SURVEY OF THE LAW OF PRIVILEGE IN TEXAS COURTS

ALEX WILSON ALBRIGHT
UNIVERSITY OF TEXAS SCHOOL OF LAW
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Alex Wilson Albright
Professor of Law
University of Texas School of Law
727 East Dean Keeton Street
Austin, Texas 78705
aalbright@mail.law.utexas.edu

BA 1977, University of the South; JD 1980, Texas

A Teaching Quizmaster and member of the Texas Law Review during law school, Professor Albright was a partner with Thompson & Knight in Dallas before joining the faculty in 1988.

A specialist in Texas civil procedure, she is the author of Texas Courts: Pretrial (Grail & Tucker 1996, 1997, 1998) and several articles, including "The Texas Discovery Privileges: A Fool's Game" (Texas Law Review, 1992). Recently, she has been working with the Texas Supreme Court on revising the Texas Rules of Civil Procedure relating to pretrial discovery.
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## II. THE WORK PRODUCT PRIVILEGE

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## III. THE CONSULTING EXPERT PRIVILEGE

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This paper discusses recent developments covering the major privileges asserted in civil litigation in Texas courts under Articles V of the Texas Rules of Evidence, the Federal Rules of Evidence and the Texas Rules of Civil Procedure. Key emphasis is given to granddaddy privileges such as the attorney-client, work product and trade secret privileges. Because of some key differences in the law of privilege in state and federal courts, this paper generally discusses some aspects of federal law as it applies to the major privileges.

I. THE ATTORNEY-CLIENT PRIVILEGE

A. General Parameters - Texas

Texas Rule of Evidence 503 codifies the attorney-client privilege. This privilege protects confidential communications between an attorney and client relating to the attorney’s rendition of legal services. See TEX. R. EVID. 503(b); Huie v. DeShazo, 922 S.W.2d 920, 922 (Tex. 1996). As recognized by the Texas Supreme Court, this is one of the oldest privileges of confidential communications in the common law. Ford Motor Co. v Leggat, 904 S.W.2d 643, 647 (Tex. 1995). The client, the client’s representative, or the attorney on behalf of the client may assert the privilege. See TEX. R. EVID. 503(c).

Rule 503 provides:

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

   (e) 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 present 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.

The attorney-client privilege allows “unrestrained communication and contact between an attorney and client in all matters in which the attorney’s professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding.” Huie, 922 S.W.2d at 922 (quoting West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978), see Harlandale School Dist. v. Cornyn, 25 S.W. 3d 325 (Tex. App - Austin 2000, pet. denied). Significantly, the attorney-client privilege is known as an “absolute” privilege -- it is not subject to the need and hardship exception. Goode, et al., Texas Practice: Courtroom Handbook on Texas Evidence 321 (West 1999).

The attorney client privilege extends to all matters or business transactions, regardless of whether the matters are pertinent to the matter for which the attorney was employed. Boales v. Brighton Builders, Inc., 29 S.W.3d 159 (Tex. App. – Houston [14th Dist.], 2000 pet denied).  

* This paper is a compilation of papers that Kim Askew, David Keltner and I have prepared. I thank my research assistant, Susan Finger, for updating it this time.
B. General Parameters - Federal

FED. R. EVID. 501 provides that (except as otherwise required by the Constitution or statute) privileges 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.

Thus, the federal attorney-client privilege (like other evidentiary privileges) is defined by federal common law, not by rule or statute. The seminal federal case is *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). In *Upjohn*, the United States Supreme Court held that communications between the attorney and client (and their representative) made to secure legal advice were privileged and not subject to discovery.

Federal courts will usually protect material under the attorney client privilege when:

1. legal advice of any kind is sought;
2. from an attorney acting in the capacity of an attorney;
3. the communication is confidential and outside the presence of strangers; and
4. a client seeks the advice from the attorney.

*Upjohn*, 449 U.S. at 395; *Smith v. Texaco Inc.*, 186 F.R.D. 354, 356 (E.D. Tex. 1999). Like Texas state law, the application of the attorney-client privilege under federal law is “a question of fact, to be determined in the light of the purpose of the privilege.” *In re Auclair*, 961 F.2d 65, 68 (5th Cir. 1992).

The federal attorney-client privilege protects the same interests as the state privilege. Under federal law, the attorney-client privilege serves to encourage full and frank communication between clients and their attorneys, thereby promoting the broad and public interests in the observance of law and the administration justice. *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir. 1999); *United States v. El Paso Co.*, 682 F.2d at 583, 539 (5th Cir. 1982). As with Texas courts, federal courts will also strictly construe privileges. *De La Paz v. Henry’s Diner, Inc.*, 946 F. Supp. 484 (N.D. Tex. 1996).

C. In Anticipation of Litigation Requirement

Unlike the work product privilege, the attorney-client privilege is not limited solely to communications made in anticipation of litigation. In *re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App-Texarkana 1999, orig proceeding).

D. Extends to Preliminary Pre-Hiring Discussions

Under state and federal law, the attorney-client privilege extends to all preliminary confidential communications between a lawyer and the potential client made for the purpose of the client obtaining legal advice. Communications are protected even if the attorney has not been hired or retained at the time the communication is made. *Hart v. Gossam*, 995 S.W.2d 958, 962 (Tex. App.–Fort Worth 1999, orig. proceeding); *In re Auclair*, 961 F.2d 65, 68 (5th Cir. 1992).

E. Privilege Belongs to Client


F. Who Is the “Client”?

I. Client as Defined Under the “Subject-Matter” Test

Texas recently adopted the “subject matter” test to determine who qualifies as a representative of a corporate client entitled to assert the privilege. Prior to March 1, 1998, the Texas attorney-client privilege extended only to those in a corporation’s “control group.” The control group was narrowly defined to include only those employees with authority to obtain legal services for the corporation or to act on legal advice on behalf of the
corporation. See TEX. R. EVID. 503(a)(2) (repealed March 1, 1998); National Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993) (noting that the “control group” test generally protects communications made between the attorney and the “upper echelon” of a corporation).

Effective March 1, 1998, Rule 503 was amended to incorporate the “subject matter” test for determining who qualifies as a representative of a corporate client. See TEX. R. EVID. 503 (comment to 1998 change). New Rule 503(a)(2) defines a “representative of the client” to include those in the corporation’s control group and any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

TEX. R. EVID. 503(a)(2)(B).

This “subject matter,” or “scope of employment” test tracks the test set forth in Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981), which defines the privilege applicable under Federal Rule of Evidence 501. Because Texas courts interpreting the Texas Rules of Evidence frequently look to the federal courts’ interpretation of the Federal Rules, practitioners seeking to interpret and apply Rule 503(a)(2)(B) should seek guidance from federal cases interpreting Upjohn’s subject-matter test.

The recently adopted subject matter test significantly broadens the attorney-client privilege in Texas. Thus, lawyers representing corporations will find that their investigations within the company generally will fall under the privilege. Interviews with employees who are not in the upper echelon of the company, but who nonetheless possess significant knowledge of the matter at issue, will be protected under the attorney-client privilege. This is significant for two reasons: (1) the interviews are not discoverable as “witness statements” under Rule 192.3(h); and (2) the interviews are not discoverable even under circumstances of need and hardship (e.g. the employee dies before being deposed). Nevertheless, there are limits to the privilege under the new test. For example, one court of appeals has rejected the argument that “all communications between corporate representatives could be claimed as privileged on the basis that ‘the legal department can better represent us if we keep them informed.’” In re Monsanto, 998 S.W.2d 917 (Tex. App.--Waco 1999, orig. proceeding).

In a recent diversity case, National Converting & Fulfillment Corp. v. Bankers Trust Corp., 134 F.Supp. 2d 804 (N.D. Tex. 2001), the court found that communications made by the plaintiff owner to his son, a non-practicing attorney, to aid the son in seeking legal advice for the corporation were protected by the corporate attorney-client privilege under Rule 503, even though the son was not an employee of the father’s firm.

For a thorough discussion of the development and application of the attorney-client privilege in the corporate context, see Craig W. Saunders, Comment, Texas Rule of Evidence 503: Defining “Scope of Employment” for Corporations, 30 ST. MARY’S L.J. 863 (1999).

Confusion can arise in the application of the work product and attorney-client privileges with respect to in-house counsel. For a thorough discussion of this topic including recent cases, see Fred A. Simpson, Has the Fog Cleared? Attorney Work Product and the Attorney-Client Privilege: Texas’s Complete Transition into Full Protection of Attorney Work in the Corporate Context, 32 ST. MARY’S L.J. 197 (2001).

2. Statements to Insurer

In In re W&G Trucking, Inc., 990 S.W.2d 473 (Tex. App.--Beaumont 1999, orig. proceeding), the court addressed whether a written statement given to an insurance investigator was privileged under the attorney-client privilege. Relators contended that the statement was privileged because it was between a client and his representative for the purpose of rendering professional advice to the client. The court found that statement was not covered by the attorney-client privilege. The insurance investigator did not represent relator and did not take the statement for the purpose of rendering legal advice - the statement was investigative.

Compare this result with that of In re Texas Farmers Ins. Exch., 990 S.W.2d 337 (Tex. App.--Texarkana 1999), leave denied, 12 S.W.3d 807 (Tex. 2000), in which the trial court ordered the disclosure of an attorney’s letter to an insurance company concerning the examination under oath he conducted of the company’s insured. The court held that the attorney had been
working solely in the capacity of an investigator studying a house fire claim that the company suspected might have been caused by arson. The court specifically found that the attorney’s work was conducted prior to a time when the company anticipated litigation. The Court of Appeals affirmed the trial court’s ruling, holding that his “factual” communications with the insurance company were not privileged, although communications concerning “legal strategy, assessments, and conclusions” would be.

The Texas Supreme Court declined to review the case, which prompted a dissent from Justice Hecht: “The rule the court of appeals has adopted affects not only every lawyer retained to take an EUO [examination under oath], but every plaintiffs’ lawyer who investigates a client’s claims, and every attorney retained to investigate the internal affairs of a corporation or other group . . . .” Justice Hecht argued that “in no situation should an attorney be required to reveal his communications with his client about a factual investigation,” but his plea was insufficient to sway his colleagues to accept the case for review.

At least one court has protected a communication to an insurer as an attorney-client communication. The Fort Worth Court of Appeals has expressly held that narrative reports made by a client to his attorney and to his liability insurance carrier are protected from disclosure by the attorney-client privilege, even though the reports might otherwise be considered “witness statements.” In re Fontenot, 13 S.W.3d 111 (Tex. App.--Fort Worth 2000, no pet.) (report to attorney was sent in a different lawsuit, but concerned facts of this case; report to insurance carrier was made in response to plaintiff’s demand letter in this case; both were privileged attorney-client communications).

3. Privilege Belongs To The Corporation; Not To An Individual Employee Of A Corporation

Like individuals, corporations have a right to refuse to disclose privileged attorney-client communications. Upjohn v. United States, 449 U.S. 383 (1981); Nguyen v. Excel Corp, 197 F. 3d 200, 206 (5th Cir. 1999).

In re Marketing Investors Corp., No. 05-98-00535-CV, 1998 WL 909895 (Tex. App.--Dallas Dec. 31, 1998, no pet.) presents an interesting spin on the assertion of the attorney-client privilege in the corporate context. A former employee took privileged documents for his own use after his termination, and his former employer sued for the return of the documents. The former employee acknowledged that the documents were privileged, but asserted that he was not violating the attorney-client privilege because he had had come into the legitimate possession of the documents through his employment and had a right to them. He also maintained that, as a former employee, he had a joint representation with his former company. Of course, the company maintained that the employee lost all rights to possession of the privileged documents once he was terminated.

The court held that in the corporate context, there is but one client for the purpose of asserting the attorney-client privilege. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former employee might have made to counsel concerning matters within the scope of his corporate duties.

One who is no longer an officer of a corporation can no longer assert the privilege over the wishes of the corporation. There was no evidence in the record that the attorneys had ever represented the employee personally, and there was no basis on which the employee could assert the corporate attorney-client privilege.

4. Trustee Is the Client When the Trustee Seeks Legal Advice to Administer a Trust on Behalf of a Beneficiary

In Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996), the Texas Supreme Court held that the attorney-client privilege protected communications between a trustee and a lawyer the trustee retained to offer legal advice relating to the administration of a trust. In Huie, a trust beneficiary sued the trustee for breach of his fiduciary duties relating to the administration of the trust. During discovery, the beneficiary deposed a lawyer hired by the trustee to offer advice relating to trust administration issues. The lawyer refused to answer several questions regarding the content of communications between the trustee and lawyer on the basis of the attorney-client privilege. Id. at 922. The
beneficiary objected to the assertion of the privilege on the ground that the trustee’s fiduciary duty of disclosure to the beneficiary should override any applicable privilege. The beneficiary also argued that the privilege did not apply because the trustee was seeking legal advice ultimately to aid the beneficiary; and that the trustee’s lawyer represented the “trust,” rather than the trustee. \textit{Id.} at 923.

The Texas Supreme Court upheld the invocation of the attorney-client privilege, holding that the trustee’s fiduciary duty of disclosure to the trust beneficiary did not override the privilege between the trustee and his attorney. \textit{Id.} at 923. Although the trustee must disclose all “material facts” to the beneficiary, this duty does not include disclosing confidential communications, such as legal advice from the attorney. \textit{Id.} The Court made clear, however, that the attorney-client privilege would not protect facts communicated by the trustee to the attorney of which the client had knowledge independent of the communication. \textit{Id.} In other words, “a person cannot cloak a material fact with the privilege merely by communicating it to an attorney.” \textit{Id.} The Court also emphasized that its holding did not release the trustee from his obligation to disclose all material facts relating to his administration of the trust. \textit{Id.} The Court reasoned that the justification for the attorney-client privilege -- to promote an environment in which the attorney can render sound legal advice -- applied with full force to the relationship between a trustee and his attorney. See \textit{Id.} at 924 (“A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee’s actions.”).

