PRIVILEGES AND THE OIL PATCH

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Chapter 6

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PRIVILEGES AND THE OIL PATCH

I. INTRODUCTION

A. Broad Discovery

The oil and gas industry becomes involved in many types of cases – joint interest disputes, environmental, personal injury, employment, and commercial litigation. These cases and others are becoming bigger and more document intensive. Class actions are multiplying.

Adversaries to the industry are propounding increasingly broad requests and courts are taking very broad interpretations of disclosure requirements. It may not be "anything goes," but it's close – particularly in some courts.

Broad and open discovery is one of the cornerstones of our current legal system.

B. Privileges – Limitations on Discovery Intended to Encourage Particular Conduct or Communications

Privileges (such as the attorney-client privilege, the work product privilege, the self-critical analysis privilege or the environmental audit privilege) limit such open discovery.

Accordingly, privileges are generally "strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" Trammell v. United States, 445 U.S. 40, 50 (1980).

Privileges have been created to foster or encourage certain relationships and their related conduct or communications because they are considered are considered important to society or the legal system.
8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD R. MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL, 2D § 2016 (1994). As discussed below, each privilege has its own rationale.

C. Privilege Assertions and Challenges

Disputes regarding assertions of privilege are commonplace.

> "Few issues arise with greater frequency in civil litigation than whether a document is privileged from compelled disclosure by virtue of the attorney-client privilege"
> EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (3rd ed. 1996).

A 1983 study found that "the work product protection is the most frequent litigation discovery issue." SPECIAL PROJECT, THE WORK PRODUCT DOCTRINE, 68 Cornell L. Rev. 760, 763 (1983).
Courts do not like these battles or their frequency. As discussed below, several recent changes in the rules and some creative court ordered procedures have been designed to minimize controversies over the assertion of privileges.

D. Overlapping Privileges or Protections

Many documents will be covered by several privileges. For example, a memo from an attorney regarding an assessment of a potential environmental hazard and what has been and still needs to be done about it could (in some states) potentially fall under each of the four privileges discussed in this paper.

Generally, however, a particular document (given its author and circumstances of origin and dissemination) will fall within a particular privilege

As discussed below, each privilege has its own requirements and limitations – differing as to the necessity of attorney involvement, the likelihood of litigation, and the subject matter involved.

Though a document may be covered by more than one privilege, far too often because the circumstances of a document's origin can no longer be completely discerned) it is difficult to prove up even a single privilege.

As discussed in the conclusions section, certain steps should be taken to maximize the ability to maintain a document's privileged status.

II. PRIVILEGES AND EXEMPTIONS FROM DISCOVERY

A. Attorney-Client Communications

1. Definition/Scope

The attorney-client privilege is the oldest privilege and the only privilege recognized in all jurisdictions within the United States.

a Texas

In Texas, the privilege and its parameters are defined by Rule 503 of the Texas Rules of Evidence.

(1) *General Rule of Privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
(a) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
(b) between the lawyer and the lawyer's representative;
(c) by the client or a representative of the client, or the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
(d) between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client.
(2) *Special rule of privilege in criminal cases.* In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

Tex. R. Evid. 503.

Both the communications from the client to the lawyer (or his representatives) and statements and advice of the attorney (or his representatives) to the client are privileged. Dewitt & Rearick, Inc. v. Ferguson, 699 S.W.2d 692, 693 (Tex. App.—El Paso 1985, orig. proceeding).

The attorney-client privilege attaches to the complete communication between the client and the attorney -- not only to legal advice ultimately provided but to all the communications made in connection with obtaining such advise. Marathon Oil Co. v. Moye, 893 S.W.2d 585 (Tex. App.—Dallas 1994, no writ).

Once it is established that a document contains confidential information, the privilege extends to the entire document, and not merely to the specific portions relating to an attorney-client communication. WILLIAM V. DORSANEO III, E. LEE PARSLEY AND JULIE CARUTHERS PARSLEY, TEXAS LITIGATION GUIDE § 90.06[2][c], citing Pittsburgh Corning Corp. v. Caldwell, 861 S.W.2d 423, 424-25 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding)(order requiring production of confidential documents with or without redaction was abuse of discretion).

If a document is privileged, the fact that certain information within the document may be discoverable through other means does not overcome the privilege. Keene Corp. v. Caldwell, 840 S.W.2d 715, 719-20 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

However, a person cannot cloak a fact with the privilege merely by communicating it to an attorney. The attorney cannot be called on to reveal the communications, but the facts are subject to discovery through other proper means. Id., citing Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996); Pittsburgh Corning Corp. v. Caldwell, 861 S.W.2d 423, 424-25 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

b Federal

Unlike Texas, the privilege is not defined statutorily – but via common law.

Rule 501 Fed. R. Evid. provides that (except as otherwise required by the Constitution or statute) privileges in shall be governed by the principle of common law as interpreted by the federal courts, except when state law will supply the rule of decision as to an element of a claim or defense, in which case privilege issues will be determined in accordance with state law.

The seminal federal case is Upjohn Co. v. United States, 449 U.S. 383, (1981). In Upjohn, the United States Supreme Court held that communications between the attorney and client (and their representatives) made to secure legal advice were privileged and not subject to discovery. Id. at 395

The protection is from disclosure of the communications themselves -- the underlying facts are discoverable. Upjohn, 449 U.S. at 395.

2. Rationale of Privilege

The purpose of the attorney-client privilege is to ensure the free flow of information between the attorney and client (the client must be able to confide in its attorney, secure that the communication will not be disclosed), ultimately serving the broader societal interest of effective administration of justice. Jaffee v. Redman, 518

U.S. 1, 11-13 (1996); Ford Motor Co. v. Leggat, 904 S.W.2d 643, 647 (Tex. 1995).

> Along with an independent judiciary, the sacrosanctness of the confidential relationship between a lawyer and his client are bastions of an ordered liberty -- predicated upon the tacit assumption that lawyers are consulted for the purpose of abiding by rather than in order to devise means to break the law.

EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (3rd ed. 1996).

3. Elements and Parameters

In order for a communication to be privileged:

(a) the communication must have been between (i) the asserted holder of the privilege, a client (or someone who sought to become a client) or a "representative" of such "client" and (ii) an attorney or a "representative of an attorney" in his professional capacity;
(b) the communication must have been made for the purpose of obtaining legal advice or legal services, and
(c) the communication must have been intended to be confidential and made confidentially (outside the presence of strangers) and
(d) the privilege must not have been waived.

See Tex. R. Evid. 503; In re Shell Oil Refinery, 812 F. Supp. 658, 661 (E.D. La. 1993). United States v. Mobil Corp., 149 F.R.D. 533, 536 (N.D. Tex. 1993)

a Persons Whose Communications Are Covered

The privilege covers communications between a "client" or "representative of the client," on the one hand and the client's "lawyer" or "representative of the lawyer" on the other hand. Tex. R. Evid. 503(a). Upjohn, 449 U.S. at 392-97; United States v. Mobil Corp., 149 F.R.D. 533, 537 (N.D. Tex. 1993).

(1) Representative of the Client -- Generally

The definition of "representative of the client" for purposes of the determining whether the attorney-client privilege applies was recently amended in Texas (effective in 1998) and now (consistent with federal law) includes:

> any other person who for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

Rule 503(a)(2)(B), Tex. R. Evid.

This amendment to Rule 503 changed the test for determining whether someone qualified as a "representative of the client" from the "control group test" previously used in Texas to the "subject matter test" which had been (and remains) the test in federal cases. This change had been harkened by both the bar and the courts, including the Texas Supreme Court.

In Valero Transmission, L.P. v. Dowd, 960 S.W.2d 642 (Tex. 1997), the plaintiffs sought production of various documents between various officers and employees of Valero and its counsel. Valero argued that the drafts and all letters from its counsel were protected by the attorney client privilege.

The Texas Supreme Court in Valero concluded that some of the documents were protected by the existing attorney-client privilege and some were not. The deciding factor as to many of these documents was whether the authors or recipients were members of the "control group" under the prior Texas Supreme Court teachings in National Tank; Valero, 960 S.W.2d at 646-649.

In National Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993). National Tank had held that only employees who "controlled" the actions of the corporation could personify the corporation for purposes of the application of the attorney-client privilege and that employees who were not authorized to seek legal counsel on behalf of the corporation could be considered representatives of the corporation for purposes of the privilege. Id. at 197-98.

