IN THE SUPREME COURT OF TEXAS

NO. 05-0613

IN RE BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 28, 2006

JUSTICE JOHNSON, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA, dissenting.

The trial court quashed trial subpoenas and granted a protective order shortly before trial was scheduled to start in a malicious prosecution case, effectively excluding all testimony from current and former employees of the Bexar County Criminal District Attorney's office who participated in prosecuting the underlying criminal case. The trial court's action was based on an unsworn "Motion to Quash Trial Subpoenas and For Protective Order" filed by the DA's office and argued by the parties without testimony or evidence. I agree with the court of appeals that based on this record the trial court abused its discretion in quashing the subpoenas.

The Bexar County District Attorney's office filed its unsworn motion in late February 2005 in a malicious prosecution suit filed by David and Annette Crudup. The motion related that DA investigator Al Larry, assistant DA Sylvia Cavazos, and former assistant DA Robert McCabe had been served with subpoenas on behalf of the Crudups to give trial testimony in early March in the

166th District Court in San Antonio. The motion stated that "The [DA's] Office objects, on its behalf and on behalf of these individuals, to their required appearance and testimony based on the work product privilege." By its motion the DA's office claimed that testimony based on the individuals' work or by reference to the DA's records should be found privileged; that the mental impressions, opinions, conclusions, legal theories and strategies of an attorney and the attorney's employees which were "prepared in anticipation of litigation or for trial" were privileged; and that the DA's entire litigation file was privileged.[1] The motion requested that the subpoenas be quashed and a protective order granted. The motion did not mention that the DA's litigation case file had been produced in August 2003 in response to a subpoena *duces tecum* or that an assistant DA had given a deposition on written questions at that time to prove the file as a business record. Nor did the motion claim that (1) the file had been involuntarily or mistakenly disclosed; (2) testimony of the subpoenaed witnesses would not be relevant to the civil suit or that the witnesses did not possess knowledge of facts relevant to the suit; (3) there had been other instances of DA employees or attorneys having been subpoenaed to give testimony in malicious prosecution cases and that testifying in such suits was becoming burdensome; or (4) the witnesses' attendance at court in this particular suit would disrupt the work of the DA's office.[2] McCabe, who no longer worked for the

[1] The DA's motion arguably sought protection for the contents of its case file. The trial court's order granted the motion without specifying whether the material in the DA's case file was going to be excluded from evidence as work product or whether the court only quashed the trial subpoenas. The DA disclaims any issue as to the documents which were produced and asserts that the only issue is whether the subpoenas were properly quashed.

[2] The motion was signed by an Assistant Civil Division DA whose address was listed as 300 Dolorosa in San Antonio. The record gives the address of the Bexar County Courthouse as 100 Dolorosa — apparently a short distance from the DA's office.

DA, did not urge that his attendance at court would work a hardship or that he needed some accommodation as to the time or date of his attending court.

The Crudups' response asserted, in part, that (1) the subpoenaed individuals were fact witnesses based on their having had conversations with real party in interest Cindy Blank and testimony about such conversations was not privileged; (2) even if some documents in the DA's file might ordinarily be privileged work product, not all documents in the file would be privileged as work product; and (3) the DA's entire file had already been produced in response to a subpoena *duces tecum*, had been on file in the civil case for over a year, and any privilege which might otherwise exist as to the contents of the file was waived. A copy of the DA's case file and the written deposition questions and answers proving it up were attached to the response. Following a hearing at which no evidence was introduced, the trial court quashed the subpoenas.

The DA's argument relies to a significant degree on our opinion in *State ex rel. Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994). The DA cites *Walker* in support of its position that the work-product privilege exempts its entire litigation case file from discovery. In *Walker* a subpoena *duces tecum* was issued for:

> Any and all records, books, papers, documents written memoranda [sic], handwritten notes, photographs and videotapes, including but not limited to the entire file(s) in your possession or under your custody or control, indictments, arrest records, investigation, punishment evidence, forensics, internal correspondence and memos regarding the arrest and subsequent conviction of [NAME OF DEFENDANT] on September 27, 1993.

Id. at 380.