The Court also rejected the beneficiary’s arguments that either she or the “trust” was the real client. The Court held that the trustee is the client because it is the trustee who is “empowered to hire and consult with the attorney and to act on the attorney’s advice.” \textit{Id.} at 925. The trustee did not hire the attorney to represent the beneficiary. \textit{Id.} Further, the “trust” was not the client because “trust” is not a separate legal entity; a trust is a “fiduciary relationship governing the trustee with respect to the trust property.” \textit{Id.} at 926 (emphasis in original).

5. A Governmental Body may be a “Client”

Rule 503 defines “client” to include public organizations or entities. \textit{Tex. R. Evid.} 503(a)(1).

(a) \textbf{City Council}. In a straightforward application of Rule 503(a)(1), the Waco Court of Appeals held that the attorney-client privilege applies to a city council’s discussions with the city attorney regarding a lawsuit filed against the city council under the Texas Open Meetings Act. \textit{Markowski v. City of Martin}, 940 S.W.2d 720, 726-27 (Tex. App.--Waco 1997, pet. denied) (noting that \textit{Tex. Gov’t Code} § 551.071 allows a governing body to consult with an attorney about pending or contemplated litigation). See also \textit{El Centro del Barrio, Inc. v. Barlow}, 894 S.W.2d 775, 778 (Tex. App.--San Antonio 1994, orig. proceeding) (non-profit, private, incorporated community health center corporation qualifies as a client).

(b) \textbf{Commissioners Court}. The attorney-client privilege protected confidential communications between the Wichita County Commissions Court and its attorney in \textit{Hart v. Gossum}, 995 S.W. 958 (Tex. App.--Fort Worth 1999, orig. proceeding). Appellants sought to obtain production of a September 6, 1996 letter under the Texas Public Information Act. The court produced the letter, but redacted the portion containing legal strategy and confidential advice from the lawyer. The court held that the redacted portion was properly withheld because it contained confidential communications between the attorney and the client for the purpose of obtaining legal advice. \textit{Id.} at 961.

(c) \textbf{School Board of Trustees}. The Harlandale Independent School District Board of Trustees was a client within the meaning of \textit{Tex. R. Evid.} 503 when it hired a lawyer to investigate and give it legal advice regarding a sexual harassment claim. \textit{Harlandale School District v. Cornyn}, 25 S.W.3d 325 (Tex. App. – Austin 2000).
6. **Privilege Survives Assignment of Claims**

The relator in *In re Cooper, ___ S.W.3d ____,* No.09-01-122-CV, 2001 WL 586738 (Tex. App.-Beaumont 2001, orig. proceeding) was the original defendant in an automobile personal injury suit. After the plaintiff obtained a judgment in excess of his insurance policy limits, Cooper assigned his claims against his insurers to the plaintiff who then filed a “Stowers” case against the insurers. In the new suit, the insurance companies sought disclosure of communications protected in the original suit by Cooper’s attorney-client privilege. The trial court ordered production finding that Cooper waived the privilege by assigning his claim. The Court of Appeals found that, absent an express waiver in the assignment releasing the privilege and where no disclosure of the communications was made to the insurers during the initial suit, the privilege survived the assignment.

**G. Who is a “Lawyer”?**

The Texarkana Court of Appeals has held that the attorney-client privilege does not apply to communications made between a lawyer and the lawyer’s client if the attorney is acting in a capacity other than an attorney. *In re Texas Farmers Insurance Exchange*, 990 S.W.2d 337 (Tex. App.-Texarkana 1999, leave denied). In that case, homeowners sued their homeowner’s insurance carrier for denying liability under the policy when their house was destroyed by fire. The insureds sought to depose the insurance company’s attorney who had conducted some of the insurance company’s investigation that led up to the denial of the claim and discover his file. The trial court denied the insurance company’s motion to quash the deposition. The court of appeals found that only the attorney’s investigation after the claim was denied was privileged because it was work product. However, the court held that pre-denial communications were not work product, as litigation was not yet anticipated. Nor were they attorney-client communications, because the lawyer was acting as an investigator rather than a lawyer. The court noted that a blanket privilege would allow insurance companies to “simply hire attorneys as investigators at the beginning of a claim investigation and claim privilege as to all the information gathered.”

It is certainly true that a lawyer must be acting as a lawyer to claim the benefit of the privilege. *See Goode, et al.*, 1 TEXAS PRACTICE: TEXAS RULES OF EVIDENCE 332 (2d edition 1993 & supp. 1999) (noting that the privilege is inapplicable if the attorney is acting in a capacity other than an attorney, such as an accountant, bail bondsman, or friend.) *See also Huie*, 922 S.W.2d at 926-27 (remanding to determine whether lawyer was providing accounting or legal services). Nevertheless, lawyers often conduct investigations of fact in the course of providing professional legal service. *See e.g. Upjohn*, 499 U.S. at 373 (applying attorney-client privilege to statements taken by lawyer in course of investigations). Thus, it is likely a mistake to interpret this opinion as barring application of the privilege to a lawyer’s factual investigations. *See In re Farmers Ins. Exch., 12 S.W.3d 807* (Tex 2000) (Hecht, J dissenting from order denying leave to file mandamus).

**H. What is a “Communication”?**

1. **Underlying Facts and Documents Are Not Privileged, Even If Communicated to the Lawyer**

Rule 503 allows a client to refuse to disclose (and prevent others from disclosing) “communications” between lawyers, clients and their representatives. The privilege does not extend to the disclosure of underlying facts. The privilege only protects confidential attorney-client communications. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 341 (Tex. App.--Texarkana 1999, orig. proceeding); *Huie*, 922 S.W.2d at 923. Thus, the client must testify to facts within the client’s knowledge (learned through means other than a privileged communication), although the client need not disclose that the facts were communicated to the attorney.

Similarly, documents are not covered by the attorney client privilege simply because they are passed to a lawyer and maintained in the lawyer’s files. *Smith v. Texaco*, 186 F.R.D. 354, 356 (E.D. Tex. 1999) (employer’s internal study of race and employment not protected by the attorney client privilege even though the information was organized under the direction of counsel in anticipation of litigation); *see also National Union Fire Ins. Co. of Pittsburgh v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993) (party does not cloak document with attorney-
client privilege simply by forwarding it to her attorney).

2. Applies to all Facts and Conclusions Communicated By the Lawyer

In Harlandale School District v. Cornyn, 25 S.W.3d 328 Tex. App. (Tex. App. – Austin, 2000 pet. denied), the court addressed the issue of whether a lawyer’s factual assessments were covered by the attorney client privilege. The Harlandale Independent School District Board of Trustees hired an outside attorney to investigate sexual harassment allegations and, after the completion of the investigation, to provide a “legal analysis of the matters investigated.” Id. After the report was completed, a San Antonio Express News reporter sought the report under the Public Information Act. The school board requested a ruling on whether the report was properly produced. In an informal opinion letter, the Attorney General’s office ruled that the “factual information compiled by an attorney acting as an investigator” was properly disclosed, but the actual legal opinions and legal advice were privileged. Id. at *4.

The school district then filed a declaratory judgment action seeking a court ruling on whether the report was properly disclosed under the Public Information Act. The district court agreed with the Attorney General’s ruling and found that the report was in part a summary of factual investigation and in part a legal opinion. Production of the factual investigation was ordered produced and the school board appealed arguing that the entire report was excepted from disclosure under the Public Information Act. Id. at 5.

The Austin Court of Appeals reversed the trial court ruling, finding that the privilege protected all the information in the report. The attorney was not working in the dual role as an investigator and attorney, but only as an attorney. The factual investigation had been undertaken in connection with the attorney functioning in a legal capacity. Id. at *19. The entire report was privileged and exempted from disclosure under the Public Information Act.

The attorney client privilege protected legal advice given to parties during contract negotiations, and those discussions were not discoverable in an ensuing lawsuit. Boales v. Brighton Builders, Inc., 29 S.W.3d 159 (Tex. App. –Houston [14th Dist.], 2000).

3. An Attorney’s Computer Files Containing Work Product are Not “Communications” Between an Attorney and Client

In In re Bloomfield Mfg. Co., 977 S.W.2d 389 (Tex. App.--San Antonio 1998, orig. proceeding), the San Antonio Court of Appeals rejected a claim that a computer database containing an attorney’s opinions as to the nature of the plaintiffs’ claims, the injury, and the ultimate likelihood of success of each claim was a “communication” between the attorney and client protected by the attorney-client privilege. Id. at 392. Although the court based its determination on the fact that the party asserting the privilege had offered no “proof” that the database was a communication, the court also noted that an “instrument” protected by the attorney-client privilege is one that “owe[s] its existence to an effort to transmit information from one to the other.” Id. (Citing Suddarth v. Poor, 546 S.W.2d 138, 141 (Tex. Civ. App.--Tyler 1977, writ ref’d n.r.e.)). Compare Bloomfield with Pittsburgh Corning Corp. v. Caldwell, 861 S.W.2d 423, 425 (Tex. App.--Houston [14th Dist.] 1993, orig. proceeding)(holding that memorandum from claims director to the lawyer is privileged) and Enos v. Baker, 751 S.W.2d 946 (Tex. Civ. App.-Houston [14th Dist.] 1988, orig. proceeding)(holding that an attorney’s “client files,” presumably containing communications between the attorney and client, are privileged). The Bloomfield court, however, protected the database as work product. Id.

Rapidly evolving communications technology has created new questions about maintaining client confidentiality and interpreting the attorney-client privilege. For an interesting overview of this topic, see Brian Burris, Y. Danae Bush & Mitchel L. Winick, Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications, 31 TEX. TECH L. REV. 1225 (2000).
I. What Communications Are “Confidential”?

Texas Rule 503(a)(5) defines a “confidential” communication as one “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services . . . .” Carmona v. State, 947 S.W.2d 661, 663 (Tex. App.--Austin 1997, no writ). Although not statutorily based, federal law applies the same definition of confidentiality. See generally In re Auclair, 961 F.2d 65, 68 (5th Cir. 1992); Church of Scientology of Texas v. I.R.S., 816 F. Supp. 1138, 1154 (W.D. Tex. 1993).

Several recent Texas State opinions interpret this language of Rule 503(a)(5).

1. Disclosure to Non-Clients is “Some Evidence” that a Communication is Not Confidential

In Osborne v. Johnson, 954 S.W.2d 180 (Tex. App.--Waco 1997, orig. proceeding [leave denied]), the Waco Court of Appeals considered Rule 503’s requirement that a privileged communication be one “intended” to be confidential. At issue was whether reports compiled by investigators working for a university’s legal counsel were “intended” to be disclosed to persons not within the university’s control group. Id. at 188. The court of appeals upheld the district court’s ruling that the documents were not confidential, finding that the reports themselves suggested that they had been compiled by persons not working for counsel, and that the reports’ contents had been disclosed to non-clients. These facts “constitute[d] ‘some evidence either that the communications were never intended to be confidential, or that the privilege was waived by disclosure to third parties.”’ Id. at 189 (quoting Cameron County v. Hinojosa, 760 S.W.2d 742, 746 (Tex. App.--Corpus Christi 1988, orig. proceeding [leave denied])).

Also at issue in the case was whether handwritten notes by the client regarding the investigation were intended to be confidential. The court upheld the trial court’s order compelling disclosure because the notes were unaccompanied by evidence “concerning when they were prepared, who was present or participated in the discussions which led to their preparation, or the status and identity of the persons whose comments are reflected in the notes.” Id. at 190.

2. An Attorney’s Communication of a Trial Date to A Client Is Not Confidential

In Austin v. State, 934 S.W.2d 672 (Tex. Crim. App. 1996), a criminal case, the Court of Criminal Appeals held that an attorney’s communication to his client of the client’s upcoming trial date was not a “confidential” communication, because the information transmitted did not involve the subject matter of the client’s legal problems. Id. at 675. The Court found that the rationale of the attorney-client privilege—to encourage unrestrained communication between the attorney and client—would not be furthered by prohibiting disclosure of this information. Id. The communication was therefore “collateral” to the attorney-client relationship. Id.

3. A Client’s Transmittal of Misappropriated Privileged Documents to Her Attorney Does Not Preclude Ethical Obligation to Return to Opponent

In In re Meador, 968 S.W.2d 346 (Tex. 1998), the Texas Supreme Court addressed the trial court’s refusal to disqualify a lawyer who had received copies of the litigation opponent’s privileged documents from his client, who had taken the documents when she worked for the opponent. The Court briefly addressed a claim that a client’s transmittal of misappropriated documents to her lawyer was a “confidential communication” protected by the attorney-client privilege, thus the lawyer was precluded from returning the documents as it would implicate the client in their misappropriation. The Court refused to find that returning the documents implicated the privilege. Id. at 353. However, the Court seemed to rely primarily on ethical considerations rather than giving real consideration to issues relating to the privilege.

4. Attorney Fee Statements May Not Be Privileged

In Judwin Properties, Inc. v. Griggs & Harrison, P.C., 981 S.W.2d 868 (Tex. App.--Houston [1st Dist.] 1998), pet. denied per curiam, 11 S.W.3d 188 (Tex. 2000), the court dealt with the interesting issue of whether the contents of attorney billing invoices could support a motion for summary judgment in a case in which an attorney sued to collect fees against a former client. The
attorneys sued the former client seeking to collect unpaid fees. The client filed a counterclaim for damages allegedly sustained as a result of the unauthorized public disclosure of the confidential information contained in the fee statements, including claims for breach of contract, breach of implied warranty, breach of fiduciary duty and negligence and gross negligence. *Id.* at 868-69. The court ultimately granted summary judgment on all claims, including the negligence claims.

On appeal, the issue before the court was whether Rule 503 prevented the law firm from disclosing the bills relevant to the issue of the client’s non-payment of the agreed fees. The client argued that the bills were an attorney-client communication within the meaning of Rule 503 which imposed a duty upon the attorney not to damage his client unnecessarily.

The court found that Rule 503 did not impose a duty upon the attorney in this situation. Indeed, Rule 503(d) expressly provides that there is no privilege when the communication is relevant to an issue of breach of duty by the lawyer to the client or the client to the lawyer. *Id.* at 870. Given this lack of duty under Rule 503, the fee statements could be used to support the summary judgment.