The Texas Supreme Court in Valero noted the problems that arise for corporations under the "control group test." It is "extremely naive" to think that all decisions can be made by the "upper echelon" of management in a corporation without involving operational or middle management persons - individuals who might not qualify as a representative of the client under the "control group test". Valero Transmission, L.P. v. Dowd, 960 S.W.2d at 646.

The foregoing amendment to the Texas Rules of Evidence addressed the concern discussed in Valero -– making the group within an organization

covered by the privilege parallel to federal application.

The federal courts had previously rejected the control group test in favor of the broader subject matter test – applying the privilege to encompass communications between corporate counsel and employees of a corporation concerning matters within the scope of their employment. Upjohn, 449 U.S. at 392-97; United States v. Mobil Corp., 149 F.R.D. 533, 537 (N.D. Tex. 1993).

(2) Joint Defense/Attorney-Client

The "joint defense privilege" is included within the attorney-client privilege Tex. R. Evid 503(b)(1)(C);. Fred Weber, Inc. v. Shell Oil Co., 432 F. Supp. 694 (E.D. Mo. 1977). In re Monsanto Co., 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding); Marathon Oil Co. v. Moye, 893 S.W.2d 585 (Tex. App.–Dallas 1994, no writ).

The joint defense/attorney-client privilege protects confidential communications between the client, his (or her) lawyer, or his (or her) representative on the one hand and a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest. Tex. R. Evid 503(b)(1)(C); Monsanto Co., 998 S.W.2d at 922.

Communications made by persons to consult an attorney together as a group with common interests seeking common representation are subject to the attorney-client privilege. In re Auclair, 961 F.2d 65, 70-71 (5th Cir. 1992).

(3) "Representative of the lawyer"

"Representative of the lawyer" is a person employed by the lawyer to assist the lawyer in the rendition of professional legal services. Rule 503(a)(4), Tex. R. Evid. In National Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993). Burlington Indus. v. Exxon Corp, 65 F.R.D. 26, 33 (E.D.. Md. 1974).

It can include an accountant who is reasonably necessary for the lawyer's rendition of legal services and investigators hired by counsel WILLIAM V. DORSANEO III, E. LEE PARSLEY AND JULIE CARUTHERS PARSLEY, TEXAS LITIGATION GUIDE § 90.06[2][c], citing Tex. R. Evid. 503(a)(4); IMC Fertilizer, Inc. v. O'Neill, 846 S.W.2d 590, 591 (Tex. App.–Houston [14th Dist.] 1993, orig. proceeding). See also Dabney v. Investment Corp. of America, 82 F.R.D. 464 (E.D.. Pa. 1979).

b For Purposes of Obtaining Legal Advice

In order that an attorney-client communication to be privileged, it must have been given or obtained for purposes of rendering or receiving legal advice. Upjohn, 449 U.S. at 395; Texaco, Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385, 387 (M.D. La. 1992), appeal dismissed, 995 F.2d 43 (5th Cir. 1993). Tex. R. Evid. 503(b). See also Clayton v. Canida, 223 S.W.2d 264, 266 (Tex. App.–Texarkana 1949, no writ); In Re NationsBank, N.A., No. 01-99-00278-CV, 2000 Tex. App. LEXIS 4158 (Tex. App.–Houston [1st Dist.] June 19, 2000) (unpublished).

However, (unlike the work-product exemption) the attorney-client privilege does not depend on whether litigation is anticipated. See e.g. United States v. Mobil Corp., 149 F.R.D. 533, 538 (N.D. Tex. 1993) (holding that a document generated by corporate defendants' subsidiary's general counsel sent to corporate finance director was protected by the attorney-client privilege, but not by the work product privilege, inasmuch as there was no indication that the document was prepared in anticipation of litigation).

4. Waiver

a Intentional Disclosure

(1) Disclosure Outside the Litigation

The privilege is waived by disclosure to third parties, (i.e., parties outside the attorney-client relationship). Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 554 (Tex 1990) (holding that a gas well operator waived its attorney-client privilege as to an internal investigation of alleged kick-back and bribes from suppliers and contractors by disclosing those results to federal investigators and to the media).

The same is true in federal court. See e.g. Johnson v. United States, 542 F.2d 941, 942 (5th Cir. 1976); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).

(2) Use in Litigiation

Moreover, "a party may not use – at any hearing or trial – material or information withheld from discovery under a claim of privilege, including a claim sustained by the court , without timely amending or supplementing the party's response to that discovery." Rule 193.4(c) Tex. R. Civ. P.

The results are similar in federal courts. See e.g., Savoy v. Richard A. Carrier Trucking, Inc., 178 F.R.D. 346, 350 (D. Mass. 1998); Harding v.

Dana Transport, Inc., 914 F. Supp. 1084, 1094-96 (D.N.J. 1996).

The extent of the waiver, however, will be determined on a case by case basis See Duke v. Power Elec.& Hardware Co., 674 S.W.2d 400, 404 (Tex App.– Corpus Christi 1984, no writ) (holding that asking questions to establish motive or intent of a party when acting on advice of an attorney may not result in a complete waiver of the attorney-client privilege).

b Inadvertent Production

Inadvertent production of documents containing attorney-client communications may or may not waive the privilege.

Rule 193.3(d), Tex. R. Civ. P. substantially changed existing law as set forth in Granada Corp. v. First Court of Appeals, 844 S.W.2d 223 (Tex. 1992) (orig. proceeding). The Granada court held that inadvertent production waived the privilege unless the party proved that the inadvertent production was "involuntary" under the meaning of Rule 511, Tex. R. Evid., which required the producing party to show hat "efforts reasonably calculated to prevent the disclosure were unavailing". The Granada Court held that where documents had not been segregated during the producing party's multiple opportunities to review the production, the inadvertent production was not "involuntary" and, therefore, the privilege had been waived. See also Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 773-74 (Tex. App–El Paso 1985, no writ).

Under the new Texas rule, a party that produces privileged material without intending to waive the privilege, in response to a written discovery request, does not waive the privilege if the party amends the response within 10 days (or a shorter time designated by the court) after discovering the inadvertent production. Rule 193.3(d) Tex. R. Civ. P

The amended response must identify the privileged material inadvertently produced and must state the privilege asserted. Rule 193.3(d) Tex. R. Civ. P

Upon receipt of such amended response, the party who received the inadvertently produced materials must return the specified material and any copies. Rule 193.3(d) Tex. R. Civ. P.

Federal courts hold that determining whether an inadvertent production (particularly during litigation) will waive the privilege must be done on a case-by-case basis. United States Fidelity & Guaranty Company v. Braspetro Oil Services Co., Nos. 97 Civ. 6124, 98 Civ. 3099 (JCK) (THK) 2000 U.S. Dist. LEXIS 7939 *17 (S.D.N.Y., June 7, 2000).

The federal courts look at several factors:

(i) the reasonableness of the precautions taken to prevent inadvertent disclosure;
(ii) the time taken to rectify the error;
(iii) the scope of the discovery and the extent of the disclosure; and
(iv) overarching issues of fairness.

Id., at *17-27.

c Offensive Use (Sword-Shield)

A party who uses the discovery privilege offensively (as a sword rather than as a shield), waives his privilege. Marathon Oil Co. v. Moye, 893 S.W.2d 585 (Tex. App.–Dallas 1994, no writ).

A client cannot claim a privilege to preclude discovery while he simultaneously seeks affirmative to relief on the basis of the information sought to be withheld from discovery. Id at 590.

In Marathon, the court discussed the elements that must be found in order for there to be a waiver of the privilege through offensive use:

(1) the party asserting the privilege must seek affirmative relief;
(2) the privileged information, if believed by the fact finder, would probably be outcome determinative; and
(3) disclosure of the privileged communication is the aggrieved party's only means of access to the evidence.

893 S.W.2d at 590. The appellate court held that, by raising its affirmative defenses, Marathon did not seek "affirmative relief. Therefore, waiver of the privilege based on offensive use did not apply. Id. at 590.

Federal interpretation of the "offensive use" exception to the attorney-client privilege does not require that the party asserting the privilege seek affirmative relief. See Apex Mun. Fund v. N-Group Sec., 841 F. Supp. 1423 (S.D. Tex. 1993) (noting the important difference between federal law and Texas law and Texas' more rigorous requirements). See also Krug v. Caltex Petroleum Corp., No. 05-96-00779-CV, 1999 WL 652495 (Tex. App.–Dallas August 27, 1999, no pet.)(unpublished opinion)(discussing same).