Before the file was produced in *Walker* the DA moved to quash the subpoena and for a protective order. The trial court examined the DA's files *in camera*, directed that certain documents comprising work product be withheld and directed production of the remaining documents, including police reports, court documents, photographs, etc. We conditionally granted a writ directing the trial court to rescind that part of its order denying the DA's motion to quash. In doing so, we stated:

> In effect, this requires the District Attorney to produce his entire litigation file, except for documents involving direct communications. This order is too broad. In *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding), we stated that "[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."

Id. The DA's reliance on *Walker* is misplaced.[3]

First, in the case before us the file was produced over a year before the DA filed the motion to quash. The subpoena *duces tecum* pursuant to which the Bexar County DA's office produced its file in 2003 required the production of all records relating to, and the case file for, the prosecution of David Crudup. The testimony of the assistant DA in response to the subpoena was that all the requested records had been produced. To the extent that the DA's work product was disclosed by documents, notes, trial preparatory memoranda, organization of the case file or in any other way by the file, the privilege was waived long before the DA's motion was filed in February 2005. *See* TEX. R. EVID. 511(1); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990).

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[3] Even though *Walker* dealt with discovery matters and the case before us deals with trial testimony, neither party contends that the principles to be applied in determining privilege and waiver are different in the different settings. Both parties rely on cases involving discovery matters.

Second, the objects of the DA's motion to quash were witnesses. The work product privilege precludes testimony or discovery as to types of information; it does not make persons privileged from testifying. Witnesses are not the same as documents. Documents have fixed contents that can be analyzed to determine whether the documents and their contents are privileged. But the full knowledge of a witness as to facts and matters relevant to claims made in a lawsuit can hardly ever be known, and the testimony of a witness is not fixed until after the witness has completed testifying. It is only while witnesses are testifying or after they have testified that the admissibility or privileged nature of their testimony can be determined. Witnesses occasionally are instructed, upon timely and proper motion, not to answer certain questions because the questions seek testimony as to matters which are privileged or are otherwise inadmissible. But if the questions are rephrased the witnesses then may sometimes be allowed to answer. Lawyers may be instructed not to ask witnesses about certain matters, such as privileged work product, but that does not preclude lawyers from asking, and witnesses from testifying about, other matters.[4] For example, testimony as to general procedures such as procedures of the DA's office for intake of criminal complaints, processing of those complaints, whether investigation is made into the facts of cases before criminal proceedings are instituted, and whether contacts are typically made with complaining witnesses before criminal proceedings are begun, during the proceedings, or after the proceedings are completed would not be work product as to the Crudup prosecution. Yet such testimony was encompassed by the DA's motion and is precluded by the trial court's order.

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[4] *See* TEX. R. CIV. P. 199.5(d)-(g) and 199.6 as to conduct of oral depositions and assertion of privilege from testifying.

There is no rule that gives an attorney or an attorney's employees a privilege from being called to testify. Texas Rule of Evidence 501 provides that:

> Except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority, no person has a privilege to:
>
> (1) refuse to be a witness;
> (2) refuse to disclose any matter;
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Privileges are addressed in Article V of the Texas Rules of Evidence. The DA's office does not cite a provision of Article V, any rule, or a Constitutional or statutory provision which allows its attorneys and employees to be completely exempted from attending court or testifying as to facts or relevant matters within their knowledge. The DA cites an exemption only for testimony as to one area: work product. The work product privilege in our rules of civil procedure allows the DA employees to be protected from testifying as to the subject matter of their work product and that protection continues past termination of the criminal case and applies in a situation such as that before us. *Owens-Corning Fiberglass Corp. v. Caldwell*, 818 S.W.2d 749, 751-52 (Tex. 1991). However, the privilege is not a general exemption from being called as a witness. It is limited and as relevant here extends to (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, employees, or agents; or (2) communications 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, employees, or agents. *See* TEX. R. CIV. P. 192.5(a). The privilege

does not extend to protecting facts the attorney or the attorney's representatives may acquire. *Owens-Corning Fiberglass Corp.*, 818 S.W.2d at 750 and n.2; *Axelson*, 798 S.W.2d at 554.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), cited by the Court, the United States Supreme Court addressed the question of whether either written witness statements in possession of, or oral witness statements made to, an attorney in the case at bar had to be produced to opposing parties in response to a pretrial discovery request. The witness statements being discussed were not made by a non-client witness to an attorney in another case, as is the situation with the Crudups, nor were the witness statements asserted to be evidence in another proceeding. They were witness statements taken by an attorney as part of trial preparation in the case in which the discovery was sought. In addressing disclosure of any such oral witness statements, the *Hickman* Court noted that:

> Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. . . . Denial of production of this nature does not mean that any material, non-privileged facts can be hidden from the petitioner in this case.