5. **Redaction Generally Doesn’t Render Privileged Documents Discoverable**

A number of Texas Courts of Appeal have held, in the context of information protected by the attorney-client privilege, that redaction of the privileged portion of the information will not then render the remainder of the document discoverable. See *e.g.* In re Bloomfield Mfg. Co., 977 S.W.2d 389, 392 (Tex. App.- San Antonio 1998, orig. proceeding); Pittsburgh Corning Corp. v Caldwell, 861 S.W.2d 423,425 (Tex. App.- Houston [14th Dist.] 1993, orig. proceeding); Keene Corp. v. Caldwell, 840 S.W.2d 715, 720 (Tex. App.- Houston [14th Dist.] 1992, orig. proceeding). The Pittsburgh Court explained that, in the attorney-client context, the trial court does not have the authority to shield portions of documents from discovery through redaction of privileged information while allowing production of the remainder of the document. *See Pittsburgh Corning* at 425. The Court held that once it is established that a document contains a confidential communication, the privilege extends to the entire document, and not merely to the specific portions related to legal advice, opinions, or mental analysis. *See id.* The Court concluded that “except in the rarest circumstances, documents falling within the attorney-client privilege simply are not discoverable, even when they are interwoven with factual information.” *See id.* at 427.

The Corpus Christi Court of Appeals followed this line of cases in In re Columbia Valley Regional Medical Center, 41 S.W.3d 797 (Tex. App.- Corpus Christi 2001, orig. proceeding), finding that reduction of patient-identifying information from non-party medical records did not defeat the medical records privilege.

**J. Exceptions to the Attorney-Client Privilege**

1. **The Crime-Fraud Exception**

The crime-fraud exception to the attorney-client privilege applies “[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the lawyer knew or reasonably should have known to be a crime or fraud.” TEX. R. EVID. 503(d)(1).

In order to establish the crime-fraud exception, the party seeking to destroy the privilege must present prima facie proof that the client was engaged in an ongoing crime or fraud or was seeking to commit a crime or fraud. *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992). A mere allegation of fraud in the pleadings is not enough to establish a prima facie case. In re Monsanto Co., 998 S.W.2d 917, 934 (Tex. App.--Waco 1999, orig. proceeding).

The El Paso Court of Appeals has held that “fraud” can include not only common law or criminal fraud, but also any situation in which “a prospective client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage.” *Volcanic Gardens Management Co. v. Paxson*, 847 S.W.2d 343 (Tex. App.--El Paso 1993, orig. proceeding). The party must also show that a relationship exists between the communication for which the privilege is challenged and the prima facie proof offered. *Granada*, 844 S.W.2d at
the disciplinary rule, the Court of Appeals invoked the new exception to the attorney-client privilege based upon while the Court of Criminal Appeals effectively created a advantage."

or law made to a third person or the court for personal exception applies to any "false statements of material fact of the Disciplinary Rules when it held that the crime/fraud El Paso Court of Appeals relied upon the same provision of the El Paso Court of Appeals in Survey of the Law of Privilege in Texas Courts Chapter 33

yield. As a result, the privilege must prevent or terminate crime or fraud that is likely to future criminal activity overrode the privilege. According to the Court, if the privileged information sought is needed to prevent or terminate crime or fraud that is likely to result in death or serious bodily injury, the privilege must yield. Id. at 556.

It is interesting to compare this decision with that of the El Paso Court of Appeals in Volcanic Gardens. The El Paso Court of Appeals relied upon the same provision of the Disciplinary Rules when it held that the crime/fraud exception applies to any “false statements of material fact or law made to a third person or the court for personal advantage.” Volcanic Gardens, 847 S.W.2d at 343. Thus, while the Court of Criminal Appeals effectively created a new exception to the attorney-client privilege based upon the disciplinary rule, the Court of Appeals invoked the rule to interpret the existing crime-fraud exception. Moreover, the Court of Appeals decision, allowing an exception for false statements made for personal advantage, takes far more communications out of the privilege than the Court of Criminal Appeals more limited exception.

Relying on Granada, the Houston Court of Appeals in In re Nationsbank, No. 01-99-00278-CV, 2000 WL 960274 (Tex. App.--Houston [1st Dist.] June 19, 2000) (original proceeding) recently addressed the issue of when the Rule 503(d)(1) crime fraud exception could be asserted. Plaintiff alleged that Nationsbank had engaged in fraud by wrongfully offsetting certain funds in its account when it allegedly had no security interest, lien or assignment to the funds.

The court analyzed the allegations in light of the facts discovered in the case. While there was some evidence suggesting that Nationsbank had improperly structured the transaction at issue, there was no evidence to support the elements of fraud and no basis for applying the crime fraud exception.

Conversely, the Amarillo Court of Appeals found that the deposition testimony of two former employees of an oil and gas company regarding meetings held to discuss continuation of production on lapsed leases was not privileged under the crime-fraud exception. In re Natural Gas Pipeline Co. of America, No. 07-00-0375-CV, 2000 WL 1644361 (Tex. App.-Amarillo 2000, orig. proceeding)(no publication). Various legal counsel of NGP were present during these meetings and the company asserted that the excerpts in question thus fell within the attorney-client and work product privileges. The communications NGP sought to withhold indicated that the excerpts in question thus fell within the attorney-client and work product privileges. The communications NGP sought to withhold indicated that the excerpts in question thus fell within the attorney-client and work product privileges. The communications NGP sought to withhold indicated that the excerpts in question thus fell within the attorney-client and work product privileges. The communications NGP sought to withhold indicated that the excerpts in question thus fell within the attorney-client and work product privileges. The communications NGP sought to withhold indicated that the excerpts in question thus fell within the attorney-client and work product privileges.
2. Breach of a Duty by the Lawyer or Client to the Other

TEX. R. EVID. 503(d)(3) eliminates the privilege “[a]s to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.” In Judwin Properties, Inc. v. Griggs & Harrison, P.C., 981 S.W.2d 868 (Tex. App.--Houston [1st Dist.] 1998, pet. denied per curiam, 11 S.W.3d 188 (Tex. 2000)), the First Court of Appeals utilized the exception to define the scope of a law firm’s legal duties to its client. The case involved a law firm’s suit against its former client for unpaid fees, and the petition included fee statements. The client counter-claimed for breach of various common-law duties, including negligence, resulting from the law firm’s alleged public disclosure of confidential financial information contained in the fee statements. Id. at 869.

The law firm moved for summary judgment on the client’s negligence claims, in part arguing that it had not been negligent as a matter of law because the financial information in the fee statements was not confidential under the Rule 503(d)(3) exception. Id. The trial court granted summary judgment for the law firm and the court of appeals affirmed. The court agreed that the Rule 503(d)(3) exception, which it found clearly applied to the fee statements at issue, rendered them unprivileged and therefore conclusively disproved the duty element of the client’s negligence claims. Id. at 870. The court also held that the law firm was ethically permitted to disclose the fee statements under the Texas Rules of Disciplinary Procedure. Id. Justice O’Connor dissented, objecting to the scope of the majority’s holding with respect to the application of Rule 503(d)(3). She stated that Rule 503(d)(3) should not be interpreted to permit a lawyer to “unnecessarily disclose confidential information in a fee dispute with a client.” Id. at 871 (O’Connor, J., dissenting) (emphasis in original). The lawyer should be able to reveal confidential information, “but only so far as necessary to assert his claim.” Id. (O’Connor, J., dissenting).

3. The Joint-Client or Joint-Defense Exception

(a) State

The joint-client exception removes the privilege “as to a communication relevant to a matter of common interest between 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 the clients.” TEX. R. EVID. 503(d)(5).

In In re Valero Energy Corp., 973 S.W.2d 453 (Tex. App.--Houston [14th Dist.] 1998, orig. proceeding), the Fourteenth Court of Appeals determined whether the exception applied in a lawsuit between two parties to a joint venture.

A partner to a joint venture to operate a gas pipeline sued the other joint venture partner for diverting financial opportunities and profits belonging to the joint venture.

During discovery, the defendant partner refused to disclose certain documents prepared by the defendants’ in-house attorneys, invoking the attorney-client privilege. The plaintiff responded that the documents were prepared for the benefit of the joint venture and therefore fell within the “joint-client” exception to the attorney-client privilege. Id. at 458.

The court ruled that plaintiff had failed to establish that the joint venturers were “joint clients” of the defendants’ in-house attorneys. Id. Although the in-house attorneys had advised the joint venture on some matters, that advice was “rendered on behalf of the joint venture by [the defendant’s] attorneys, who were representing [the defendant] in its capacity as pipeline operator.” Id. The partners who had hired the in-house attorneys had not requested the attorneys to represent the plaintiffs or the joint venture. Id.

In support of its ruling, the court cited Huie, where the Texas Supreme Court found that a trustee’s attorneys’ advice, although offered to allow the trustee to ultimately help the beneficiary, was nonetheless privileged against the beneficiary. The court noted that like a trustee, a partner in a joint venture owes the other partner a fiduciary duty with respect to dealings within the scope of the joint venture. Id. at 459. To aid them in carrying out these duties, the partners may consult private attorneys. The court found that although work done by the defendants’ in-house attorneys benefited the joint venture, that work was nonetheless done for the defendant and concerned “its individual rights and duties as both pipeline operator and joint venturer.” Id. at 460. The court reached this conclusion on the basis of its in camera examination of the contested documents. Id. at 459.
The court in *In re Monsanto* also addressed the applicability of the joint defense privilege under Tex. R. Civ. P. 503(b)(1)(C). The court recognized that the “joint defense” privilege is included within the attorney-client privilege and covers:

Confidential communications made for the purpose of facilitating the rendition of legal services by the client or a representative of the client, or the client’s lawyer to a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action concerning a matter of common interest therein.

998 S.W.2d at 922.

(b) **Federal**

The joint defense privilege is reorganized in civil and criminal cases by federal courts in Texas. The privilege covers all shared communications between actual and potential co-defendants and their attorneys in actual or threatened civil and criminal proceedings to the extent the communications concern common issues, and are intended to facilitate the representations on whenever such communications are made in order to facilitate the rendition of legal services to the clients involved in the joint representation. *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 624 (E.D. Tex. 1993). The privilege applies to any third party made privy to the privileged communications if that party has a “common legal interest with respect to the subject matter of the communication.” *Id.* at 624.

**K. The Privilege Continues After the Client’s Death**

In *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the United States Supreme Court held that the federal attorney-client privilege survives the death of a client. The court based its decision on the rationale that the continuance of the privilege after the client’s death furthers the client’s intent, and encourages the client to communicate “freely and frankly” with his or her attorney. *Id.* at 2085-86. *Swidler & Berlin*’s interpretation of the Federal Rules of Evidence is in agreement with the scope of the attorney-client privilege in Rule 503 of the Texas Rules of Evidence.

See Tex. R. Evid. 503(c) (stating that the privilege may be claimed by a deceased client’s representative or the client’s attorney).

**L. When Can an Attorney be Disclosed as the Source of Incriminating Evidence Against the Client?**

The El Paso Court of Appeals recently addressed as an issue of first impression whether it can be revealed that a client’s attorney is the source of incriminating information against the client. In *Sanford v. State*, No. 08-98-00094-CR, 2000 WL 5162 (Tex. App.--El Paso Jan. 6, 2000, no pet. h.), the court held that testimony that the client’s criminal attorney was the source of incriminating evidence violated the attorney-client privilege and was inadmissible.

The defendant in a criminal proceeding was convicted for the offenses of aggravated kidnapping and assault with a deadly weapon. Much of the incriminating evidence was found in the defendant’s Suburban, which the police were able to locate based on information provided by defendant’s attorney to the sheriff’s department. At trial, the court admitted not only the underlying incriminating evidence, but also the fact that the defendant’s lawyers had disclosed the location of the vehicle containing the evidence. This connected the defendant to the incriminating evidence. Over the objections of the defendant that admitting that his attorney was the source of the information which led to evidence violated the attorney-client privilege, the court admitted the evidence.

Beginning its analysis with the axiomatic proposition that only the client can waive the privilege, the El Paso court held that the fact that the attorney was the source of the incriminating evidence was inadmissible because it violated the privilege.

The court rejected the state’s arguments that the attorney could have become a party to the offense if he had not disclosed the location of the Suburban. The court noted that the crux of the issue was not that the attorney violated the attorney-client privilege by revealing the
location of the physical evidence. The attorney-client privilege was violated because the state revealed the attorney as the source of the information that led the police to the evidence.

II. THE WORK PRODUCT PRIVILEGE

The new discovery rules codify the “investigative” privileges, which were formerly set out in TEX. R. CIV. P. 166b(3) and clarified in the case law. Several of those privileges have been consolidated into the “work product” privilege, now codified at TEX. R. CIV. P. 192.5. The consulting expert privilege has been codified at TEX. R. CIV. P. 192.3(e).

New Rule 192.5 clarifies and refines the definition of “work product” itself, eliminates the witness statement privilege; and offers different levels of protection for “core” versus “other” work product. The following discussion outlines the scope of the work product privilege, taking into account new Rule 192.5 and the recent case law involving the privilege. See also Albright, Herring & Pemberton, Texas Practice: Handbook on Texas Discovery Practice (West 1999).

A. Work Product Defined

1. Texas Definition

Rule 192.5(a) defines “work product” as materials prepared and mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, and communications made in anticipation of litigation or for trial between or among a party and the parties’ representatives. A party’s “representatives” explicitly include its “attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.” Thus, this rule, like the Fed. R. Civ. P. 26 (b) (3), encompasses all work product, whether it is a lawyer’s or client’s, an opinion or ordinary work product, or party communications.

2. Federal Definition

The work product and attorney-client privileges often cover much of the same material. The crucial difference between the two privileges is that the attorney-client privilege protects attorney-client communications, regardless of whether the advice is sought for litigation purposes or for some other legal advice. The work product privilege protects the attorney's work prepared with "an eye toward litigation," Hickman v. Taylor, 329 U.S. 495, 511 (1947).

Thus, documents, materials or mental impressions sought to be protected as “work product” must have been “prepared in anticipation of litigation or for trial” in order to qualify for work product protection. Fed. R. Civ. P 26(b)(3); Tex. R. Civ. P. 192.5.

As the Fifth Circuit has held:

The work product privilege applies to documents prepared in anticipation of litigation. The law of our circuit is that the privilege can apply where litigation is not imminent as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.