5. Exceptions

There are several exceptions to the attorney-client privilege. These include the crime-fraud exception and the joint-client exception.

a Crime Fraud Exception

There is no privilege:

> If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client know or reasonably should have known to be a crime or fraud.

Tex. R. Evid. 503 (d)(1).

Courts have narrowly interpreted this exception.

Courts have held that the party who asserts the crime-fraud exception must establish:

1. a prima facie case showing a violation sufficiently serious to defeat the privilege; and
2. a relationship between the document for which the privilege is challenged and the prima facie proof offered.

Arkla, Inc. v. Harris, 846 S.W.2d 623, 630 (Tex. App.–Houston [14th Dist.] 1993, no writ).

In Arkla, the court held that the crime fraud exception to the attorney-client privilege did not apply with respect to title opinions and related documents in a trial alleging wrongful drainage of minerals. In particular, the court held that there was no showing that the services of the attorneys who prepared the title opinions and related documents were obtained with any fraudulent or illegal intent and the party seeking the documents failed to offer any proof supporting its allegation that the party's document destruction constituted fraud. 846 S.W.2d at 630.

For discussion of the crime-fraud exception in the federal context, see Clark v. United States, 289 U.S. 1 (1933); International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177 (M.D. Fla. 1973).

b Joint Client Exception

There is also no privilege:

> [a]s to 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.

Tex. R. Evid. 503 (d)(5).

In Marathon Oil Co. v. Moye, 893 S.W.2d 585, 592-93 (Tex. App.–Dallas 1994, no writ), the court held that the prima facie showing of privilege by Marathon (a coal license grantee) was not overcome by the grantor's assertion that the documents were discoverable on the ground that the grantee had generated them in the course of joint representation of the grantee and grantor's interests. The court held that there was no evidence that the grantee and grantor had both retained the grantee's attorneys as their common attorneys.

For discussion of the joint client situation in the federal context, see Valente v. Pepsico, Inc., 68 F.R.D. 361 (D.C. Del. 1975).

6. Invoking and Proving the Privilege

a Texas

(1) The assertion

Rule 193.2 Tex. R. Civ. P. provides that 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 Tex. R. Civ. P.

Rule 193.3 provides that a party withholding the information or material must (in the written response, an amended or supplemental response or in a separate document) state the following:

(1) that the information or material responsive to the request is being withheld;
(2) the request(s) to which the information or material is responsive; and
(3) the privilege(s) asserted.

(2) Request for a Log

After receiving a response with the information noted above, the party seeking the discovery may trigger further obligation upon the withholding party by serving a written request that the withholding party identify the information and material withheld.

(3) Privilege Log

Rule 193.3, Tex. R. Civ. P provides that, upon receipt of that request, the withholding party must serve a response within 15 days that:

(1) Describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege; and
(2) Asserts a specific privilege for each item or group of items withheld.

Rule 193.3, Tex. R. Civ. P.

(4) Challenging the Assertion

There is no need to request a ruling on your own objections or assertions of privilege in order preserve the objection or privilege. Tex. R. Civ. P. 193.4(b).

Rather, either party may at any reasonable time request a hearing on an objection or claim of privilege. Rule 193.4(a), Tex. R. Civ. P.

(5) Proof and Burdens

Generally, proving the privilege requires a privilege log (identifying the dates, authors, recipients, subject matters and privileges asserted as to each document withheld), affidavits (regarding representations on the privilege log as to the identity and position of the people listed as authors and recipients, the capacity in which those persons acted and the purpose for each of the communications), and often the documents themselves.

If the allegedly privileged documents are the only evidence to show that the privilege applies, the party must produce the documents for an in camera inspection. Marathon Oil Co. v. Moye, 893 S.W.2d 585, 590 (Tex. App.–Dallas 1994, no writ).

Once a party satisfies the procedural requirements to invoke the privilege and tenders the documents to the trial court, the trial court must conduct an *in camera* inspection to determine whether the privilege applies to the tendered documents. Marathon Oil Co. v. Moye, 893 S.W.2d at 590.

The Waco Court of Appeals in Monsanto discussed how it reviewed the privileged documents and privilege logs and what it looked for to determine whether the documents were privileged.

This included:

- Using its *in camera* review to determine whether there was a *prima facie* showing of a privilege;
- Determining whether documents matched the descriptions contained in the privilege logs; and
- Looking for language such as "suggestions," "review," and "input" to show that legal advice was being sought between Monsanto's attorneys and representatives.

In re Monsanto, 998 S.W.2d 917 (Tex. App. – Waco 1999, orig. proceeding).

Once a party provides a prima facie showing (through affidavits, privilege logs and tendering of the documents), the burden shifts to the party seeking the documents to refute the privilege. In Re Valero Energy Corp., 973 S.W.2d 453 (Tex. App.–Houston [14th Dist.] 1998, no pet.).

(6) Relief fromErroneous Orders to Produce Privileged Material

When a trial court erroneously orders production of privileged documents, there is no adequate remedy at law and the aggrieved party may, thus, seek a writ of mandamus. Walker v. Packer, 827 S.W.2d 833 839-40 (Tex. 1992); In re Valero Energy Corp., 973 S.W.2d at 457.

Mandamus relief is appropriate where, by ordering the production of documents, the trial court violates a duty imposed by law or clearly abuses its discretion either in resolving factual issues or in determining legal principles. In re Valero Energy Corp., 973 S.W.2d at 456-57.

Where, however, it is the "interpretation" of a privilege that is at issue, the appellate court reviews the court's decision as a legal conclusion to which it gives "limited deference." Osborne v. Johnson, 954 S.W.2d 180, 183 (Tex. App. – Waco 1997, orig. proceeding).

b Federal Procedures to Assert the Privilege

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed. R. Civ. P. 26(b)(5), *added by amendment*, 146 F.R.D. 501, 617 (U.S. 1993).

The Advisory Committee Notes reveal that this amendment was intended to give courts flexibility in their approach to assessing privilege claims.

Determinations concerning what information should be provided by a party asserting a privilege should be made on a case-by-case basis, with emphasis on the demands and scope of discovery in the particular case.

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

146 F.R.D. at 639.

Rule 23(b)(5) Fed. R. Civ. P. provides procedures for reviewing claims of privilege without requiring an *in camera* review of documents. Indeed, the Advisory Committee Notes state that "providing information pertinent to the applicability of the privilege should reduce the need for in camera examination of the documents." 146 F.R.D. at 639.

Some courts (by case management order or otherwise) establish procedures they will require to invoke a claim of privilege. These include:

> Requiring the party seeking to withhold documents on the basis of privilege to prepare a comprehensive privilege log, detailing for each document withheld: its bates number; the type of document (letter, memorandum, note, etc), the identity of its author, his or her title or position within the organization at the time he or she authored the document; the identity of each recipient, their titles or positions within the organization at the time the document was received; the date the document was created; (if work product) the name and cause number or a description of the anticipated litigation, a description of the subject matter; and the privilege(s) asserted as to the document;
>
> Requiring the counsel seeking to withhold documents to sign a certification that, after reasonable inquiry, he or she certifies that the privilege assertions as to each of the entries on the log are based on existing law or warranted by good faith argument for the extension, modification or reversal of existing law; and
>
> Threatening sanctions for including items on a log that are ultimately determined not to be privileged or otherwise meet the requisites of the attorney's certification.

These procedures attempt to encourage attorneys to closely scrutinize each privilege assertion and claim only those worth the effort and the risk of an adverse decision.

At least some federal courts have held that compliance with a court's privilege log requirements establishes a prima facie case of privilege, and the Court need not review the documents *in camera* where the challenges to the privilege claims are general in nature.

For example, in Rabuska ex rel. U.S. v. Crane Co., the Eighth Circuit upheld a district court's denial of the relator's motions to compel the discovery of documents listed in the defendant's privilege log. 122 F.3d 559 (8th Cir. 1997). Therein the court held that the *qui tam* defendant had met its burden of providing a factual basis for asserting its privileges when it produced a privilege log describing each document in question "Other than offering speculation based an a sampling of the descriptions of documents listed in the privilege logs, [Relator] has offered no evidence to contradict [Defendant's] evidence that the questioned documents were [privileged]." Id. at 565 (citing Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995). See also Guy v. United Healthcare Corp., 154 F.R.D. 172, 176 (S.D. Ohio 1993).

Absent specific objections to particular privilege claims or evidence for disbelieving the legitimacy of any of factual assertions on privilege logs, these courts have held that the parties are generally not required to bring forth additional proof of privilege – including tendering the documents for the court to review *in camera*.