Id. at 513. In a concurring opinion, Justice Jackson noted that the question of depriving a litigant of *evidence* was not involved:

> It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. It seems equally clear that discovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client.

Id. at 515-16 (Jackson, J., concurring) (citation omitted). As to statements signed or written by witnesses, "Such statements are not evidence for the defendant. . . . Nor should I think they ordinarily could be evidence for the plaintiff." *Id*. at 519.

In *United States v. Nobles*, 422 U.S. 225 (1975), the Supreme Court addressed the work-product privilege as to an investigator's report when the investigator was called as a witness in the criminal trial. The Court held that under the circumstances the privilege was waived. *Id*. at 239-40. Justice White, in a concurring opinion joined by then-Justice Rehnquist, questioned the Court's reaching the "waiver" issue before determining what protection the report had in the first instance. Justice White opined that the work-product doctrine of *Hickman* could not be

> extended wholesale from its historic role as a limitation on the nonevidentiary material which may be the subject of pretrial discovery to an unprecedented role as a limitation on the trial judge's power to compel production of evidentiary matter at trial . . . .
>
> [T]he work-product doctrine of *Hickman v. Taylor*, *supra*, has been viewed almost exclusively as a limitation on the ability of a party to obtain pretrial discovery. It has not been viewed as a "limitation on the broad discretion as to evidentiary questions at trial."

Id. at 242-43 (White, J., concurring). As to the work-product privilege and trial evidence Justice White continued:

> Indeed, even in the pretrial discovery area in which the work-product rule does apply, work-product notions have been thought insufficient to prevent discovery of *evidentiary and impeachment* material. In *Hickman v. Taylor*, 329 U.S. at 511, the Court stated: ". . . Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . ." Pursuant to this language, the lower courts have ordered evidence to be turned over pretrial even when it came into being as a result of the adversary's efforts in preparation for trial...
>
> Accordingly, it would appear that with one exception to be discussed below, the work-product notions of *Hickman v. Taylor, supra*, impose no restrictions on the

> trial judge's ordering production of evidentiary matter at trial; that these notions apply in only a very limited way, if at all, to a party's efforts to obtain evidence pretrial pursuant to discovery devices . . . .

Id. at 249-51 (emphasis in original). Justice White then referenced an example of such a disclosable fact: "A member of a defense team [who] witnesses an out-of-court statement of someone who later testifies at trial in a contradictory fashion becomes at that moment a witness to a relevant and admissible event . . . ." *Id*. at 250. Although Justice White was addressing whether notes of the defense team member concerning the witness's statement should be disclosed in the trial for which the notes were prepared, a matter on which Texas and federal procedure might differ, the substance of his example applies to the situation before us. Attorneys and members of an attorney's trial-preparation team may in some circumstances be fact witnesses to matters and events.

Furthermore, to the extent a work product privilege exists, it can be waived. *Nobles*, 422 U.S. at 239. Texas rules and practice are in accord. If a privilege applies, it is waived if the "person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure is itself privileged." TEX. R. EVID. 511(1); *see Axelson*, 798 S.W.2d at 554.

In disputes such as this, the burden of proceeding and producing evidence must be on one of the parties. The trial court effectively placed the burden on the Crudups to show why the DA's attorneys and employees should be required to testify and what information or facts would be elicited from them. That is different from the placement of the burden by Texas Rule of Evidence 501 and our prior cases. We have previously required the party resisting testifying or having its employees testify to shoulder the burden of properly asserting a privilege and showing that it applied to the