United States v. El Paso Co., 682 F.2d at 593 (citations omitted).

When documents are prepared after a potential cause of action arises, even if actual litigation has not yet begun, those documents are considered work product. On the other hand, documents prepared in the regular course of business, rather than for litigation, are not protected. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2024, n.25 (2d ed. 1994).

3. Continuing Privilege

Combining party communications and attorney work product into one work product privilege makes all trial preparation privileges continuing privileges that a party may assert in litigation other than the litigation in which the protected materials were prepared. Even under prior Texas practice, the attorney-client privilege and the attorney work product privilege were continuing privileges. See Owens Corning Fiberglas Co. v. Caldwell, 818 S.W.2d 749, 750-52 (Tex. 1991).
Because the party communications rule had language that limited its application to the specific lawsuit for which the communication was made, the party communication privilege was not continuing. See Republic Ins. Co. v. Davis, 856 S.W.2d 158, 164 (Tex. 1993). Consequently, while an attorney’s work product was protected from discovery in later related cases, discovery was available for trial preparation materials that were party communications, but were not attorney work product. Rule 192.5, like the federal rule, changes this: all work product is now protected in all subsequent cases, subject to the need and hardship exception for ordinary work product.

4. “In Anticipation of Litigation”

A crucial definitional aspect of work product is the requirement that it be prepared “in anticipation of litigation or for trial.” Rule 192.5(a)(1) and (2); In re Temple-Inland, Inc., 8 S.W.3d 459, 462 (Tex. App.--Beaumont 2000, orig. proceeding); United States v. El Paso Co., 682 F.2d at 593.

In its 1993 opinion National Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993) (orig. proceeding) (modifying Flores v. Fourth Court of Appeals, 777 S.W.2d 38 (Tex. 1989) (orig. proceeding)), the Texas Supreme Court interpreted the “in anticipation of litigation” requirement under the Former Rule 166b.3 exemptions. The Court stated a two-part test for determining whether an investigation was conducted in anticipation of litigation. First, the objective prong asks whether “a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue.” Id. at 195.

Second, 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.” Id.

The Supreme Court based its National Tank opinion on a thorough review of opinions and commentary construing the requirement under Federal Rule of Civil Procedure 26(b)(3) and its state counterparts. National Tank, 851 S.W.2d at 203-07. Because the new work product rule follows the federal rule, there is no reason to believe that the 1999 amendments affect National Tank’s holding. Hence, National Tank and its progeny remain valid law. See Oyster Creek Fin. Corp. v. Richwood Inv. II, Inc., 957 S.W.2d 640, 646 (Tex. App.--Amarillo 1997, pet. denied)(citing National Tank’s two-part test); Henry P. Roberts Inv., Inc. v. Kelton, 881 S.W.2d 952, 955-57 (Tex. App.--Corpus Christi 1994, orig. proceeding) (applying National Tank’s two-part test).

Law prior to the 1999 amendments demonstrates that the in-anticipation-of-litigation requirement will be followed. As an example, in Oyster Creek Fin. Corp. v. Richwood Inv. II, Inc., 957 S.W.2d 640 (Tex. App.--Amarillo 1997, pet. denied), the court determined whether damage calculations allegedly prepared by an attorney constituted work product. Four days before trial, an attorney was ordered to appear and produce his calculations of principal, interest and attorneys in a case seeking to recover on note. The trial court, without any evidence, conducted an in-camera review of the calculations and held they were covered by the work product doctrine. On appeal, the appellant argued that the trial court improperly held that the calculations were covered by the work product doctrine.

In determining whether the work product doctrine was properly asserted, the court first noted that the trial court had improperly placed the burden of proof by requiring the party seeking the discovery to justify the privilege. The resisting party had the burden of establishing the privilege by pleading it and presenting evidence which establishes the privilege. Here, the trial court initially placed the burden on the discovering party by asking counsel to explain why the calculations were discoverable and relevant, instead of placing the burden in the party seeking the exclusion.

When the party resisting discovery sought to establish the privilege, it merely stated through attorney argument that the calculations contained several scenarios for calculating interest and that it was work product. This evidence did not meet the resisting party’s burden of establishing work product.

Moreover, other evidence in the record showed that, while the attorney prepared the calculations, they were not prepared in anticipation of litigation but were prepared in anticipation of a foreclosure of the note. Based on this evidence, the court held that the calculations
of principal and interest made by an attorney for his client in an effort to affect private collection of a note under threat of private foreclosure, do not constitute attorney work product. The handwritten notes were not work product and were not privileged.

B. Protection for Work Product

Rule 192.5(b) specifies the protection provided to work product. Subparagraph (1) provides the mental impressions and opinions of an attorney or attorney’s representative: called “core” work product-with ultimate protection: they are not discoverable.

Subparagraph (2) provides protection to other work product, but like the federal rule, also subjects it to discovery upon a showing of need and hardship. Subparagraph (4) also tracks the federal rule-it cautions courts to protect against discovery of opinion work product when ordering discovery under circumstances of need and hardship.

Subparagraph (3) is unique to Texas. It recognizes that parties often argue that any discovery of work product under circumstances of need and hardship “incidentally discloses by inference attorney mental processes. Rule 192.5(b)(3); see also Occidental Chem. Corp. v. Banales, 907 S.W.2d 488, 490 (Tex. 1995) (orig. proceeding)(per curiam). Nevertheless, it instructs that such incidental inferential disclosure does not violate subparagraph (1).

Thus, Rule 192.5(b) attempts to find balance in requiring discovery under circumstances of need and hardship, while providing the most protection possible for core work product. At the same time, it refuses to allow the protection for core work product to swallow the need and hardship exception. Ultimately, the interpretation of this rule should be virtually identical to that given to the federal work product doctrine.

There is one difference between the new Texas rule and the federal work product doctrine: the high degree of protection provided to a lawyer’s mental impressions and opinions.

While the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383, 399-401 (1981), acknowledged 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, although, of course, it is subject to the exceptions of Rule 192.5(c). "See discussion in Section 4(B) below”. See also Thomas v. General Motors Corp., 174 F.R.D. 386, 388 (E.D. Tex. 1997)(opinion work product, such as an attorney’s legal strategy, evaluation of strengths and weaknesses of the case, etc. is given almost absolute protection from discovery). Furthermore, Rule 193.3(c) exempts the lawyer’s trial preparation materials, which would include certain types of core work product, from the procedure by which a party asserts a privilege.

C. Need and Hardship Exception for Non-Core Work Product

The primary exception to the work product doctrine is the substantial need and undue hardship exception, which applies to all work product other than “core work product.” This exception is not new to Texas practice, as it previously applied to the witness statement and party communication exemptions. Former Rule 166b.3.

The Supreme Court addressed the exception in two opinions - Flores v. Fourth Court of Appeals 777 S.W.2d 38, 42 (Tex. 1989) (orig. proceeding), and State v. Lowry, 802 S.W.2d 669, 673 (Tex. 1991) (orig. proceeding). In Flores, the Court acknowledged Federal Rule of Civil Procedure 26(b)(3) as the source of the exception and advised Texas courts to look to federal precedent in applying it. In Lowry, the court applied the need and hardship exception, finding that under the facts of that case the party seeking discovery had satisfied the standard.

Federal courts have generally held that the standard for need is more than relevance; the material must be essential to the proper presentation of the client’s case to overcome the work product privilege. See Hickman v. Taylor, 329 U.S. 495, 511-13 (1947). To satisfy the undue hardship standard, the party must have tried to obtain the information contained in the requested discovery and been unable to do so after a reasonable
effort. The essential question is what is a reasonable effort.

Only two Texas opinions give any guidance. In *State v. Lowry*, the Supreme Court held that proof that “the plaintiff had gathered information during the investigation that led to filing suit, and might lead to information supporting the defense” met the “need” standard. The undisputed difficulty in replicating the investigation met the “hardship” standard. *See Lowry*, 802 S.W.2d at 673. In *Dillard Department Stores, Inc. v. Sanderson*, 928 S.W.2d 319 (Tex. App.--Beaumont 1996, orig. proceeding), the court of appeals followed federal precedent and found need and hardship to exist under circumstances presenting “issues of credibility and failing memory.” The witness had given a statement soon after the incident and was unable to remember certain events at the time of her deposition.

**D. Work Product Exceptions**

Rule 192.5(c) contains a list of matters that are exempt from the work product privilege. The rule provides:

Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

(1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions;

(2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4;

(3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;

(4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and

(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

TEX. R. CIV. P. 192.5(c). Most of these exceptions existed to some extent prior to adoption of the new discovery rules. *See Former Rule 166b(3)(a), (c), (e).*

1. **Testifying experts**

The former rules also excepted testifying experts from discovery privileges, and a recent case examined the potential conflict between the party communications privilege and the exception for reports made by testifying experts. *See D.N.S. v. Schattman*, 937 S.W.2d 151 (Tex. App.--Fort Worth 1997 (Orig. proceeding).

At issue in *Schattman* was whether a defendant who had also designated himself as a testifying expert medical witness could be compelled to produce a narrative medical report that he had prepared before trial for his insurance carrier. The defendant claimed that the report was privileged under the party communications privilege. The plaintiff responded that the designation of the defendant as a testifying expert automatically waived any party communications privilege. The court sided with the defendant-expert and held that the designation of a party as a testifying expert does not automatically waive the party communications privilege. *Id.* at 156.

Rather, the privilege is waived only if the defendant-expert relies on a party communication or a privileged document as a basis for his testimony. *Id.*; *accord Aetna Cas. & Sur. Co. v. Blackmon*, 810 S.W.2d 438, 400 (Tex. App.--Corpus Christi 1991, orig. proceeding).

Otherwise, almost all privileged communications between a party-expert and his representatives would be discoverable. *Id.* at 157-58. It does not appear that the new rules would significantly affect the court’s analysis. *See Rule 192.5* (memorandum would be work product, although subject to testifying expert discovery); 192.3(e)(allowing discovery of reports prepared by the expert in anticipation of the testimony).
2. **Trial Witnesses**

Under the former rules, the identity of witnesses who were expected to testify at trial (as opposed to those who had knowledge of relevant facts) were protected as attorney work product. See, e.g., Rogers v. Stell, 835 S.W.2d 100, 101 (Tex. 1992) (per curiam); Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992). Now Rule 192.3 (e) allows discovery of trial witnesses (although not through a Rule 194 request for disclosure), and Rule 192.5(c)(1) ensures that no party may successfully refuse to disclose trial witnesses under a claim of privilege.

3. **Witness statements**

The new rules eliminate the witness statement privilege included in old Rule 166b(3)(c), which protected the written statements of potential witnesses or parties made subsequent to the litigation or in anticipation of litigation.

Rule 192.3(h) now specifically provides that statements of persons with knowledge of relevant facts are discoverable, regardless of when the statement was made. TEX. R. CIV. P. 192.3(h); In re Fontenot, 13 S.W.3d 111, 113, (Tex. App.-Fort Worth 2000, orig. proceeding) see also TEX. R. CIV. P. 192 cmt. 9 (noting that witness statements are discoverable to the extent permitted by the rules concerning scope of discovery). A party may obtain witness statements through requests for discovery. See TEX. R. CIV. P. 194. Rule 192.3(h) continues to allow any person to obtain his or her own written statements.

Even though a document may qualify as a witness statement, other privileges, such as the attorney-client privilege, may prevent discovery of particular statements. See Rule 192 cmt. 9. For example, suppose that the plaintiff’s lawyer in an intersection collision case has taken two statements during preparation for trial: (1) that of his client, and (2) that of a bystander witness. If the defendant requests statements through a Rule 194.2(i) request for disclosure or otherwise, the plaintiff will have to produce the bystander’s statement, which is not privileged, but will not have to produce the plaintiff’s statement, which the attorney-client privilege in Texas Rule of Evidence 503 protects.

Remember, however, that the requirements of the attorney-client privilege must be satisfied. See In re Texas Farmers Ins. Exch., 990 S.W.2d 337 (Tex. App.--Texarkana 1999, pet. denied) (attorney’s communications made in the role of investigator are not privileged).

Rule 192.3(h)’s definition of “witness statement,” which is substantially similar to that in Former Rule 166b.3.c, includes:

1. a written statement signed as otherwise adapted or approved in writing by the person making it, or

2. a stenographic, mechanical, electronic, as other type of recording of a witness’ oral statement, or any substantially verbatim transcription of such a recording.

TEX. R. EVID. 192, 3(h); In re Jiminez, 4 S.W.3d 894, 95, (Tex. App.--Houston [1st Dist.] 1999, orig. proceeding); In re Team Transport, 996 S.W.2d 256, 259 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding).

Significantly, the rule explains that notes taken during a conversation or interview with the witness do not qualify as a witness statement. These notes taken in anticipation of litigation would continue to be the attorney’s work product. See Marshall v. Hall, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, orig. proceeding) (holding attorney notes are work product).

Several parties have argued that discovery of witness statements taken prior to January 1, 1999, which were privileged when taken, violates the party’s due process rights. Two courts of appeals have addressed the issue and rejected the argument. See In re W & G Trucking, Inc., 990 S.W.2d 473 (Tex. App.--Beaumont 1999, orig. proceeding); In re Team Transport, Inc., 996 S.W.2d 256 (Tex. App.--Houston [1st Dist] 1999, orig. proceeding).

Interestingly, while the new rule seems very straightforward and unambiguous in making all witness statements discoverable, Official Comment 9 casts some doubts upon this by saying that the rule “does not render all witness statements automatically discoverable but subjects them to the same rules concerning the scope of discovery and privileges applicable to other documents or tangible things.” Presumably, this was intended to protect statements given by a party to his counsel (attorney-client
privilege). See In re Fontenot, 13 S.W.3d 111 (Tex. App.-Fort Worth 2000, no pet.) (report to attorney was sent in a different lawsuit, but concerned facts of this case; report to insurance carrier was made in response to plaintiff’s demand letter in this case; both were privileged attorney-client communications).