As the court in United Healthcare held, an *in camera* review of documents described in privilege logs based on unfounded objections

> would constitute, in this Court's estimation, an expenditure of judicial resources that could be justified only by an implicit determination that

> the representations made by defense counsel are untrue. That determination is unwarranted, and the Court declines to undertake *in camera* review of the requested documents.

United Healthcare, 154 F.R.D. at 176. See also Rabushka ex rel. U.S., 122 F.3d at 565.

7. Recent Industry Cases

Frequently, proving up the privilege requires a combination of methods. In In re Valero Energy Corp., 973 S.W.2d 453 (Tex. App.– Houston [14th Dist] 1998, no pet.), the court held that the parties affidavits, when read together with the privilege log and memorandum, as well as the content of the documents sought to be discovered, established a prima facie claim for the application of the attorney-client privilege to inter-office memorandum and notes exchanged between defendant's counsel and its representatives.

The court held that, upon such prima facie showing, the burden shifted to the plaintiffs to refute the privilege. Id. at 457-58.

The court further held that joint venturers were not joint clients of one of the joint venturer's in-house counsel and, therefore, could not come within the joint client exception to the attorney-client privilege, even thought in-house counsel rendered undisclosed legal services to the joint venture and the other joint venturer paid for some undisclosed portion of the joint venture's legal expenses. . Id. at 458

In Seagull Mid-South, Inc. v. Medina, No. 01-97-00219-CV, 1997 WL 251955 (Tex. App.– Houston [1st Dist.] 1997, mand. pending), Seagull had objected to a document request that certain documents were protected by the attorney client privilege.

Seagull had supported its objections with affidavits from certain attorneys and employees in Seagull's general counsel's office. Id. at *3. One employee's affidavit identified law firms and individuals that had rendered legal advice to Seagull. Another attorney affidavit stated that she was an attorney with primary responsibility for rendering legal advice to Seagull and that she had reviewed unspecified documents and participated in meetings in which she had given legal advice. Other affidavits, likewise, did not address specific documents. Id. at *5-6.

The court held that Seagull had failed to establish the attorney client privilege because the evidence contained in the affidavits was a mere recitation of applicable criteria without supporting facts. The court held:

> In its affidavits, Seagull should have identified the role of the individuals referenced in the documents and established with specific facts that they were part of a limited group authorized to seek and act upon legal advice.

Id. at *5-6.

The court in In re Sea Mar Management, Inc., No. 14-98-01095-CV, 1999 Tex. App. LEXIS 626 (Tex. App.–Houston [14th Dist] Jan. 28, 1999, no pet.)(unpublished) addressed Sea Mar's assertions of privilege as to several documents, as well as the assertion that the privilege had been waived or did not apply because of the crime fraud and offensive use exceptions.

The court held that documents that Sea Mar shared with its investment banker were privileged. Sea Mar's disclosure to its investment banker did not waive the privilege. Sear Mar's investment banker qualified as a "representative of the client" authorized to receive and act upon confidential legal advice rendered by Sea Mar's attorneys in connection with a particular transaction. The court noted that the fact that the investment banker could not give final approval to the transaction did not disqualify it as Sea Mar's representative under Rule 503(a)(2)(A). Tex. App. LEXIS 626 *10-11.

The court also held that a letter between Sea Mar and its counsel (to which Sea Mar claimed privilege) was not excepted by the crime-fraud exception. The court listed the requisites of the crime fraud exception – including a prima facie showing of contemplated fraud or criminal design and a demonstration of the relationship between the document being sought and the alleged fraud. Sea Mar did not contest the first, but only the latter. The court found that there was no connection between the letter the and the alleged fraud. In particular, it noted that the lawyer had not been consulted during the period of the alleged fraud and that the letter was not written until three months after any alleged fraud had occurred. Tex. App. LEXIS 626 *14-16.

Finally, the court also held that and that Sea Mar had not subjected the privileged documents to discovery by offensive-use. It noted the requirements to find offensive use: (1) that the party asserting the privilege must seek affirmative relief; (2) that the privileged information, if

believed by the fact finder, would probably be outcome determinative; and (3) that disclosure of the privileged communication is the aggrieved party's only means of access to the evidence. The court concluded that only the first requirement was satisfied (via Sea Mar's counterclaim for specific performance and tortious interference with contract). The court, noting that that the letter from counsel being sought contained only opinion, found that it was not outcome determinative of Sea Mar's claims and that there were other means to obtain evidence as to the alleged fraud, including depositions. Tex. App. LEXIS 626 *17.

B. Work Product

1. Definition/In Anticipation of Litigation

The work product and attorney-client privileges often cover much of the same material. The crucial difference between them is that the work product privilege protects only materials prepared with "an eye toward litigation," Hickman v. Taylor, 329 U.S. 495, 511 (1947).

Thus, for documents, materials or mental impressions to be accorded work product protection, they must have been generated or prepared "in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3); Tex. R. Civ. P. 192.5. Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335 (6th Cir. 1988); Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 40-41 (S.D.N.Y. 1984); Burlington Indus. v. Exxon Corp, 65 F.R.D. 26, 33 (D. Md. 1974); Tex. R. Civ. P. 192.5; National Tank Co. v. Brotherton, 851 S.W.2d 193, 202-207 (Tex. 1993).

Documents prepared in the regular course of business, rather than for litigation, are not protected. Id.; Arkla, Inc. v. Harris, 846 S.W.2d 623, 630 (Tex. App.–Houston [14th Dist.] 1993, no writ); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2024, n. 25 (2d ed. 1994

Moreover, non-privileged **facts** cannot remain buried in work product and may be discovered through appropriate searching interrogatories. Hickman, 329 U.S. at 513; Suggs v. Whittaker, 152 F.R.D. 501, 507 (M.D.N.C. 1993); General Motors v. Gayle, 924 S.W.2d 222 (Tex. Civ.–Houston [14th Dist.] 1996) (motion to file mandamus overruled) (petition for rehearing filed 7/28/97, and overruled 10/2/97).

The Texas Supreme Court established a two-prong test in determining whether an investigation was conducted "in anticipation of litigation." National Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993) citing Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 40-41 (Tex. 1989).

1. The objective prong asks whether "a reasonable person would have conducted from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue."
2. The subjective prong asks whether "the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

National Tank, 851 S.W.2d at 203-205.

While (as discussed below) the work product rules changed extensively in 1998, because the Texas Supreme Court in National Tank was looking at federal cases in interpreting the "in anticipation of litigation requirement" and because the new work product rule follows the federal rule in this regard, National Tank's holding as to this requisite is still valid. ALEX WILSON ALBRIGHT, CHARLES HERRING, JR. & ROBERT H. PEMBERTON, HANDBOOK ON TEXAS DISCOVERY PRACTICE: THE NEW RULES GOVERNING DISCOVERY, § 6.15 (1999).

2. Rationale

The work product protection promotes diligence in preparing a case for trial. It provides an area within which an attorney can analyze and prepare a case without fear of disclosure. Marathon Oil Co. v. Moye, 893 S.W.2d 585, 589 (Tex. App.–Dallas 1994, no writ).

Its primary purpose is to prevent exploitation of another party's efforts in preparing for litigation. Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691, 699 (D. Nev. 1994).

It is a tool of judicial administration, borne out of concerns over fairness and convenience and designed to safeguard the adversarial system – but not having intrinsic value in itself outside the litigation area. Pete Rinaldi's Fast Foods v. Great American Ins. Cos., 123 F.R.D. 198, 201 (M.D.N.C. 1988).

3. Types of Materials Protected and Not Protected

The 1998 changes to the Texas Rules of Civil Procedure constituted a major structural revision to the discovery exemptions in Texas. The new Texas rules now make the materials protected and the degree of protection afforded very similar to those afforded in federal cases. Accordingly, they will be discussed together, noting relevant distinctions.

The revisions to the Texas Rules were intended to correct a number of perceived problems with Rule 166(b)(3) Tex. R. Civ. P. In general, the revisions "corrected" the problems by adopting the approach of Rule 26(b) Fed. R. Civ. P.

One such problem was that a "work product" objection under Rule 166(b)(3) Tex.R. Civ P protected only the ***attorney's*** work product, and perhaps only the attorney's mental impressions and opinions. ALBRIGHT, ET AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE § 6.15 (1999).