testimony in question. *See Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996) (orig. proceeding); *Peeples v. Honorable Fourth Supreme Judicial Dist.*, 701 S.W.2d 635, 637 (Tex. 1985) (orig. proceeding); *Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex. 1985) (orig. proceeding). *See also* TEX. R. CIV. P. 199.6 (providing that a party seeking to avoid having a witness give deposition testimony on the basis of privilege is required to provide evidence to support the claim of privilege in the form of testimony or affidavits served before hearing on the privilege claim). The quashed subpoenas in this case were not discovery inquiries requesting the DA's office to disclose specific information to which the motion for protective order was directed. They were trial subpoenas which would require the witnesses to testify generally. At a minimum the trial court should have required the DA's office to show what particular knowledge and information possessed by its employees was work product for which the privilege had not been waived. It then could have limited the Crudups' inquiries pending further development of a record. Because this record is clear that the DA did not make any such showing, the DA's employees were not entitled by law or rule to refuse to be witnesses and testify, even if some testimony as to their knowledge, information, and mental processes was later properly excluded upon objection. TEX. R. EVID. 501(1), (2); 511(1). Nor was the DA's office entitled to prevent its employees from being witnesses and testifying absent such showing. TEX. R. EVID. 501(4).

The Court concludes that conversations between the DA's office and Blank during the course of the criminal charge investigation were work product. But Blank was a non-party to the criminal proceeding and was not an employee of the state. The DA's office did not offer any proof that more conversations between Blank and DA employees took place than were memorialized by the DA's

file. Apart from information disclosed by notes in the DA's file, for which the privilege had been waived by disclosure, the content of statements made by Blank to the DA's employees, if any, might be work product. *See* TEX. R. CIV. P. 192.3(h). But even in the absence of a record showing there were more conversations between Blank and the employees than are disclosed in the DA's file and assuming there were, statements made by the DA's employees to Blank arguably, if not conclusively, were not privileged. The DA's office did not show that any conversations between its employees and Blank not memorialized in its litigation file included work product, that is, either (1) material prepared by the DA's office or its employees for, or mental impressions of its employees developed in anticipation of, the criminal trial; or (2) communications made in preparation for the criminal trial between a party and the party's representatives. *See* TEX. R. CIV. P. 192.5(a). If the DA's employee's statements to Blank did not include work product, the statements were not privileged to start with. If the statements to Blank disclosed work product, the privilege as to the material disclosed was presumptively waived and the DA would have had the burden to prove or show why the conversations did not effect a waiver of privilege as to the disclosed matters. *See* TEX. R. EVID. 511(1); *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 648-49 (Tex. 1985) (orig. proceeding); *see also Axelson*, 798 S.W.2d at 553-54 ("Since there was evidence that the investigation [which was being claimed as privileged work product] was disclosed to the FBI, IRS, and the *Wall Street Journal*, the court of appeals properly held that these privileges had been waived."); *Nat'l Union Fire Ins. Co. v. Hoffman*, 746 S.W.2d 305, 311 (Tex. App.—Dallas 1988) (orig. proceeding). And, to the extent that documents memorializing the conversations had been produced and the privilege as to their contents thereby waived, the DA's employees had no

privilege to refuse to testify about them. *See* TEX. R. EVID. 501; *Hoffman*, 746 S.W.2d at 311 (holding that attorneys who authored letter to client which had been disclosed could be examined about the letter despite claim of attorney-client privilege).

Because the Crudups' response raised the question of disclosure of the DA's work product both by disclosure of the DA's litigation file and by its employees' conversations with Blank, the question of waiver of privilege was raised and the DA had the burden of proving that no waiver occurred. *See Jordan*, 701 S.W.2d at 648-49. Even though the Crudups did not have the burden to proceed, given the state of the record, their response to the motion specifically set out some reasons the DA's motion should be denied. As noted above, those reasons included assertions that (1) the subpoenaed witnesses were fact witnesses because they had conversations with real party in interest Cindy Blank and testimony about those conversations was not privileged; and (2) prior production of the DA's file waived any privilege as to contents of the file. The Crudups provided support for their response: a copy of the DA's file. The file contains, among other matters, a report from investigator Larry and notes documenting progress of the prosecution and conversations between Blank and assistant DAs handling the case. At least one of the conversations took place after the criminal proceeding was dismissed. As previously noted, the DA was representing the State in the criminal proceeding against David Crudup; Blank was neither a party to the proceeding nor an employee of the state; and the DA did not prove any reason that the content of its employees' conversations with such a non-party witness was privileged work product. If the DA's employees disclosed work product to Blank in the conversations or by disclosure of the file and if either disclosure was significant, then waiver may have occurred as to more of the DA's work product than

just the amount disclosed. *See* TEX. R. EVID. 511(1). Intuitively, one could speculate that there remained some of the DA's work product for which the privilege had not been waived. But speculation is not sufficient: proof is required.