Separate from attorney-client communications, however, Official Comment 9 has provided grounds for arguments about other types of witness statements. For example, in In re Jimenez, 4 S.W.3d 894 (Tex. App.--Houston [1st Dist.] 1999, no pet.), a party attempted to withhold as work product a witness statement given in anticipation of litigation to an insurance agent. The party argued that Comment 9 effectively trumped the plain wording of the rule and allowed witness statements to be protected from disclosure under the work product privilege. The Houston Court of Appeals rejected this argument, holding that the rule meant what it said - witness statements are discoverable regardless of when taken -- even if they might otherwise qualify as work product because they were made in anticipation of litigation.

4. Photographs

Former Rule 166b.3.c provided that the witness statement and party communications privileges did not protect photographs.

Case law held that only photographs that are an integral part of a consulting expert’s report were privileged. Houdaille Indus. Inc. v. Cunningham, 502 S.W.2d 544, 550 (Tex. 1973).

The new rule is somewhat different from the former rule in that it excepts from the work product privilege “any photograph or electronic image” of underlying facts (e.g., a photograph of an accident scene) or any photograph or electronic image that a party intends to offer in evidence. This new language is significant in two ways: first, it clearly applies not only to photographs, but also to videotapes, digital images, and any other electronic image; and second, it requires parties to produce any image that reveals discoverable facts or facts that might be used in evidence at trial. See Southern Pac. Transp. Co. v. Banales, 773 S.W.2d 693, 694 (Tex. App.--Corpus Christi 1989, orig. proceeding) (requiring the trial court to review videotape in camera to determine if work product privilege applies).

While under the former rule it was clear that a photograph of an accident scene taken by a witness or party was not protected from discovery because photographs were excluded from the party communication and witness statement privileges, one taken by a lawyer arguably could have been considered “attorney work product” and not discoverable. Cf. Axelson, Inc. v. McIlhaney, 755 S.W.2d 170, 173 (Tex. App.--Amarillo 1988)(allowing discovery of attorney’s photographs that did not reveal mental impressions or opinions), mand. proceeding on other grounds, 798 S.W.2d 550 (Tex. 1990). The new rule eliminates this argument by declaring all such images discoverable, regardless of who took them. The rules recognize, however, that some images taken in anticipation of litigation or for trial might not be of underlying facts, but, rather, of models that represent mental impressions, opinions, and strategies. While prior law protected only photographs that were integral to a consulting expert’s report, the 1999 rules recognize that all participants in the litigation, including counsel and parties, may have photographs that also deserve protection from discovery.

E. Whether Successor Attorneys May Properly Have Access to A Disqualified Attorney’s Work Product

In consolidated mandamus proceedings in In re George, No. 99-0616, 2000 WL 898313 at *1 (Tex. July 6, 2000) (orig. proceeding), the Texas Supreme Court decided, as a matter of first impression, the issue of the scope of a successor attorney’s access to the work product of a disqualified attorney, and gave trial courts guidance for deciding access issues related to successor council’s access to work product so that the purposes underlying disqualification are furthered.

The court ruled on this important issue in two mandamus proceedings. In the first mandamus proceeding, the court disqualified the law firms of McKool Smith and Jordan, and Howard and Pennington (“McKool and Pennington”) based on their prior representations of Relators in a substantially related matter while at a prior firm.
After McKool and Pennington withdrew, the Hartnett law firm appeared as counsel of record. At that time, Relators’ counsel notified Hartnett that they should not receive, review or use any of McKool and Pennington’s work product, and that they should not view any documents not already in the public record. After Relators filed Motions for an Order Prohibiting Turnover of Work Product and Related Material, the trial court permitted the transfer of the McKool and Pennington files, but prohibited the firms from communicating about the case except on issues involving the logistics of transferring the files.

Relators immediately brought a second mandamus action arguing that the transfer of the McKool and Pennington work product to the new counsel had the effect of defeating the prior disqualification order because of the very risk of the disclosure of confidential information. While the lawyers could not communicate with new counsel, the files transferred still contained confidential work product and provided information on which the new counsel could attack Relators.

In analyzing this important issue, the court developed two separate rules to address issues arising from the different types of material in an attorneys’ file - information in the public record and work product.

**Information in Public Record** - When an attorney is disqualified, successor counsel is “presumptively” entitled to obtain the pleadings, discovery, and correspondence in the public record or exchanged by the parties.

**Work Product** - Rejecting several approaches followed in other jurisdictions for handling the transfer of work product, the Texas Supreme Court developed its own standard for determining when disqualified counsel can provide work product to successor counsel. The Court created a rebuttable presumption that the work product in a lawyer’s file contains confidential information. *Id.* at *7. The presumption arises when the former client of the disqualified attorney establishes that the two representations are substantially related. The current client of the disqualified attorney can rebut the presumption by demonstrating that there is not a substantial likelihood that the desired items of work product contain or reflect confidential information. *Id.*

Once the successor counsel moves for access to the work product of the disqualified counsel and the former client moves to restrict access, the trial court should order the disqualified attorneys to produce an inventory of work product containing: (a) each item of work product created; (b) the subject matter of the item; (c) the claims it relates to; and (d) any other factor the court considers relevant. The trial court should also consider the nature of the work product. *Id.* at *8. As an example, depositions or case summaries are less likely to contain confidential information than disqualified attorney notes. The trial court can also order an *in camera* inspection of work product documents.

**F. Waiver**

Unlike the attorney-client privilege, the work product privilege is held by both the client and attorney, and either one may assert it. Waiver by a client of the work product privilege will not deprive the attorney of her own work product privilege, and vice versa. *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994).

**G. Conflicts in Federal and Texas Law**

The San Antonio Court of Appeals was recently faced with a conflict between federal substantive law and Texas procedural law. In *In re Weeks Marine, Inc.*, 31 S.W.3d 389 (Tex. App.- San Antonio 2000, orig. proceeding), the real party in interest (Martinez) alleged permanent injuries in a suit brought under the Jones Act. The Act, which provides a remedy to seaman injured in course of employment due to negligence of employer, is a federal statute but the plaintiff filed the suit in state court. Martinez sought discovery of an investigative report and a surveillance report prepared for Weeks Marine subsequent to Martinez’ engagement of an attorney. Although the reports were clearly prepared in anticipation of litigation thus qualifying as privileged work product under Texas Rule 192.5(a), Martinez argued that federal law governing his action for maintenance and cure imposed a duty on him to supply medical information substantiating his claim and a correlative duty on Weeks Marine to investigate his claim. *Id.* at 390. Martinez further argued that he was entitled to discovery of the reports because Weeks Marine contended he had not cooperated in their efforts to investigate his alleged injury. *Id.* at 391.
Following an in camera inspection, the trial court found the reports were not privileged. In the subsequent mandamus proceeding, the court of appeals held that a trial judge presiding over a maritime case in state court must apply federal substantive law, but that he must apply state procedural law. [citing Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402 (Tex. 1998)]. The court found that while Martinez may have been able to discover the documents in federal court, that he had subjected himself to Rule 192.5 by choosing to sue in state court, and under that rule the documents were privileged. Id. at 391.

III. THE CONSULTING EXPERT PRIVILEGE

A. New Rule

New Rule 192.3 preserves the former consulting expert privilege from old Rule 166(b)(3). Rule 192.3(e) states:

The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.

TEX. R. CIV. P. 192.3(e). The new rule makes no substantive changes in the scope of the privilege. Like “core work product” the privilege is absolute; it is not subject to the “substantial need” exception in Rule 192.5(b)(2). However, because it is found in Rule 192.3, rather than Rule 192.5, it appears not to be subject to the exceptions of Rule 192.5(c).

At least one Texas Court has addressed the applicability of the consulting expert privilege under new Rule 192. The issue arose in In re Doctors Hosp. of Laredo, 2 S.W.3d 504 (Tex. App.--San Antonio 1999, (orig. proceeding) when discovery was sought of a doctor who was originally designated as a testifying witness, but later redesignated as a consulting expert. None of the witnesses or testifying experts had received any of the re-designated doctor’s opinions.

The court held that Rule 197.3(e) prevented discovery of the consulting experts’ opinion as long as the opinions had not been reviewed by a testifying expert. Id. at 505. The testifying expert could be redesignated as long as it was not an effort to suppress evidence or for an improper purpose.

For an interesting take on “uncloaking” consulting expert witnesses in both the federal and state contexts, see Stephen D. Easton, Ammunition for the Shoot-Out with the Hired Gun’s Hired Gun: A Proposal for Full Expert Witness Disclosure, 32 ARIZ. ST. L.J. 465 (Summer 2000).

B. Pre-1999 Cases

The various opinions that have discussed the consulting expert privilege should remain valid after the 1999 rules. The Texas Supreme Court most recently discussed this privilege in General Motors Corp. v. Gayle, 951 S.W.2d 469 (Tex. 1997). There, the Court addressed the issue of whether a party could be compelled, in effect, to permanently designate an expert as “consulting” before the expert had performed testing or analysis for the case. Gayle was a products liability lawsuit based on the alleged defective design of a seatbelt system installed in a General Motors truck. Id. at 471.

General Motors, the defendant, intended to conduct several crash tests involving the seatbelt system. The plaintiffs moved for an order allowing them to attend such tests. Id. at 471-72. The trial court issued an order permitting the plaintiffs to attend the crash tests, but specifically accepted from the order any test conducted by a consulting expert. Id. at 472-73. The order further prohibited General Motors from having consulting experts conduct a test and then using the test at trial, or from running a similar test and using the results at trial. Id.

On mandamus review, the Supreme Court noted that this prohibition effectively forced the defendants to designate in advance which tests would be conducted purely for consulting purposes, and which tests were for evidentiary purposes. Id. at 473.

The Supreme Court vacated the trial court’s order because it created the possibility that General Motors would be unable to use a favorable test at trial because it had previously designated the test as a consulting test. Id. at 474. The Court found that this situation would be “at odds with the rationale of the consulting-expert privilege, which is intended to allow parties to consult privately with
an expert before deciding whether to designate that person as a witness.” *Id.* at 475.

The Court rejected the plaintiffs’ arguments that vacating the trial court’s order would permit General Motors to run tests until it achieved a favorable result, and then to shield the unfavorable test results from the plaintiffs. According to the Court, such a possibility was actually consistent with the purpose of the consulting expert privilege, which was “to allow a party to develop its factual theories fully.” *Id.* The Court also rejected the plaintiffs’ argument that allowing the tests were unfair because the plaintiffs did not have the resources available to conduct their own tests. The Court noted that there was no “'substantial hardship' exception to the consulting expert privilege, because the privilege ‘protects the very core of a party’s thought processes and strategy regarding the litigation.’” *Id.*

The Beaumont Court of Appeals relied on *Gayle in In re 5 Byrd Enters., Inc.*, 980 S.W.2d 542 (Tex. App.--Beaumont 1998, orig. proceeding). In *5 Byrd Enters.*, the attorney of a man accused of sexual assault arranged to have his client take several polygraph examinations. *Id.* at 543. The accuser, who was the defendant and counter-plaintiff in a defamation suit brought by the accused, sought discovery of the results of each of the examinations. The accused refused to produce the results of two of the examinations. Citing *Gayle*, the court upheld the accuser’s refusal to disclose the results of the two examinations. The court found that the examinations had been conducted by consulting experts “whose opinions were not [to] be used at trial nor reviewed by any testifying expert.” *Id.* at 544.

In *Castellanos v. Littlejohn*, 945 S.W.2d 236 (Tex. App.--San Antonio 1997, orig. proceeding), the San Antonio Court of Appeals considered whether a party could “de-designate” a testifying expert and instead name the witness as a consulting expert. In *Castellanos*, the plaintiffs designated a doctor as merely a testifying expert. When the defendants noticed the doctor’s deposition on written questions, the plaintiffs alleged that the doctor’s designation as a testifying expert was a result of a clerical error and sought to re-designate the doctor as merely a consulting expert. *Id.* at 237.

The court limited the question before it to whether a party may de-designate a testifying expert when the original designation was a result of a clerical error. *Id.* at 239. To answer this question, however, the court applied a test devised by the Texas Supreme Court that addressed the intentional de-designation of experts for strategic reasons. That test requires that the de-designation not constitute “an offensive and unacceptable use of discovery mechanisms’ or ‘violate' the clear purpose and policy underlying the rules of discovery.” *Id.* (quoting *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990)). The *Castellanos* court read the Tom L. Scott opinion as permitting de-designation “so long as [the de-designation] is not part of ‘a bargain between adversaries to suppress testimony’ or for some other improper purpose.” *Id.* at 240. Applying this test, the court concluded that because the original designation had been inadvertent, the de-designation was not for an “improper” purpose. *Id.*

The San Antonio Court of Appeals addressed the issue of de-designation in *In re Doctors Hosp. of Laredo*, 2 S.W.3d 504 (Tex. App.--San Antonio 1999, orig. proceeding). The court applied the new discovery rules, and found that the de-designation in that case did not violate the discovery rules.

In *Sosa ex rel. Grant v. Koshy*, 961 S.W.2d 420 (Tex. App.--Houston [1st Dist.] 1997, pet. denied), the First Court of Appeals was called to clarify who may qualify as a consulting expert. In *Sosa*, a case involving a collision between an automobile and a pedestrian, the defendants hired a firm specializing in accident reconstructions to recreate the accident. *Id.* at 430. The owner of the firm testified at trial and the defendants prevailed. *Id.* On appeal, the plaintiff argued that the trial court erred by permitting the expert to testify because the defendants had failed to disclose before trial several “consulting experts.” *Id.* The alleged “consulting experts” were employees of the reconstruction expert, and had helped him by taking measurements and photographs and by making calculations. *Id.*

The court of appeals held that the employees of the reconstruction expert were not consulting experts, and therefore did not have to be designated as such. The defendants had retained and designated the reconstructionist’s firm as a testifying expert. The court, relying on language from old Rule 166b(3)(b), found that neither of the defendants had “informally consulted” with the employees, and had not ‘retained’ or “specially employed” the employees. *Id.* The fact that the
reconstructionist relied on the employees’ work did not make them consulting experts. *Id.*

The fact that many industries are served by a small pool of consulting experts became an issue in *Weatherford International, Inc. v. Baytech*, No. 08-00-00372-CV, 2001 WL 735753 (Tex. App.- El Paso 2001, no pet h.). Following a pipe break in a well, pipe-supplier Weatherford engaged a drilling and completion engineer to assess options and, Weatherford claimed, to assess the validity of any claims from operator Baytech in anticipation of litigation. Baytech had conferred with the same engineer concerning equipment selection prior to drilling the well but had no contract. Prior to litigation, there was considerable collaborative effort between the parties to remedy the break during which the engineer communicated openly with both sides.

