

LEGAL UPDATES

PUBLISHED: FEBRUARY 20, 2019

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# Texas Supreme Court Rules Emails to Testifying Expert Can Be Privileged

The Texas Supreme Court in *In re City of Dickinson* recently answered that question in the negative and held that attorney-client communications remained privileged and undiscoverable even if the client is designated as a testifying expert.

*In re City of Dickinson* involved a dispute between the City of Dickinson and the Texas Windstorm Insurance Association (“TWIA”). The city argued that TWIA had failed to pay for property damage related to Hurricane Ike. The city moved for summary judgment on causation. In response, TWIA submitted an affidavit of its corporate representative who provided both factual and expert testimony. During a deposition, the city learned that the affidavit had been revised several times. The city sought production of the draft affidavits and related correspondence, arguing that it was entitled to that information as part of expert discovery. TWIA argued that the emails were privileged.

The district court compelled production of the emails. The court of appeals reversed, concluding that the emails were privileged. The Texas Supreme Court agreed.

The court reasoned that Texas Rule of Civil Procedure 192.3(e), pertaining to the general scope of expert discovery, stated that a party “may” obtain the materials listed in that rule, but that “Rule 192.3 does not require the disclosure of information that is attorney-client privileged.” Likewise, the court found that Rule 194, which specifically addresses expert discovery, “merely permits a party to request disclosure, it does not require it.” In short, the Supreme Court found nothing in the discovery rules that would trump the attorney-client privilege. Therefore, while normally emails exchanged between a testifying expert and attorney are discoverable, they are not discoverable in

cases where the testifying expert is also a client and the emails are attorney-client privileged.

## **What This Means for You**

*In re City of Dickinson* provides significant protection for communications made between an attorney and testifying expert where that expert is also the client.

But *In re City of Dickinson*'s holding is not absolute. The court also noted that “while attorney-client and work-product privileges are sometimes conflated,” work-product is “expressly discoverable” under the expert discovery rules. How the court will parse whether communications in this sphere are discoverable work-product or undiscoverable attorney-client communications will be left for another day because the parties in *In re City of Dickinson* conceded that the emails at issue were attorney-client communications. Therefore, it is worth keeping in mind that not *all* communications or documents provided to a client-testifying expert can necessarily be withheld.

## **Contact Us**

If you have questions about your responsibilities related to this update, contact Kate David, Arturo Michel, Mike Stafford, Philip Morgan or your Husch Blackwell attorney.