL, FOR IN CAMERA INSPECTION”
- Mark each document with privilege claimed
- Offer **specific Bates numbers** for *in camera* inspection **ON THE RECORD**

Affidavits

- OFFER INTO EVIDENCE at hearing

Live Witnesses

- Risky unless you have very sophisticated witness
- May be good idea to have at hearing in case judge has questions
- Sometimes necessary if volume of documents is too large

Defeating Claim of Privilege

Once prima facie case of privilege is established, burden then shifts to party seeking to compel discovery to controvert proof, show that privilege was waived, or prove exception to privilege. See *In re Monsanto Co.*, 998 S.W.2d at 933-34.

Ideas for Defeating Claims of Privilege

- Depose affiants
- Look for waiver
- Look for exceptions
 - Need and hardship. TRCP 192.5(b)(2).
 - Crime/fraud. TRCP 192.5(c)(5).
 - Offensive use.
- If it sounds bogus, it probably is—look for caselaw.

If You Do Lose

- Mandamus is available
 - *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding) (party will not have adequate remedy on appeal when trial court erroneously orders disclosure of privileged information which will materially affect rights of aggrieved party)
- Try to convince trial court to give you 30 days to produce documents under TRCP 193.4(b).
- If trial court gives you too little time, file motion for temporary relief at court of appeals to stay underlying proceedings under TRAP 52.10.

Questions?

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