After Baytech sued for damages and Weatherford countersued for unsuccessful fishing operation expenses, the engineer signed a confidentiality agreement acknowledging his role as a consulting expert for Weatherford. Baytech, claiming it knew nothing of such an agreement, continued to contact the engineer who continued to communicate with them. Weatherford sought to conceal the engineer’s knowledge as a consulting expert at trial arguing that Baytech should not reap any rewards of improper contact with the engineer. The Court found ample support for the conclusion that the engineer was retained to assess and resolve the incident, that his investigation was not performed primarily in anticipation of litigation, and that he could not be shielded by privilege.

C. **No Substantial Need Test**

A party cannot obtain the opinions, work product, or identity of a true consulting expert (one whose opinions have not been reviewed by a testifying expert) based on the substantial need test. *Gayle*, 951 S.W.3d at 469.

IV. **THE TRADE SECRET PRIVILEGE**

The trade secret privilege is codified in Texas Rule of Evidence 507. Rule 507 states:

A person has a privilege, which may be claimed by the person or the person’s agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Questions likely to arise under this rule are: (1) what is a “trade secret” for purposes of Rule 507; (2) how does a party resisting discovery prove the existence of a trade secret; (3) under what circumstances will a court require disclosure of a trade secret under the exceptions in Rule 507; and (4) what are the resisting party’s options to limit the potentially harmful effect of disclosure of a trade secret? These questions are addressed in turn.

A. **What is a Trade Secret?**

Rule 507 does not define the term “trade secret.” In a recent lawsuit based on misappropriation of trade secrets, however, the Texas Supreme Court defined “trade secret” as “any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know [to] use it.” *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996)(citing Restatement of Torts § 757). *See also Seatrax v. Sonbeck Intern. Inc.*, 200 F.3d 358, 365 (5th Cir. 2000) (Fifth Circuit recognizes this as the trade secret definition under Texas law). No court has specifically addressed whether this common-law definition of trade secret should apply to Rule 507.

However, in a concurring opinion in *Chapa v. Garcia*, 848 S.W.2d 667 (Tex. 1992), Justice Doggett interpreted “trade secret” as used in Rule 507 to be consistent with the Restatement definition. *Id.* at 670 (Doggett, J., concurring) (listing the six factors set out in Restatement of Torts § 757 cmt. b as determinative of the existence of a trade secret); *cf. Upjohn Co. v. Freeman*, 906 S.W.2d 92, 96 (Tex. App.--Dallas 1995, no writ)(applying the Restatement definition of trade secret when interpreting Tex. R. Civ. P. 76a regarding sealing orders). Unless and until the Texas courts specifically address the issue, practitioners should consult misappropriation of trade secrets cases when defining trade secret as used in Rule 507.
1. Customer Lists

Odell Geer Construction Co. sought the discovery of a customer list in litigation against a competitor in the crushed-stone business (Frost) who proved that the list was a trade secret, and the court entered an order prohibiting any party from reviewing the list except the attorneys and experts. _In re Frost_, 998 S.W.2d 938 (Tex. App.--Waco 1999, orig. proceeding). Frost than filed a mandamus proceeding seeking to prevent the production of the list on the basis that it was a trade secret.

The court conditionally granted the mandamus, finding that once a party resisting discovery establishes that the information is a trade secret, the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of the claims. _Id._ at 939. Rule 507 contemplates a higher burden of proof than the mere relevance of the information. Here, Geer did not meet its heightened burden of showing that the list was necessary for a fair adjudication of its claims. It argued that the list was necessary to an issue of “custom and usage” with customers, but no evidence of fair adjudication was presented.

2. Supplier Lists

A supplier’s list of suppliers of hair care products was found to be a trade secret in _John Paul Mitchell Systems v. Randalls Food Market, Inc.,_ 17 S.W.3d 721 (Tex. App.--Austin 2000, n. pet. h.). Appellant Paul Mitchell argued that Jade Drug Company’s supplier list was not a trade secret because Paul Mitchell did not compete in the same market as Jade and that it had no protection for the supplier list. In analyzing whether Jade had provided sufficient evidence that the supplier list was a trade secret, the court applied six factor test recognized by Texas courts and the restatements:

- the extent to which the information is known outside of the business;
- the extent to which it is known by employees and others involved in the business;
- the extent of the measures taken by the person asserting a trade secret to guard the secrecy of the information;
- the value of the information to competitors and the owner of the alleged trade secret;
- the amount of effort and money spent in developing the information; and
- the ease or difficulty with which the information could be properly acquired or duplicated by others.

_Id._ at 738. After reviewing the factors, the court concluded that the supplier list had been properly held to be a privileged trade secret.

The court also rejected arguments that a trade secret is not entitled to protection simply because competitors do not compete in the same market. The court noted that the Texas Supreme Court had already rejected this position because such a position “would render Rule 507 meaningless in non-competitor cases.” _Id._

B. How Does a Party Prove the Existence of a Trade Secret?

A party resisting discovery on the basis of a trade secret must persuade the court that the items requested are indeed trade secrets, without revealing the trade secret itself to the requesting party or the public. _In re Continental Gen. Tire Inc.,_ 979 S.W.2d 609, 612 (Tex. 1998); _John Paul Mitchell Systems, v. Randalls Food Market, Inc.,_ 17 S.W.721, 738-39 (Tex. App.--Austin 2000, n. pet. h.).

The resisting party should therefore first attempt to prove the existence of a trade secret through affidavits or testimony that describe how the information sought is proprietary and sensitive, but not reveal the contents of the information. _See, e.g., Automatic Drilling Machs., Inc. v. Miller, 515 S.W.2d 256, 260 (Tex. 1974)(noting that a trial court could determine trade secret status based on a witness’ “description of the secret processes and devices in terms sufficiently general” to protect the resisting party); Enron Oil & Gas Co. v. Flores, 810 S.W.2d 408, 411-13 (Tex. App.--San Antonio 1991, orig., proceeding)(affirming the trial court’s reliance on expert testimony describing the “sensitive and secret” nature of annual gas reserve reports in general to determine whether_
the reports were trade secrets). The resisting party must at least identify the particular document or material alleged to be a trade secret. See Chapa, 848 S.W.2d at 168; In re Leviton Mfg. Co. Inc., 1 S.W.3d 898, 902 (Tex. App.--Waco 1999 orig. proceeding).

The resisting party’s affidavits or testimony must amount to more than conclusory evidence or assertions that the information or material sought is a trade secret. See Automatic Drilling Machs., 515 S.W.2d at 260; Humphreys v. Caldwell, 881 S.W.2d 940, 946 (Tex. App.--Corpus Christi, 1994, orig. proceeding), approved, 888 S.W.2d 469 (Tex. 1994); see also Chapa, 848 S.W.2d at 671 (Doggett, J., concurring) (noting that a “single secret affidavit” cannot support trade-secret status as a matter of law). If affidavits or testimony are insufficient to determine the privileged nature of the information, the resisting party may also request that the trial court conduct an in camera inspection of the information, possibly aided by an expert. See id.

C. Under What Circumstances Will a Court Compel Disclosure of a Trade Secret?

As noted by Justice Doggett in Chapa v. Garcia, 848 S.W.2d at 670-71 (Doggett, J., concurring) Rule 507’s privilege is a “qualified privilege.” Rather than provide absolute protection of a trade secret, Rule 507 forbids disclosure of a trade secret only “if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” Tex. R. Evid. 507.

Recently, in In re Continental Gen. Tire, 979 S.W.2d 609 (Tex. 1998), the Texas Supreme Court clarified the circumstances under which trade secrets must be disclosed in litigation. The Continental Gen. Tire case involved a products liability suit against the manufacturer (Continental Gen. Tire) of an allegedly defective tire. During discovery, the plaintiffs requested Continental Gen. Tire’s formula for its “skim stock” rubber compound. Continental Gen. Tire used the compound to help bond the inner and outer belts of its tires. Id. at 610. Continental Gen. Tire objected to the plaintiffs’ request on the grounds that the formula was a trade secret. In the ensuing litigation, the parties agreed that the skim stock compound was a trade secret. At issue was whether disclosure of the formula would work an “injustice” sufficient to protect Continental Gen. Tire under Rule 507.

The Texas Supreme Court first noted that Rule 507 seeks to accommodate two competing interests: (1) the importance of trade secrets as valuable property interests that are worthy of protection; and (2) the fair adjudication of individual lawsuits. Id. at 612. The first interest is furthered by the existence of the privilege itself. The second interest is incorporated into the “injustice” exception in Rule 507. Thus the court imposed a burden-shifting scheme to incorporate both interests:

First, the party resisting discovery must establish that the information is a trade secret. The burden then shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claims. If the requesting party meets this burden, the trial court should ordinarily compel disclosure of the information, subject to an appropriate protective order.

Id. at 613.

To determine whether disclosure of a trade secret is necessary for a “fair adjudication of claims,” the Court invoked a balancing test: “[T]he trial court must weigh the degree of the requesting party’s need for the information with the potential harm of disclosure to the resisting party.” Id.

A party does not establish the requisite degree of “need” simply by demonstrating that the information is relevant to its case. See Id. at 613 (“[B]ecause relevance is the standard for discovery in general, . . . this approach likewise would render Rule 507 meaningless.”). Instead, the Court looked to the plaintiffs’ proffered reasons for obtaining the formula. The plaintiffs maintained that the compound used in the tire at issue did not contain the “right ingredients”, and that compound used in the tire at issue improperly contained sulfur. Id. The Court rejected these reasons primarily because the plaintiffs failed to support them with expert testimony or other evidence. Specifically, the plaintiffs’ expert failed to show that he needed the compound formula to determine whether the compound contained the proper ingredients; the plaintiffs had no other compound for purposes of comparison; and the plaintiffs presented no evidence to support their theory that the compound may have improperly contained sulfur. See Id.

With respect to the other side of the balance—the potential harm of disclosure -- a major factor to be
considered is how effective a protective order is likely to be in securing the particular trade secret. See *id.* at 614 (rejecting the argument that a protective order can never adequately protect against disclosure of a trade secret; instead, the “potential inadequacies” of a given protective order should be accounted for when the court conducts its balancing test); see also *Jampole v. Touchy*, 673 S.W.2d 569, 574-75 (Tex. 1984) (refusing to apply the privilege because a protective order could adequately safeguard against leaking of the trade secret to the party’s business competitors).

After *Continental Gen. Tire*, practitioners seeking to compel disclosure of a trade secret should present well-supported reasons for needing the trade secret to prove their case. These reasons should focus on the likely actual impact of the secret on the party’s case, rather than the centrality of the secret to the party’s trial strategy. Parties seeking to avoid disclosure should attempt to specifically point out, with supporting evidence if possible, how and why a protective order is unlikely to be effective, given the facts of the particular case. See *Continental Gen. Tire*, 979 S.W.2d at 614 (noting that a trial court should be more willing to affirm nondisclosure when presented with “specific, fact-based grounds for believing that trade secrets may be disclosed in violation of its protective order”). Parties may also support their arguments with analysis from federal cases interpreting Fed. R. Civ. P. 26(a)(7), which protects trade secrets in federal cases. See *Continental Gen. Tire*, 979 S.W.2d at 612 (citing federal cases interpreting Rule 26(c)(7) as support for the Court’s adoption of a balancing test for Rule 507).

The Court in *In re Leviton Mfg. Co., Inc.*, 1 S.W.3d 898 (Tex. App.--Waco 1999, orig. proceeding), provided an excellent real world analysis of the shifting-burden concept in proving a trade secret:

The concept of “shifting burdens” and the way in which cases discuss it is often misleading. The cases discuss that where a party establishes a given set of facts the “burden shifts” for the other party to prove some other fact. There is no discrete point at which the judge turns to the parties and says - “O.K. the trade secret privilege has been established, the burden has shifted, now you must establish that the information is necessary for a fair adjudication of your claims or defenses. There is only the one hearing when the evidence is submitted. Only after the trial court has ruled can the niceties of a “shifting burden” be discussed and reviewed. It is incumbent upon the parties to anticipate what the evidence may establish and make the objections and submit the evidence necessary to establish each fact necessary to support the requested relief.

*Id.* at 902, n. 2.

D. Waiver of Trade Secrets

The court in *In re Leviton Mfg. Co.*, 1 S.W.3d 898 (Tex. App.--Waco 1999, orig. proceeding) addressed the issue of whether the trade secret privilege had been established so that the production of trade secrets was precluded. Relators asserted a trade secret privilege in response to a discovery request seeking the production of prototypes of certain designs and related information and documents.

At a motion to compel hearing, relators presented evidence of the privilege through affidavits and portions of expert testimony. The court found that the parties had proven the trade secret but ordered the production of the privileged items under a protective order.

The court first dealt with the issue of waiver. In response to an initial motion to compel seeking the production of prototypes, the relators responded that the prototypes did not exist or to the extent they did exist, they had previously been produced. In response to a second motion to compel, the relators realized that the scope of the discovery request had been broadened to include items protected from discovery by the trade secret privilege and asserted a timely written objection in response to the request. Under these facts the court found that the privilege had not been waived.

The court then discussed the trade secret privilege of Rule 507 that protects two accommodating interests - that trade secrets are important and worthy of protection and that there is an importance to the fair adjudication of lawsuits. Once a trade secret is established, the discovering party has the burden of establishing that the trade secret is necessary for a fair adjudication of its claims and defenses. This is the “shifting burdens” of trade secret litigation.
In determining that the discovering party had not met its burden of showing that the information was necessary for the fair adjudication of the claim, the court relied on the testimony of an expert that established that the designs in which a trade secret was claimed was not at issue in the litigation. In this instance, the trial court improperly ordered the production of trade secrets subject to a protective order.