Under the new Texas rule (as well as the federal rule), a party's representatives" include its "attorneys, consultants, sureties, indemnitors, insurers, employees, or agents". Tex. R. Civ. P. 192.5(e). Fed. R. Civ. P. 26(3).

Thus, the work product privilege is broadened to provide at least some protection to all work product --whether it is prepared by a lawyer or the client and whether it is lawyer opinion or ordinary work product, or a party communication. Tex. R. Civ. P. 192.5(e). Fed. R. Civ. P. 26(3).

The new Texas rules move the consulting expert privilege of former Rule 166(b)(3) to Rule 192.5(e). The protection is now nearly parallel to that afforded under the federal rules.

Rule 26(b)(3) Fed. R. Civ. P. contains the federal protection for work product of a non-testifying expert specially employed in anticipation of litigation, which is similar.

The new Texas rules eliminate the witness statement exemption. I.e., witness statements, even if made in anticipation of litigation, are NOT work product. Tex. R. Civ. P. 192.3(c); 192.5(c)(1). That change does not render all witness automatically discoverable, but subjects them to the same rules concerning scope of discovery and privileges applicable to other documents and tangible things. ALEX WILSON ALBRIGHT, ET. AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE at § 6.15 .

Moreover, the identity of any person who is expected to testify at trial is expressly subject to discovery and NOT protected as work product. Tex. R. Civ. P. 192.3(d); 192.5(c)(1).

4. Joint Defense/Work Product

Parties with a "common interest" in litigation, however, may exchange work product to prepare a common defense and, if done under appropriate safeguards, such exchange will ordinarily not waive the work product protection. This is true whether the party with whom work product is exchanged is an actual co-defendant or a party with common interest in "potential" litigation. See Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 191 (N.D. Ill. 1985). See also Keene Corp. v. Caldwell, 840 S.W.2d 715, (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) concerning documents relating to an asbestos "task force" set up to determine strategies for defending asbestos actions nationwide) .

So long as the "joint parties" anticipate litigation against a common adversary on the same or similar issues, they can share the "fruit" of their trial preparation efforts without fearing waiver of work product protection. See e.g., United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

Where a party claims that a document is joint defense work product, the asserting party must show:

(1) that the document is either opinion work product or ordinary work product (discussed below);
(2) that there was an agreement made prior to the communication, between the "joint parties" that the document would be kept confidential;
(3) that there was an agreement to pursue a joint defense strategy; and
(4) that at the time the document was prepared there was a substantial probability of litigation.

In re Megan-Racine Assoc., 189 B.R. 562 (Bankr. N.D.N.Y. 1995).

a Industry Group Documents

Plaintiffs (particularly in class actions and cases brought by federal or state agencies or on their behalf) against industry members frequently seek documents generated by industry groups (e.g., API, IPAA, etc).

These "industry documents" may or may not be privileged. For example, a document by a non-lawyer within an industry organization sent to all members encouraging them to have their respective companies lobby for or against a piece of proposed legislation or proposed administrative rule would likely not be protected as joint defense attorney client privilege or work product. On the other hand, an attorney within an industry organization discussing an actual or proposed lawsuit regarding the enforcement of actual rules or an injunction against the enforcement of proposed legislation or rules sent only to those members who have agreed to participate in such litigation or proposed litigation should carry with it the joint defense/work product protection.

In order to determine whether they are privileged, each document's author (including whether he is an attorney), its recipients and the circumstances surrounding its origin (did it involve potential litigation or an administrative action) need to be analyzed.

5. Extent of Protection

The degree of protection from disclosure by the work product doctrine depends upon the nature of the materials sought to be protected.

a "Core Work Product" or "Opinion Work Product"

(1) Texas

Rule 192.5(b)(1) Tex. R. Civ. P. provides that the mental impressions and opinions of an attorney or attorney's representative (including consultants)—called "core work product" are NOT discoverable regardless of need or hardship.

(2) Federal

The "facts known or opinions held" by an attorney or non-testifying expert who has been "retained or specially employed in anticipation of litigation or preparation for trial" may be discovered through depositions or interrogatories only upon a showing of "exceptional circumstances" under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. Fed. R. Civ. P. 26(b)(4)(B).

> [I]t should be noted that the showing of "exceptional circumstances" is a much higher standard then required for trial preparation materials.

Katherine Ettredge, Note: "A Breath of Fresh Air in the Smoky Haze of Environmental Litigation: Discovery Protection for the Environmental Consultant," 26 Tex. Envtl. L. J. 84, 91 (1995).

The protection afforded under the federal rule, may not be identical to that under the Texas rule:

> While the federal work product doctrine acknowledges that the attorney's mental impressions and opinions are at the core of the work product doctrine and receive "almost" absolute protection from discovery, Rule 192.5(b)(1) unequivocally states that core work product (an attorney's mental impressions and opinions) is not discoverable. Further, Rule 193.3(c) exempts certain types of core work product from the procedure by which a party asserts a privilege.

ALBRIGHT, ET AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE § 6.15.

But see Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691, 699 (D. Nev. 1994) (noting the "absolute immunity" afforded "opinion" work product); 26 Tex. Envtl. L. J. at 91 ("[n]o showing of need and hardship will allow discovery of the consultant's opinion work product").

b The Rest – "Ordinary Work Product"

Rule 192.5(b)(2) Tex. R. Civ. P. and Rule 26(b)(3) Fed. R. Civ. P. protect documents and other tangible things "prepared in anticipation of litigation or for trial by or for a party or by or for that party's representative" (i.e., "other work product") from discovery, subject to the opposing party showing that it:

> has a 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 materials by other means.

Tex. R. Civ. P. 192.5(b)(2); Fed. R. Civ. P. 26(b)(3).

In Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 584-85 (S.D. Tex. 1996), the court held that the substantial need/undue hardship limitation on work product precluded protection from discovery of transcripts of recorded interviews of defendant's employees who witnesses the plaintiff's accident. The court found

that, since the interviews had been conducted shortly after the accident, the transcripts would be more accurate than any statements that could later be obtained by deposition from the same witnesses.

c Inferencial Revelations of Thought Processes

An attorney's mechanical compilations of information that indirectly reveal his thought processes are protected (but only under the qualified protection subject to need and hardship). See Tex. R. Civ. P. 192.5(b)(3). I.e., it is not a violation of Rule 192.5(b)(1) to order disclosure under 192.5(b)(2) if such incidentally discloses by inference attorney mental processes otherwise protected under Rule 192.5(b)(1). ALBRIGHT, ET AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE § 6.15.

This provision has no counterparts in the federal rules. Both the federal and Texas rules, however, caution courts to protect against discovery of opinion work product when ordering discovery under circumstances of need and hardship. Rule 23(b)(3). Fed. R. Civ. P. and Rule 192.5(b)(4) Tex. R. Civ. P. ALBRIGHT, ET AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE § 6.15.

d Continuing Protection

One problem with former Rule 166(b)(3) Tex R. Civ. P. was that the party communication protection was limited to litigation for which the communication was made, so that materials prepared in anticipation of related, but different, lawsuits became discoverable in Texas..

The new Texas rules consolidate previously distinct protections – the attorney work product exemption and the party communication exemption -- and replace them with the broader "work product privilege." under Rule 192.5, Tex. R. Civ. P.

By doing so, all trial preparation privileges are continuing privileges that a party may assert in litigation other than the litigation in which the protected materials were prepared." ALBRIGHT, ET AL., HANDBOOK ON TEXAS DISCOVERY PRACTICE § 6.15.

The same continuing protection has been afforded in recent federal cases addressing the issue. See Lumber v. PPG Indus., Inc., 168 F.R.D. 641, 645 (D. Minn. 1996) (holding that the work product immunity is not lost if a document was not prepared in anticipation of the litigation in which it is sought so long as it was prepared in anticipation of some litigation).

6. Waiver

a By Failure to Assert, or Untimely Assertion of the Privilege

The procedures under the Texas rules (discussed above) regarding asserting and proving up the attorney-client privilege also apply to the work product privilege See Rule 193.3 (c), Tex. R. Civ. P. If these procedures are not followed, the work-product privilege may be waived.