In their motion for reconsideration of the trial court's order, the Crudups attached and quoted individual notes from the DA's file setting out the contents of a conversation between Blank and the assistant DA handling the prosecution. They again urged that the contents of notes reflecting conversations were a proper subject of testimony from the subpoenaed witnesses. The DA's office still did not attempt to show authority for or offer evidence to support its employees being exempt from giving testimony as to contents of the notes. The trial court denied the Crudups' motion to reconsider.

The quashing of subpoenas by the trial court on this record turned the procedure for protecting privileged work product upside down. Instead of the DA having to show why its employees who had knowledge of relevant matters should be protected from testifying, the Crudups' attorney had to try to preserve his clients' right to call witnesses by disclosing *his* work product in pleadings and argument in the trial court and setting out testimony he wanted to elicit from the subpoenaed employees. He has had to continue that course through two appellate court proceedings.

Unlike the situation in *Walker* where the district attorney challenged an overly broad subpoena and court order, here it was the DA's office that made an overly broad request seeking an order from the trial court permitting witnesses to refuse to give testimony. *See* TEX. R. EVID. 501; *Walker*, 873 S.W.2d at 380. If the DA's office had sought only to preclude testimony as to work product, the privileged nature of the subject matter might not have required much, if any, proof. The

trial court could have entered a protective order precluding the Crudups' attorney from inquiring into certain matters pending further orders of the court. Then as the trial proceeded the court would have had the benefit of at least some record on which to base its decision as to both the existence of privilege as to the subject matter and whether waiver of the privilege as to the specific testimony sought had occurred. When the DA's office ended its pretrial presentation in the trial court without providing proof that all of the testimony the subpoenaed witnesses could give would be work product for which the privilege had not been waived, however, that should have been the end of the matter as to the motion to quash. There was no evidence to support the trial court's order which effectively granted a privilege to the DA's employees and attorneys from testifying at all, and the motion should have been denied. *See* TEX. R. EVID. 501. The motion should have been denied also because the question of waiver of the privilege by disclosure was raised and there was not evidence that waiver had not occurred. *See* TEX. R. EVID. 511(1).

A quote from the United States Supreme Court which we have previously referenced is applicable here:

> "Proper presentation 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."

Nat'l Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458, 461 (Tex. 1993) (quoting *Hickman*, 329 U.S. at 511). Much evidence can be presented in different ways. For example, records of events can be read or witnesses can be called to testify as to the matters covered by the records; witnesses can be called live or by reading depositions; or several witnesses can be called to present evidence

(hopefully non-repetitiously) which could be presented by one witness when the impact of calling multiple witnesses will be greater in the trial lawyer's judgment than using only one witness to tell the story. Decisions about how evidence will be presented at trial so as to maximize the client's chances of prevailing are among the most important a trial lawyer must make. In this case the trial court's order unduly interfered with the Crudups' attorney's trial preparation and forecloses certain choices as to how his client's case can be presented at trial. Among other problems it creates, the trial court's order (1) impairs the Crudups' attorney's ability to determine how best to present the Crudups' case to the jury because he cannot count on having the subpoenaed witnesses (or any other witness from the DA's office) available to testify; (2) forecloses the Crudups' attorney from using live testimony to present and explain matters disclosed by the DA's file such as the dates of contact with Blank, the substance of conversations with her and both the existence and substance of reports from police officers and investigators; and (3) keeps the Crudups' attorney from asking DA employees to interpret notes they made in the case file, or even whether records of all conversations with complaining witnesses were made.

The Crudups' counsel has maintained that he planned to prove that the complaint made by the Blanks to the DA was false and that the DA would not have filed the criminal proceedings absent the false complaint. Maybe he can; maybe he can't. But counsel was entitled to formulate and pursue trial strategy without having it limited by a preemptive exclusion of certain witnesses with knowledge of relevant matters or having to disclose his strategy and justify it in pretrial and appellate proceedings simply because the DA's office filed a motion such as the one it filed.

I would deny the relief sought by the DA's office. *See State v. Biggers*, 360 S.W.2d 516, 517 (Tex. 1962).

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Phil Johnson
Justice

OPINION DELIVERED: May 4, 2007