V. HUSBAND-WIFE COMMUNICATION PRIVILEGE - RULE 504

Rule 504 provides that a person has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person’s spouse while they are married. Sterling v. State, 814 S.W.2d 261 (Tex. App.--Austin 1991, writ ref’d). The privilege only protects confidential communications, not observed acts. Emery v. Johnson, 139 F.3d 191 (5th Cir. 1997), cert denied 525 U.S. 969 (1998).

In Mercado v. State, No. 14-97-00466-CR, 1999 WL 212995 (Tex. App.--Houston [14th Dist.], Apr. 8, 1999, no pet.)(unpublished), a defendant sought to overturn a conviction on the basis that the trial court erroneously admitted the testimony of his wife against him in violation of Rule 504 of the former Texas Rules of Criminal Evidence, which is now Rule 504 of the Texas Rules of Evidence. Here, the rule was not implicated because there was no objection to the testimony at trial. Further, there is no privilege under the rule if the communication is made to enable or aid anyone to plan to commit a crime or fraud. Tex. R. Evid. 504(a)(2).

For a review of the history and purpose of the marriage privilege and an interesting argument for extending the privilege to same-sex couples, see Jennifer R. Brannen, Note, Unmarried with Privileges? Extending the Evidentiary Privilege to Same-Sex Couples, 17 Rev. Litig. 311 (1998)

VI. CLERGY COMMUNICANT PRIVILEGE - RULE 505

The clergy-communicant privilege under TEX. R. EVID. 505 protects as privileged confidential communications between a person and a clergyman, and those communications to a hospital chaplain protected under clergy claimant privilege; Simpson v. Tennant, 871 S.W.2d 301, 306-07 (Tex. App.--Houston [14th Dist.] 1994, no writ) (privilege protected communications made while seeking spiritual advice and guidance from a reverend). Rule 505 defines “clergyman,” “confidentiality,” and permits the privilege to be claimed by the person, his guardian or conservator, or by the person’s representative if the person is deceased.

VII. PHYSICIAN-PATIENT PRIVILEGE - RULE 509

TEX. R. EVID. 509 protects as privileged confidential communications between a physician and patient relative to or in connection with professional services. The physical patient privilege (Rule 509) and the mental health privilege (Rule 510) did not exist at common law, and are based only on statutory law. R. K. v. Ramirez, 887 S.W.2d 836, 839 (Tex. 1994). The Texas Supreme Court has stated that the purpose of the privilege is to (a) encourage full communication between a physician and patient necessary for effective treatment; and (b) to prevent the unnecessary disclosure of highly personal information. Id. at 839. Like the mental health privilege, the physician patient privilege can be waived. Id.

Recent cases in Texas discuss the application of the privilege. In In re Xeller, 6 S.W.3d 618 (Tex. App.--Houston [14th] 1999, no pet.), the court addressed the scope of the physician-patient privilege. At issue was a request for medical reports (known as TWCC-69 forms) prepared by the physician relator and other physicians at relator Medical Evaluation Specialists in connection with required medical examinations or designated doctor examinations of Brown & Root employees. The trial court ordered discovery and the relators sought mandamus on the basis the reports were covered by the physician - patient privilege.

The court held that the records were protected from discovery by the privilege that protects “the records of the identity, diagnosis, evaluation or treatment of a patient by a physician that are created or maintained by a physician.”
There was no question that the records were privileged and that the underlying patients had not consented to the discovery of their medical records. Further, the mere filing of a claim with an insurance company does not necessarily mean that a patient has waived his or her privacy.

In *In re Irvin*, No. 05-98-01771-CV, 1998 WL 908955 (Tex. App.--Dallas, Dec. 31, 1998, no pet.), a discovering party attempted to obtain mental health records to confirm that the relator was seeing a mental health professional. He argued that the mental health records were relevant to Irvin’s state of mind on the assault and battery claim because Irvin had pleaded guilty to a narcotics charge some seven to nine months before the altercation at issue. The court rejected this argument, finding that the records were not relevant.

Federal cases have applied the physician patient privilege as it exists under Texas law, (only in cases where state law applies), but there is no physician patient privilege under federal statutes, rules or common law. *Gilbreath v. Guadalupe Hosp. Foundation, Inc.*, 5 F.3d 785, 791 (5th Cir. 1993).

Beyond the physician-patient privilege of Rule 509, there are numerous other statutory privileges that arise in the context of medicine, touching on such timely matters as identity of blood donors, confidentiality of AIDS testing, and peer/committee physician review. For an excellent review of these variations beyond the scope of this paper, see Thomas C. Riney & Christopher D. Wolek, *Hippocrates Enters the New Millenium: Texas Medical Privileges in the Year 2000*, 41 S. Tex. L. Rev. 315 (Spring 2000).

1. The Physician/Patient Privilege Protects Identities from Discovery

In *In re Anderson*, 973 S.W.2d 410 (Tex. App.--Eastland 1998, no pet. h.), the court addressed the issue of the scope of the physician-patient privilege. In a sexual assault case against a physician and his clinic, a party sought to discover the identity of persons with knowledge of relevant facts, including persons who had made a complaint against the doctor or the clinic. The trial ordered the identity (name, address and telephone number) of persons with knowledge of relevant facts, including those persons who had made a claim against the defendants.

On mandamus, the appellate court determined whether the disclosure was proper. Looking to the language of FED. R. CIV. EVID. 509(b)(2) the court recognized that the rule provided that records of the "identity" of patients are confidential and privileged and may not be disclosed.

The opposing counsel argued that Rule 509 was an evidentiary rule. While the information might not be admissible, it did not prevent the discovery of information reasonably calculated to lead to the discovery of admissible evidence.

The court, however, distinguished the typical evidentiary rule from Rule 509 which specifically covers the physician-patient privilege. In the words of the court:

Unlike other privileges which protect only communications or reports, the physician privilege by its express terms goes beyond that and also protects identities . . . . Here, the plain terms of the privilege do prohibit disclosure of identity. If disclosure were required, the privilege would be meaningless to the patient who holds a legitimate interest in it.

Although a waiver issue was raised, the court held that the privilege belonged to the patient and only the patient could waive.

In *In re Dolezal*, 970 S.W.2d 650 (Tex. App.--Corpus Christi 1998, no pet. h.), a party issued a notice of deposition for a chiropractic doctor and subpoenaed certain documents which included the following:

1. the names of all patients seen by the doctor at the request of the lawyer “at any time and for any reason” within the last three years; and

2. a list of all patients the doctor had treated, reviewed, diagnosed or provided care in any form represented by the lawyers in the last three years.

The request sought information on all patients represented by the attorneys regardless of whether a lawsuit had been filed.
The court began its analysis by noting that medical records are within a zone of privacy protected by the United States Constitution. Under the physician/patient privilege under Texas law, a communication between the patient and his physician is confidential if it is not intended to be disclosed other than to those present to further the interest of the patient in the consultation, examination or interview of the patient.

Further, TEX. R. CIV. EVID. 509(a)(3) states that records of the “identity, diagnosis, evaluation or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.” Based on this law in Texas, the court found that the physician, as the treating physician, could claim the privilege on behalf of his clients.

2. The Physician/Patient Privilege Belongs to the Patient - Not The Physician

In In re Anderson, 973 S.W.2d 410, 411 (Tex. App.--Eastland 1998, no pet h.), the court rejected the argument that the physician had failed to properly object to discovery requests and had waived the physician/patient privilege. The privilege belongs to the patient not to the doctor. Thus, there was no waiver.

3. Privilege survives death of patient

The legal representative of a deceased nursing home resident was found to have the right to protect the confidentiality of the deceased resident’s personal and clinical records, where the records were sought by a former nursing home resident in a health care liability action against the home in which the former resident alleged she was sexually assaulted by the deceased resident prior to his death. In re Diversicare General Partner, Inc., 41 S.W.3d 788 (Tex. App.- Corpus Christi 2001, orig. proceeding).

4. Exceptions

The mental health (Rule 510) and physician patient (Rule 509) privileges do not apply if the party relies upon the mental, physical or emotional condition as a part of their claim or defense. TEX. R. EVID. 509(d)(5); Ramirez, 887 S.W.2d at 840-41.

VIII. THE MENTAL HEALTH PRIVILEGE - RULE 510

TEX. R. EVID. 510 affords protection in civil cases to mental health records that might reveal the identity, diagnosis, evaluation or treatment of a patient that are created or maintained by a physician or professional.

The court protected mental health records in In re Doe, No. 03-00-00231-CV, 2000 WL 719542 at *1 (Tex. App.--Austin May 25, 2000, orig. proceeding) (no publication), a personal injury case in which the trial court had ordered the mental health records of an inmate when she alleged mental anguish in connection with her alleged rape by a prison guard. The Court addressed the litigation exception to the mental health privilege in which confidential mental health records can become discoverable in civil litigation if the mental condition of the plaintiff is a part of a claim or defense. In other words, the mental health of a plaintiff must be “of legal consequence to a claim or defense.” Id. at *7. Because the plaintiff had only alleged mental anguish, and had not placed her mental condition in issue, the court held that the trial court abused its discretion by ordering the production of the mental health records.

IX. SELF-EVALUATION OR SELF-CRITICAL ANALYSIS PRIVILEGE

Litigants frequently assert self-evaluation or self-critical analysis privileges in which they try to prevent the discovery of internal investigations. Neither the state nor federal courts in Texas have recognized such a privilege, but litigants keep trying.

This privilege was first articulated in Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970); aff'd, 479 F.2d 920 (D.C. Cir. 1973), to protect internal evaluations and investigations from discovery. Bredice provides a qualified privilege for such materials that can be overcome if the discovering party can cite extraordinary circumstances that give rise to good cause for the production of the information.

Where courts have recognized the self-critical privilege, the privilege attaches only where the party
asserting the privilege shows: (a) the information sought resulted from a critical self-analysis undertaken by the party seeking protection; (b) the public has a strong interest in preserving the free flow of the type of information sought; (c) the information is of the type whose flow would be curtailed if discovery were allowed; and (d) the document was prepared with the expectation it would be kept confidential, and has in fact been kept confidential. *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) See also Note, *The Privilege of Self-Critical Analysis*, 97 Harv. L. Rev. 1083, 1086 (1983).

The self-evaluation privilege never applies to a discovery request from an agency of the United States pursuant to a valid subpoena or request for production of documents. See generally *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586 (5th Cir. 2000). Id.

**X. INVOKING AND PROVING A PRIVILEGE**

**A. Asserting A Privilege Under Texas Law**

The new rules seek to eliminate prophylactic objections by eliminating the need to raise an objection based on privilege to discovery requests. See Rule 193.2(f) ("A party should not object . . . on the grounds that . . . information . . . is privileged but should instead comply with Rule 193.3"). The "privilege statement" under Rule 193.3(a) now takes the place of a privilege objection. *In re Monsanto*, 998 S.W.2d 917, 924 (Tex. App.--Waco 1999, orig. proceeding).

Under this procedure, a party may withhold privileged information from the discovery response, but must notify the other side he is doing so. This notification may be in the discovery response document itself or in a separate document, and must contain the following information:

1. the statement that information or material responsive to the request has been withheld;
2. the request to which the withheld information relates;
3. the privilege(s) asserted.

*In re Monsanto*, 998 S.W.2d at 925; see also *In re Williams*, No. 07-00-0136-CV, 2000 WL 369687 (Tex. App.--Amarillo, April 11, 2000, orig. proceeding).

Simply put, a party asserting a privilege may note that it is withholding privileged material and, if requested, prepare a privileged log. *In re Lavernia Nursing Facility, Inc.*, 12 S.W.3d 566, 571 N.2 (Tex. App.--San Antonio 1999, orig. proceeding).

**B. Waiver**

The courts are now beginning to strictly enforce the privilege assertion procedures under Rule 193.3(a) -- making an objection to privileged information or materials may not preserve the privilege. As an example, in *In re Williams*, No. 07-00-0136-CV, 2000 WL 369687 (Tex. App.--Amarillo, April 11, 2000, orig. proceeding), the trial court required the production of an attorney’s medical research file even though the file had not been reviewed or relied upon by a testifying expert. Respondent had propounded an interrogatory requesting that the relator "identify any written authorities or other medical literature supporting any of your contentions or claims in this lawsuit." *Id* at *5. Relator objected on the basis of the work product privilege.

The Amarillo Court of Appeals upheld the trial court’s order requiring the production of the medical research complied by the lawyer. By merely asserting an objection, the lawyer had failed to follow the procedures of Rule 193.3 under which the lawyer simply needed to withhold the privileged information and identify the specific request. If the documents were the documents of a lawyer, they could have been withheld without any further comment. Given that the lawyer failed to follow either path, the trial court had a sufficient basis for overruling the objections. *Id* at *6.

Similarly, in *In re Lavernia Nursing Facility, Inc.*, 12 S.W.2d 566, the Court held that a nursing home was required to produce disciplinary reports and counseling records because it failed to follow the procedures of Rule 193.3 in protecting the records through affidavits or otherwise.
Plaintiffs waived any applicable attorney client or work product privileges by failing to comply with the requirements of TEX. R. CIV. P. 193.3(a) for withholding allegedly privileged documents. In re Hardisty, No. 05-00-01080-CV, 2000 Tex. App. LEXIS 5501 (Tex. App.– Dallas, Aug. 17, 2000)(no publication).


C. Request for a Log

After receiving a discovery response in which a privilege is asserted, the party seeking the discovery must serve a written request upon the withholding party requesting the identity of the information and material withheld. TEX. R. CIV. P. 193.3; In re Monsanto, 998 S.W.2d at 926.

D. The Privilege Log

1. The Procedure

Upon receipt of that request, the withholding party must serve a response within 15 days that:

a. 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

b. Asserts a specific privilege for each item or group of items withheld.

TEX. R. CIV. P. 193.3; In re Monsanto, 998 S.W.2d at 926.

2. Preparing the Log

While parties must now prepare privilege logs to give notice of the documents in which privileges are asserted, the mere listing of a specific privilege in a response of a privilege logs does not prove a particular privilege. In re Monsanto, 998 S.W.2d at 926. Courts have the power to review a privilege log in great detail to ensure that the log matches and fairly describes the documents for which a privilege is asserted. Id. at 929.