Note, however, that the rules specifically exempt any privileged communications to or from a lawyer or the lawyer's representative that is created or made from the point at which a party consults a lawyer to obtain legal services with respect to a specific claim in the litigation in which discovery is requested and concerning the litigation in which the discovery is requested. Those materials are treated as privileged without the need for counsel to assert a claim of privilege or to describe the information withheld. Rule 193.3(c), Tex. R. Civ. P.

b By Disclosure

Protection is waived by disclosure to third parties where the disclosure is inconsistent with the maintenance of secrecy from the disclosing party's adversary. See Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424-1431 (3d Cir. 1991) (defendant waived its work product privilege as to internal investigation reports by voluntarily turning them over to government agencies – even though the turnover had been pursuant to a confidentiality agreement); Western Fuels Ass'n v. Burlington N. R.R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984). Arkla, Inc. v. Harris, 846 S.W.2d 623, 630-31 (Tex. App.–Houston [14th Dist.] 1993, no writ).

If the disclosure increases the likelihood that opposing counsel will obtain the information, the policy underlying the protection is defeated and waiver may be found. See United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 446 (W.D. Mo. 1976).

The protection may also be waived where counsel attempts to make testimonial use of the materials. Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408 (D. Del. 1992).

7. Recent Industry Cases

In Midwest Gas Serv., Inc. v Indiana Gas Co., No. IP 99-690-C-D/F, 2000 U.S. Dist LEXIS 8098 (S.D. Indiana, March 7, 2000), the court addressed requests for documents that the defendant had previously produced to the Department of Justice in response to a C.I.D. The defendant claimed that the documents were work product.

The court held that a decision as to production would await new requests for production and a new motion to compel because the plaintiffs had merely requested all documents produced or received during other litigation or investigations and had not shown the relevancy of the documents to the current litigation. In so doing, however, the court noted:

> any pre-existing documents that were produced in compliance with the C.I.D. do not gain any additional privileged status because of that production. In fact, production in response to a C.I.D. might have effected a waiver of any pre-existing work product and attorney-client productions because such privileges apply to C.I.D. requests just as they apply in federal court.

Id. at 8098 *3.

C. Self-Audit or Peer Review Privilege

1. Genesis and Definition of Privilege

In enacting Fed. R. Evid. 501, Congress did not intend to "freeze the law of privilege." Trammell v. United States, 445 U.S. 40, 47 (1980). Rather, Rule 501 was enacted to "'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' and to leave the door open to change." Id. at 47 (quoting 120 Cong. Rec. H40891, 1974) (statement of Rep. Humgate)).

This flexibility has led to the recognition of the self-analysis privilege, also known as the privilege of self-critical analysis or the self-evaluation in some jurisdictions. Michael J. Holland, 25 Brief 52, 53 (Fall 1995).

The self-critical analysis privilege allows certain records, or portions of the records that contain internal evaluations, to be withheld from production in litigation when to require such production would impede the open and candid discussion of ideas. 25 Brief 52.

The first case to articulate the self-analysis privilege was Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970); aff'd, 479 F.2d 920 (D.C. Cir. 1973).

In Bredice, a medical malpractice case, the plaintiff sought production of minutes of a hospital peer review board meeting at which the death of plaintiff's decedent was discussed. The court concluded that the meetings were entitled to a qualified privilege on the basis of "this overwhelming public interest." The D.C. Circuit Court affirmed without opinion.

2. Recognition of Privilege Not Uniform Across Jurisdictions

The self-evaluative privilege has NOT been uniformly recognized among the federal courts.

Likewise, while some states have recognized the privilege, it has NOT been recognized in all jurisdictions.

No Texas court has accepted or rejected a common law self-evaluative privilege. Texas, however, has codified a limited self-evaluative privilege for medical peer review. Tex. Rev. Civ. Stat. Ann. art. 4447d § 3 (Vernon Supp. 1988). This statute is discussed below.

The Fifth Circuit has addressed the "self-evaluation privilege," and whether it should be applied in certain situations. Specifically, In re Kaiser Aluminum and Chemical Company, the court found that "where a government agency seeks pre-accident documents" the privilege should not be recognized. 214 F.3d 586 (5th Cir. 2000).

However, the court's opinion did not decide "whether a self-evaluation privilege should ever be recognized."

3. Rationale

The self-critical analysis privilege, is based on the rationale that it is in society's interests to allow a party's employees to engage in critical analysis and evaluation of the party's conduct, unfettered by the fear that such comments may be discoverable and used adversely. 25 Brief 52.

> The 'critical self-analysis' doctrine has been employed by the courts to protect certain information from discovery particularly in instances where public policy outweighs the needs of litigants and the judicial system for access to information relevant to the litigation.

Granger v. National R.R. Passenger Corp., 116 F.R.D. 507, 508 (E.D. Pa. 1987)

4. Scope of Privilege

a Qualified Privilege

The Bredice court held that the privilege of self-analysis can be overcome if the party seeking discovery can make a showing of extraordinary circumstances amounting to good cause requiring the disclosure of the information sought. Bredice, 50 F.R.D. at 251.

The "extraordinary circumstances" test has not been widely followed. 25 Brief 52. Most courts have applied a balancing test to determine whether the privilege is applicable. 25 Brief 52.

The benefits that justify the privilege are weighed against the federal and society's interests arriving at the truth, and if these interests outweigh the need for the privilege, the privilege fails. 25 Brief at 53.

For example, in Hardy v. New York News, Inc., 114 F.R.D. 633, 641 (S.D.N.Y. 1987), the court held that a plaintiff's interest in gathering information to prove employment discrimination furthered policies of Civil Rights Act and outweighed employer's interest in candid self-analysis and voluntary compliance with equal employment law. See also O'Connor v. Chrysler Corp., 86 F.R.D. 211, 217 (D. Mass. 1980); Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433 (E.D. Pa. 1978).

b Limited to Evaluations, Not Facts

The self-critical privilege applies only to evaluations. Factual determinations and facts contained in internal evaluations or reports are not subject to the privilege and must be produced if properly requested.

There is no privilege to prevent compliance with a request for the facts on which the evaluation is based. Michael J. Holland, 25 Brief at 53-54; Todd v. South Jersey Hosp. Sys., 152 F.R.D. 676, 682 (D.N.J. 1993); In re Crazy Eddie Sec. Litig., 792 F. Supp. 197, 205-06 (E.D.N.Y. 1992).

c Does Not Apply to Federal Government Requests

The privilege does not apply when the discovery is sought by an agency of the United States (e.g., pursuant to a request or subpoena issued by a federal agency). 25 Brief at 54.

For example, in FTC v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980), an audit prepared by TRW was ordered to be produced in response to a subpoena duces tecum issued by the Federal Trade Commission. The court held:

> [w]hatever may be the status of the 'self-evaluative' privilege in the context of the private litigation, courts with apparent uniformity have refused its application where the documents in question have been sought by a government agency."

Id. at 210.

Likewise, in United States v. Noall, 587 F.2d 123 (2d Cir. 1978), the court held that the self-evaluation privilege did not apply and ordered the defendant to comply with an IRS production request.

See also Reich v. Hercules, Inc., 857 F. Supp. 367, 371 (D.N.J. 1994) (explosives manufacturer could not use self-evaluation privilege to withhold production of internal safety audit reports subpoenaed by the Secretary of Labor); In re Grand Jury Proceedings, 861 F. Supp. 386, 389-91 (D. Md. 1994) (privilege did not apply to grand jury subpoena of company's audits prepared by outside consultants to evaluate company's compliance with FDCA regulations).

5. Requirements

Where recognized, the self-critical analysis privilege attaches only where the party asserting the privilege shows:

(a) the information sought resulted from an internal critical self-analysis undertaken by the party seeking protection;
(b) the information is of the type whose flow would be curtailed if discovery were allowed; and
(c) the document was prepared with the expectation it would be kept confidential, and has in fact been kept confidential.

Michael J. Holland, 25 Brief at 52, citing Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992). Etienne v. Mitre Corp., 146 F.R.D. 145, 147 (E.D. Va. 1993); O'Connor v. Chrysler Corp., 86 F.R.D. 211, 216 (D. Mass. 1980). See also Note, The Privilege of Self-Critical Analysis, 97 Harv. L. Rev. 1083, 1086 (1983).

a The Information Sought Resulted From a Critical Self-Analysis Undertaken by The Party Seeking Protection

The information sought to be protected must have resulted from a critical self-analysis undertaken by the party seeking protection. It is extensively discussed in Bredice as well as most of the cases discussing the privilege.

In Gillman v. United States, 53 F.R.D. 316, 319 (S.D.N.Y. 1971), the court allowed discovery of the statements of hospital personnel as to what in fact happened but permitted the government to withhold from production information concerning the internal recommendations for future procedures and comments with respect to future improvements.