The privilege log must describe the withheld information with enough specificity to allow the requesting party to evaluate the applicability of the privilege, and must assert a specific privilege for each item or group of items withheld. In re Monsanto, supra, 998 S.W.2d at 925.

The mere listing of a privilege in a privilege log does not establish the validity of a privilege. In re Monsanto, 998 S.W.2d at 930. The party asserting the privilege must still provide evidence proving the privilege. If the objecting fails to prove the privilege, then the trial court may properly order production of the documents. In re Leviton Mfg. Co., 1 S.W.3d 898 (Tex. App.–Waco 1999, no pet.) (trade secrets).

3. Exemptions from Current Litigation

The revised Texas Rules specifically exempt from the privilege log requirements any privileged communication 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 in the prosecution or defense of 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. TEX. R. CIV. P. 193.3(c); Official Comment 3 to Rule 193.

E. Getting Behind a Privilege Assertion

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

F. Proof and Burdens

Once the privilege is challenged, the party asserting the privilege bears the burden of demonstrating
that the privilege applies and generally must take several steps in order to do so.

Generally, proving the privilege requires a privilege log, affidavits (regarding representations on the privilege log as to the identity and position of the people listed as authors and recipients), and often the privileged documents themselves. See In re Monsanto, 998 S.W.2d at 925-26, in which the court provides guidance on how to review claims or privilege using a privilege log, affidavits and in camera review. The Waco court reviewed the claims of privilege as follows:

- The court reviewed documents in camera and used the privilege logs to determine whether documents matched the descriptions contained in the privilege logs.

- The court reviewed documents in camera to determine whether there was a prima facie showing of a privilege.

- In determining whether the attorney-client privilege applied to various documents, including e-mails, the court looked for the use of language like “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 at 926-31.

A party must properly assert the privilege and follow these procedures to prevent the discoverability of privileged information. As demonstrated in In re Ampace Freightlines, Inc., No. 05-00-00371-CV, 2000 WL 354775, (Tex. App.--Dallas April 7, 2000, pet. denied), courts have no basis for protecting privileged documents in the absence of a proper assertion of privilege.

In Ampace, a party sought the discovery of an investigation file of an accident in a notice of deposition ducès tecum. The deposition took place and no objection or assertion of privilege was made when questions concerning privileged areas were asked. Later, the party requested the investigation file in a request for production of documents, and a claim of work product was made for the first time. The court held that the privilege was waived because the party failed to assert the privilege in response to the notice of deposition ducès tecum.

1. Requesting a Hearing

Any party may request a hearing on a claim of privilege asserted under Rule 193, and meet its burden of proving the privilege by presenting live testimony or affidavits served at least seven days before the hearing. In re Monsanto, 998 S.W.2d at 925.

2. Proof - Affidavits

Once the party asserting a privilege had made a prima facie case of privilege on the materials it seeks to protect from discovery, the discovering party must point out to the court the specific documents that it believes require inspection. In re Monsanto, 998 S.W.2d at 925-26.

When appropriate, affidavits may be used to prove up a claim of privilege. Affidavits must be based on the personal knowledge of the affiant. Id. at 926. It is critical that the affidavits reference the privilege log and documents in the log if it is being used to prove a privilege. Further, affidavits must contain factual allegations that will support a privilege. As an example, in In re Nationsbank, No. 01-99-00278-CV, 2000 WL 960274 (Tex. App.--Houston [1st Dist.], June 19, 2000, original proceeding), the appellate court held that the trial court properly ordered the production of alleged work product when the affidavit presented in support of the privilege failed to state that the documents at issue were prepared in anticipation of litigation and were work product documents.

The importance of providing testimony or an affidavit in support of a claim of privilege is also demonstrated in the recent case of In re Rogers, No. 07-99-0486-CV, 2000 WL 329568 at *1 (Tex. App.--Amarillo, March 28, 2000, orig. proceeding.) An interrogatory sought information regarding the discipline of the physician involved. An objection was made to the interrogatory on the basis of the peer review and medical review committee privileges. The court required the production of the information, however, because the doctor failed to properly prove the privilege.
The court recognized that a party must not only assert a privilege, but must prove it through live testimony or an affidavit filed “at least seven days before the hearing or at such other reasonable time as the court permits.” *Id.* at *2. In this case, the testimony was offered in the form of an affidavit that was held to be defective because it failed to show that it was served on the opposing party. Further, there was no evidence that the affidavit was tendered at the hearing to establish the claim of peer review of medical review committee privileges. See also *In re WHMC*, 996 S.W.2d 409, ___ (Tex. App.--Houston [14th Dist.] 1999, n. pet. h.) (detailed affidavit description to meet burden of showing that medical records were privileged).

3. **Proof - In Camera Review**

In some instances, an *in camera* review of documents may still be the best way to substantiate a claim of privilege. *In re Monsanto*, supra, 998 S.W.2d at 929. Here, the appellate court conducted an independent review of the documents at issue to determine the applicability of the privilege. If documents are provided *in camera*, the discovering party should point out to the court the specific documents that it believes require inspection. *Id.* at 928.

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 (Tex. App.--Dallas 1994, no writ).

4. **Burden Shift**

Once a party provides a *prima facie* showing (through affidavits, privilege logs and tendering of the documents), the burden shifts to the plaintiffs to refute the privilege. *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.--Houston [14th Dist.] 1998, no pet.).

5. **Reviewing An Order Requiring The Production of Privileged Documents**

Texas courts have generally held that mandamus is available when a trial court orders the production of alleged privileged documents because there is no adequate remedy at law. See *Walker v. Parker*, 827 S.W. 2d 833, 843 (Tex. 1992).

G. **Federal Case-By-Case Approach to Asserting Privilege**

1. **Asserting the Privilege**

FED. R. CIV. P. 26(c)(5) gives courts wide flexibility in assessing privilege claims.

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).

The Advisory Committee notes to this provision of the rule reveal that determinations concerning exactly what type of 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 litigation.

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 (emphasis added).

Frequently, a court will put into place an order identifying what it will require procedurally to invoke a claim of privilege. Often this will entail a privilege log
listing each item withheld on the basis of privilege individually, indicating the date, a general description of the item, the author’s name, the recipient’s name, the subject matter of the item, and the privilege being claimed. FED. R. CIV. P. 23(b)(5) provides procedures for reviewing claims of privilege without requiring \textit{in camera} review of documents. \textit{See} 146 F.R.D. at 639.

2. \textbf{Proving the Federal Privilege}

\textbf{(a) Blanket Privilege Assertions Insufficient}


\textbf{(b) In Camera Review}

In appropriate instances, federal courts will review claims of privilege \textit{in camera} on a document-by-document basis. \textit{Williams}, 178 F.R.D. at 116; \textit{see also Varo}, 129 F.R.D. at 142, n. 4 (recognizes that court can review documents \textit{in camera}, but refused to conduct the review because the party failed to present the privileged documents to the magistrate who initially handled the privilege claim).

\textbf{(c) Affidavits}

Federal courts will review privilege claims using an affidavit which sets forth the specific facts that establish the existence of a privilege. \textit{Varo}, 129 F.R.D. at 142.

\textbf{(d) Privilege Logs}

Privilege logs may be used to prove up privilege claims in federal courts, but they must be supported by independent evidence showing the privilege. \textit{Varo}, 129 F.R.D. at 142.

3. \textbf{Waiver}

A party waives the attorney client privilege under federal law if it fails to assert the privilege when confidential information is sought in any legal proceeding. \textit{Smith}, 186 F.R.D. at 356. While an inquiry into the general nature of the legal services a lawyer provides does not waive the privilege, any inquiry into the substance of discussions between a lawyer and a client for the purpose of rendering legal advice does implicate the privilege, and the client must assert the privilege to preserve it. \textit{Nguyen}, 197 F.3d at 206. Information regarding the specific request for advice a client makes of a lawyer, pertinent information related to the request for advice and any research undertaken by the client fails into the reaches of the attorney client privilege. \textit{Id.; see also Upjohn Co. v. United States}, 449 U.S. 383 (1981); \textit{Swidler & Berlin v. United States}, 524 U.S. 399 (1998).

Revealing limited portions of confidential attorney-client advice, without objection, waived the attorney client privilege in \textit{Nguyen v. Excel Corp.}, 197 F.3d 200 (5th Cir. 1999). In \textit{Nguyen}, Excel executives relied on the advice of counsel in attempting to establish a good faith defense to an action brought by Excel employees under the Fair Labor Standards Act. The executives had testified about the directions provided by their attorneys and about the legal research undertaken by the attorneys. Excel’s counsel objected only after the employees sought to elicit the conclusions of the attorneys regarding the research undertaken.

The district court ordered the depositions of Excel attorneys who had provided legal advice, finding that Excel had placed the advice of its counsel at issue by relying on the good faith defense. Further, Excel had waived its right to assert the privilege in the advice the lawyers had rendered. \textit{Id.} at 208.

On appeal, the Fifth Circuit addressed the sole issue of whether Excel had waived the attorney client privilege when it failed to object to questions in the depositions of its executives in which confidential attorney client information was sought.

The court held that the privilege was waived when information was relayed to a third party who was not rendering legal services to the client. An alternative basis for finding that Excel had waived the privilege was based
on the fact that Excel had selectively disclosed portions of privileged information. Excel implicitly waived the attorney client privilege by testifying about portions of the attorney client communication. Disclosure of any significant portion of the confidential communication waived the privilege as a whole. Id. Thus, Excel could not limit the testimony of the attorneys who gave legal advice, and they could be compelled to testify regarding all aspects of the confidential attorney client relationship.

XI. PROTECTING PRIVILEGED DOCUMENTS INADVERTENTLY PRODUCED

A. Inadvertent Production

Prior to the 1999 changes to the Texas Rules, production of documents containing attorney-client communications through “inadvertence” could result in waiver of the privilege. As an example, in a Granada Corp. v. First Court of Appeals, 844 S.W.2d 223 (Tex. 1992) (orig. proceeding), the Court held that inadvertent production waived the privilege unless the party proved that the inadvertent production was “involuntary” under the meaning of Rule 511 of the Texas Rules of Evidence, which required the producing party to show that “efforts reasonably calculated to prevent the disclosure were unavailing.”

The Granada court concluded that where the documents were not segregated during the producing party’s multiple opportunities to review the production, the inadvertent production was not “involuntary” and, therefore, the privilege was waived. See also Gulf Oil Corp. v. Fuller, 695 S.W.2d 769 (Tex. App.--El Paso 1985, no writ).

Under TEX. R. CIV. P. 193.3(a), often called the "snap-back" pronoun, a party who inadvertently produces privileged documents may now obtain the return of the privileged documents and continue to assert the privilege until a court rules that the documents are not privileged. 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. The amended response must identify the privileged material inadvertently produced and must state the privilege asserted. Upon receipt of such amended response, the party who received the inadvertently produced materials must return the specified material and any copies. TEX. R. CIV. P. 193.3(d).

B. Offensive Use (Sword-Shield)

1. Texas Law

Under Texas law a party offensively asserts a privilege when (1) the party seeks affirmative relief; (2) the privileged information, if believed by the fact finder, in all probability would be outcome determinative of the cause of action asserted; and (3) the evidence is otherwise not available to the opposing party. Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 (Tex. 1993).

A client cannot claim a privilege to preclude discovery while simultaneously seeking affirmative relief on the basis of the information sought to be withheld from discovery. Marathon Oil Co. v. Moye, 893 S.W.2d 585 (Tex. App.--Dallas 1994, no writ).

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. TEX. R. CIV. P. 193.4(c).

A party who uses the discovery privilege offensively (as a sword) rather than as a shield, waives a privilege. Marathon Oil Co. v. Moye, 893 S.W.2d 585 (Tex. App.--Dallas 1994, no writ). As noted by the Texas Supreme Court in discussing the offensive use doctrine:

A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action. National Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458, 461 (Tex. 1993).
In *Marathon Oil Co. v. Moye*, 893 S.W.2d 585 (Tex. App.-Dallas 1994, no writ), the court held that to find a waiver of the privilege through offensive use, the trial court must find three factors: First, the party asserting the privilege must seek affirmative relief; second, the privileged information, if believed by the fact finder, would probably be outcome determinative; third, disclosure of the privileged communication is the aggrieved party’s only means of access to the evidence. In Marathon, the appellate court held that, since Marathon did not seek “affirmative relief” by raising its affirmative defenses, waiver of privilege based on offensive use did not apply.

*Krug v. Caltex Petroleum Corp.*, 1999 WL 652495 (Tex. App.--Dallas, Aug. 27, 1999, no pet.) (unpublished), also addressed the issue of offensive use waiver. The attorney-client privilege may be waived by offensive use. The rationale behind the waiver is that:

a plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain an action. An offensive use waiver of a privilege should not be lightly found.

In this case, the appellant argued that Caltex’s actions constituted an offensive use in three ways. First, it argued that Caltex had asserted an affirmative defense that its actions in settling were privileged pursuant to public policy that encouraged the settlement of lawsuits. The court rejected this argument finding that Caltex’s position related to the settlement was merely a defensive posture and not an affirmative defense under *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 592 (Tex. App.--Dallas 1994, orig. proceeding).

Second, Caltex allegedly sought affirmative relief by injecting into the case their understanding of the law as a basis for the reasonableness of their actions. The court rejected this argument because appellants cited only inapposite federal authority and the testimony at issue could not be construed as a legal interpretation.

Finally, the court held that a request for attorneys’ fees for defending against a claim is not a request for affirmative relief. Because the first element of seeking affirmative relief was not met, the court found that the offensive waiver doctrine did not apply.

2. **Federal Law**

Federal interpretation of the offensive use exception to the attorney-client privilege is similar to Texas law. *Apex Mun. Fund v. N-Group, Sec.*, 841 F. Supp. 1423 (S.D. Tex. 1992) (offensive use of privileged information results in waiver when the party asserting the privilege sought affirmative relief). As an example, in *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir. 1999), the Court held that the privilege had been waived when the corporate client selectively disclosed confidential attorney client communications and the subjects of research. Disclosure was enough to implicate the offensive use doctrine, with the court finding that the client could not use the privilege as both a sword and shield. By relying on the attorney’s advice as a defense, the client could not preclude additional testimony related to the advice or limit the scope of the testimony.
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