In Bradley v. Melroe Co., 141 F.R.D. 1, 3 (D.D.C. 1992), the court concluded that routine information such as the date of the accident, the place of the accident, the fact of the injury, and the name and address of the person reporting the injury were producible. Relying on the affidavit of the defendant's product safety manager, the court, however, ruled that the balance of the accident investigation reports was protected from discovery by the self-analysis privilege.

b The Information is of The Type Whose Flow Would be Curtailed if Discovery Were Allowed

The second criterion of the privilege – that the information contained in the evaluation must be the type that would be curtailed if it were subject to discovery – is co-extensive with is rationale.

This was extensively discussed by the court in Granger v. National R.R. Passenger Corp., 116 F.R.D. 507 (E.D. Pa. 1987).

The self-analysis privilege generally is focused on production of reports prepared **after** an accident. At least one case has focused on the production of records generated **before** an subject incident and held them NOT subject to the privilege.

In Dowling v. American Hawaii Cruise Lines, Inc., 971 F.2d 423 (9th Cir. 1992), a seaman brought an action under the Jones Act for injuries sustained while working aboard the defendant's cruise ship. He sought discovery of the minutes of safety committee meetings held in the one-year period before the accident occurred.

The defendant objected to production, asserting the self-critical analysis privilege. The district court found that the minutes were protected by the self-critical analysis privilege.

The Ninth Circuit reversed the district court's finding. It held that there was no privilege of self-critical analysis applicable to routine internal corporate reviews of matters related to safety concerns. 971 F.2d at 426-27.

In doing so, the court noted the difference between routine pre-accident safety reviews and post-accident investigations. Such routine safety tests are performed by manufacturers not only because of the threat of liability suits but because a reputation for safety renders products more marketable to the public. Accordingly, the policy rationale did not apply to such voluntary routine pre-accident safety reviews. The court, therefore, were not protected by the self-critical analysis privilege. 971 F.2d at 426-27.

In Etiene v. Mitre Corp., 146 F.R.D. 145, 148-49 (E.D. Va. 1993), the court found that, unlike the hospital setting where the confidential nature of an internal review may be necessary to allow hospitals to improve their procedures, there was no confidential relationship to protect in any employment discrimination case. The court found that self-review would continue even in the absence of any evidentiary privilege because of a company's need to remain in compliance with federal law by filing an Affirmative Action Plan (AAP) pursuant to Executive Order 11246, as amended by Executive Order 11375.

Likewise, in In re Air Crash Disaster at Cove Neck, Long Island, New York on January 25, 1990, MDL No. 843 (TCP), slip op. at 18-19 (E.D.N.Y. April 21, 1992), the court recognized Avianca's concern regarding production of its candid internal examination of its own procedures but found that the interest of society in allowing discovery of the document would not have "a chilling effect on the compilation of such reports in the future." A serious accident such as the crash at Cove Beck must always be thoroughly investigated by all entities involved. Existing procedures regarding safety must always be closely monitored in order to provide the greatest possible safety to the passengers. "The undersigned concludes that such investigations will not be curtailed even though their findings might be properly discoverable in litigation." Id. at 20.

c The Document Was Prepared With The Expectation it Would be Kept Confidential, and Has in Fact Been Kept Confidential

Even if the self-analysis privilege is determined to be applicable, it can be waived—perhaps inadvertently—by the party wishing to assert it. See First Eastern Corp. v. Mainwaring, 21 F.3d 465, 466-67 (D.C. Cir. 1994) (waiver of right to assert self-evaluative privilege on appeal by failure to raise argument before district court); Zapata v. IBP, Inc., No. 93-2366-EEO, 1994 WL 649322 (D. Kan. Nov. 10, 1994) (waiver of self-critical analysis privilege for requested affirmative action plans and reports by failure to assert privilege in responsive objection to request for production).

The self-critical analysis privilege may also be waived when a party seeks to protect a document and then attempts to use it, i.e., uses it as both a sword and a shield. Coates v. Johnson & Johnson, 756 F.2d 524, 552 (7th Cir. 1985) (holding that fairness requires that the qualified privilege not be allowed to mask discrimination when the overall policy behind the privilege is directed toward eliminating wrongdoing).

6. Types of Cases in Which the Privilege Has Been Recognized

The extension of the principle of self-analysis beyond the medical malpractice area has been slow and narrowly drawn. 25 Brief 52

Certain courts, however, have extended the doctrine into the following areas:

a Environmental

In Reichold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522, 525-27 (N.D. Fla. 1994), the court extended the privilege to retrospective environmental reports that analyzed past conduct, practices, and occurrences relating to past pollution (analogizing the self-analysis privilege to the rule on subsequent remedial measures.

As discussed below, in addition to this protection, several states (including Texas) have provided statutory protection akin to the self-audit privilege as to health, safety and environmental audits.

b Patents

In NeoRx Corp. v. Immunomedics, Inc., No. 92-2853 (HLS), 1993 WL 493880 (D.N.J. 1993), the court held that the self-evaluative privilege protected from discovery accused patent infringer's internal evaluations of its own pending FDA application for its new drug.

c Product Liability

In Shipes v. BIC Corp., 154 F.R.D. 301, 307-08 (M.D. Ga. 1994), the court held that the self-critical analysis privilege protected confidential documents that BIC had submitted to the Consumer Product Safety Commission (pursuant to federal statute) from discovery in an action for injuries resulting from an allegedly defective BIC lighter.

See also Bradley v. Melroe Co., 141 F.R.D. 1, 3 (D.D.C. 1992).

d Employment Discrimination Suits

The courts have been divided as to whether the self-critical analysis privilege is applicable in an employment discrimination case.

Most recent cases have found that the privilege should not be recognized in this field, concluding that the need for such documents in civil litigation to enforce society's interests in fair employment practices outweighs the employer's interest in the self-analysis and the possible chilling effect on an employer's self-evaluation process. 25 Brief at 55.

For example, in University of Pennsylvania v. EEOC, 493 U.S. 182, 189-94 (1990), the Supreme Court declined to recognize special privilege for peer-review materials subpoenaed by EEOC in Title VII action).

See also Aramburu v. Boeing Co., 885 F. Supp. 1434 (D. Kan. 1995) (district court affirmed magistrate judge's order denying self-critical analysis privilege of employer's affirmative action plans and related documents in Title VII employment discrimination case); Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 181-82 (S.D. Iowa 1993); Siskonen v. Stanadyne, Inc., 124 F.R.D. 610, 612-13 (W.D. Mich. 1989).

But see Troupin v. Metropolitan Life Ins. Co., 169 F.R.D. 546 (S.D.N.Y. 1996) (refusing to compel production of the narrative, evaluative or analytical portions of report on employer's shortcomings regarding advancement opportunities available to female employees).

D. The Environmental Audit Privilege

1. Scope of the Privilege

a Protected Materials

In 1995, the Texas legislature passed the Texas Environmental Health and Safety Audit

Privilege Act (the "Act"). Tex. Rev. Civ. Stat. Ann. art. 4447 cc (Vernons' 2000). The Act provides that an 'audit report' is privileged. Tex. Rev. Civ. Stat. Ann. art. 4447cc, Sec.5(a).

"Audit report" is defined in Section 4 of the Act as "a report that includes each document and communication (other than those set forth in Section 8 of the Act) produced from an environmental, health or safety audit."

"Environmental, health or safety audit" is, in turn, defined in Section 3 (a)(3) of the Act to mean a "systematic voluntary evaluation review, or assessment of compliance with environmental or health and safety laws conducted by an owner or operator, an employee of the owner or operator or an independent contractor of a regulated facility or operation; or an activity at a regulated facility or operation."

"Regulated facility or operation" is, in turn, defined in Section 3 (a)(7) of the Act to mean a "facility or operation that is regulated under an environmental or health and safety law."

Because of the breadth of federal and state environment, health and safety laws and the enforcement powers of the respective federal and state agencies created to enforce such laws, most (if not all) oil or gas industry facilities will be regulated or will have regulated operations.

The critical question as to applicability of the Act's privilege, therefore, will likely not be whether a company qualifies to assert the privilege, but whether the document in question is, indeed, part of report involving a "systematic voluntary evaluation review, or assessment of compliance with environmental or health and safety laws." Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 3 (a)(3).

b The Protection

The Act provides that "audit reports" are not admissible in evidence or subject to discovery in legal or equitable civil actions, criminal proceedings, or administrative proceedings. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec.5 (b).

The Act also provides that certain witnesses cannot be compelled to testify regarding, or to produce any document relating to, the audit report if the testimony or documents disclose any item made as a part of the preparation of or addressed in a privileged part of the audit report. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec.5 (c).

Finally, state agencies may no longer request, review or otherwise use privileged audit reports during any agency inspection. Tex. Rev. Civ. Stat. Ann. art. 4447cc, Sec. 5 (e).

2. Rationale

The stated purpose of the Act is encouraging "voluntary compliance with environmental and occupational health and safety laws." Tex. Rev. Civ. Stat. Ann. art. 4447cc, Sec. 2.

Companies now generally recognize that auditing is a vital tool in ensuring compliance with these laws. Auditing reduces a company's costs of litigation and environmental remediation by uncovering environmental non-compliance before it becomes a problem. The public also benefits from internal discoveries of non-compliance before they impact human health or safety or the environment. Moreover, because environmental agencies of the government cannot continually monitor even most facilities, there is necessarily great reliance on voluntary audits and compliance by the regulated community.

Despite these benefits, companies have had legitimate concerns that written documents regarding voluntary internal audits may be discovered – providing road maps for agency or third-party actions against them. Thus, regulated companies lobbied for a privilege covering materials generated during such audits and an immunity for voluntary disclosure of their progress (or lack of progress).

Texas was one of nine states in 1995 to pass some form of environmental auditing legislation.

3. Waiver/Non-Waiver

The audit privilege is waivable and will be lost if privileged information is communicated to others except in limited situations described in the Act. Texas Natural Resource Conservation Commission, Litigation Support Division, "The Texas Environmental, Health, and Safety Audit Privilege Act" (September 1997) at pg.6.

Disclosures to company attorneys, officers and directors, contractors, partners, insurers and employees will *not* waive the privilege, if such disclosures are: (1) made in order to correct problems raised by the audit; and (2) if made pursuant to a confidentiality agreement between the owner and/or operator (or other person for whom the audit report was prepared), and these parties. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 6(b)(1).

Disclosure to (A) a partner or potential partner, (B) a transferee or potential transferee of

the facility or operation, (C) a lender or potential lender, (D) a governmental official of a state, or (E) a person or entity in the business of insuring, underwriting or indemnifying the facility or operation likewise will *not* waive the privilege, if such disclosure is made pursuant to a confidentiality agreement. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 6 (b) (2).

Note that the foregoing exceptions do not address disclosure to federal agencies such as the EPA. Information that is otherwise privileged under the Act cannot be disclosed to a federal agency without waiving the privilege. Texas Natural Resource Conservation Commission, "The Texas Environmental, Health, and Safety Audit Privilege Act" at pg. 8.

The Act provides that 'to facilitate identification, each document in an audit report should be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT." The lack of such designation will not, however, waive the privilege or create a presumption that the privilege does not apply. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 4(d).

4. Unprotected Information

The Act expressly excludes the following from its protections:

(1) any document, report, record, data, communication or information required by law to be collected, developed, maintained or reported (e.g., reporting obligations under the Texas Water Act or the Federal Superfund Act);

(2) information obtained by the regulatory agency through sampling, observation or monitoring or a third party source, e.g., inspections or actions by the EPA;

(3) information obtained from a source not involved in the preparation of the environmental, health, safety audit report.

In light of the numerous reporting requirements and the broad collective authority of the many federal and state agencies as to environmental, health and safety issues, these exceptions are significant. Required data regarding emissions, serious accident reports, and numerous other items, are not protected by the Act. Nor are citations or penalties assessed by a regulating agency.

Section 7 (d) of the Act provides that:

> a person claiming the privilege is subject to sanctions as provided by Rule 215 of the Texas Rules of Civil Procedure or to a fine not to exceed $10,000 if the court finds, consistent with fundamental due process, that the person intentionally or knowingly claimed privilege for unprotected information as provided in Section 8 of this Act.

5. Requirements/Limitations

a Requirements

Once initiated, an audit must be completed within six months unless the agency with regulatory authority over the regulated facility or operation grants an extension. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 4 (e).

Any attempt to continuously audit to take advantage of the Act's privilege (or immunity) provisions will obviously be viewed with suspicion that the assertion of the audit privilege is fraudulent. See Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 7(1).

b Limitations -- Potential Loop Holes

(1) Facts

Similar to the work-product and self-evaluative privilege, certain **facts** cannot be buried in the privileged audit reports. The Act provides:

> a person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed physical events of violation, may testify about those events but may not be compelled to testify about or produce documents related to the preparation of or any item listed in Section 4 of this Act.

Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 4(e).

Data that regulatory agencies obtain through sampling, observation or monitoring or that are provided by third party sources likewise are not covered by the privilege protections of the Act. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 8.

(2) Court-Ordered Production to Private Parties Based Upon A Finding of Lack of Diligence

In addition, although the legislative history clearly shows a legislative intent to apply the privilege to private third-party actions, the Act provides:

> A court or administrative hearings official with competent jurisdiction may require disclosure of a portion of an audit report in a

civil or administrative proceeding if the court or administrative hearings official determines, after an in camera review consistent with the appropriate rules of procedure:

(1) the privilege is asserted for a fraudulent purpose;
(2) the portion of the audit report is not subject to the privilege under Section 8 [see above]of this Act; or
(3) the portion of the audit report shows evidence of noncompliance with an environmental or health and safety law and appropriate efforts to achieve compliance with the law were not promptly initiated and pursued with reasonable diligence after discovery of non-compliance.

Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 7 (a).

The person seeking such disclosure has the burden of proving that subsection (1), (2) or (3) applies. Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 7 (b).

Moreover, the Act provides for interlocutory "appellate" court review of these discovery decisions. See Tex. Rev. Civ. Stat. Ann. art. 4447 cc, Sec. 7 (c) and (e).

Nevertheless, the exception in Section 7 (a) (3) is significant.

Consider the possibility of a court in a private personal injury case (having some broad connection with a particular environmental, health or safety law or regulation) determining that a company -- that has never been cited for a violation of a law or regulation and, in fact, took voluntary steps to assess its compliance – did not act with sufficient promptness or diligence and, therefore, must disclose its internal analyses with respect thereto. Clearly, this situation would not square with the intent of the Act.

III. CONCLUSIONS

To maximize the protections afforded in the privileges discussed in this paper, several steps should be taken:

- Attorneys should identify themselves on documents that they author. Where a client or his agent prepares something for his attorney, he should identify the recipient as his attorney. Such documents should also be stamped "confidential".
- If the document was sent or received by in-house counsel, it should be stamped with "Law Department."
- Attorneys should be identified as such on any notes or memoranda or minutes of meetings that they attend . If applicable, the document or the meeting notes should, on its face, that the communication was for purposes of obtaining legal advise.
- If a document or communication relates to litigation, the name of the case on it along with its cause number should be included. If it relates to anticipated litigation, state that fact in the document and, if possible, also describe parties to the anticipated litigation. Under current rules, the work-product protection applies across different pieces of litigation (and, thus the fact that it was prepared for a different anticipated litigation should not impact its assertion). Yet describing the anticipated litigation will document its "realness." Moreover, this information may be required on a subsequent privilege log.
- Consultants should be retained through a written agreement with counsel (in-house or trial counsel). The agreement should clearly identify the consultant as a "representative of the lawyer." If applicable the consultant's engagement letter should note that her or she is being sought "in anticipation of litigation" and "in furtherance of obtaining legal advice."
- Separate engagements should be entered for distinct projects or phases of work. That way if one of the projects is put "in issue" or for some other reason becomes discoverable, there is less chance that parts which remain subject to production will be disclosed.
- The engagement letter should contain an explicit confidentiality provision under which the consultant agrees to share the research work product only with his or her assistants, counsel, and counsel's designees.
- When entering into a joint defense relationship, document as fully as possible: that there is a joint defense relationship, i.e., that the parties share common interests; that prior to sharing information, the joint parties have agreed to keep the communications confidential among themselves and their attorneys; that the documents subject to the defense was made in the course of the joint defense relationship; and that the documents

were designed to further the joint defense effort.

- The documents' confidentiality should be protected – maintained in places safe from the view of persons not within the zone of protection, not provided to testifying experts; and not used or relied upon during deposition preparation-sessions or at trial.
- Remember disclosure to third parties (including the government) <u>even</u> under agreements regarding confidentiality generally results in a waiver of the privilege.
- If the environmental, health, and safety audit privilege is applicable, each document (or better yet, each page) should be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT."