PRIVILEGES: HOW TO GET INFORMATION; HOW TO PROTECT IT

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SCOPE OF ARTICLE

- How to successfully identify and assert an evidentiary privilege
- How to overcome a privilege objection

This paper will help you identify the common privileges that exist in Texas. It will outline methods you can take to protect those privileges and offer strategies for challenging the other side when they assert a privilege. The paper also contains an overview of some of the case law and statutes that provide the basis for privileges.

WHAT IS A PRIVILEGE?

- Privileges generally protect communications between individuals in special relationships of trust or information that is proprietary or constitutionally protected.

Under Texas law evidence is generally presumed discoverable.[1][1] But exceptions arise when the evidence sought invades a special relationship or seeks proprietary or constitutionally protected information. Generally, privileges against discovery are recognized to protect relationships based on trust and to encourage the free flow of information between the members involved in those relationships. Care must be maintained in preserving the confidential nature of the relationship or the privilege will be extinguished.

RECOGNIZED PRIVILEGES

- Attorney-Client, Tex. R. Evid. 503
- Work Product, Tex. R. Civ. Pro. 192.5
- Husband-Wife Communications, Tex. R. Evid. 504
- Clergy Communications Tex. R. Evid. 505(b)
- Trade Secrets, Tex. R. Evid. 507
- Physician-Patient Communications, Tex. R. Evid. 509(c)
- Peer Review, Tex. Health & Safety Code Section 161.031-33, Tex. Occ. Code Section 160.007
- Mental Health Information, Tex. R. Evid 510(b)(1-2)
- Journalist Privileges

[1] *See*, Tex.R. Civ. P. 166b(2)(a); *Loftin v. Martin,* 776 S.W.2d 145, 146 (Tex.1989), Tex.R. Civ. Evid. 402 & 501

ATTORNEY-CLIENT PRIVILEGE

- Privilege promotes client trust in the attorney and the free flow of information.
- Privilege extends only to confidential communications between attorney and client
- Privilege can be waived if communications shared with individuals outside of the relationship

The attorney-client relationship enjoys a long history of confidential protection. Laws and decisions regarding the relationship can be found in the English common law as far back as the early 16th century.[2][2] In Texas, the privilege is found in Rule of Evidence 503. The rule makes it clear that confidential communications between the client and the attorney made for the purpose of rendering legal services will not be disclosed.[3]

The rule protects disclosure of communications that are:

1. between the client or a representative of the client and the client's lawyer or a representative of that lawyer;
2. between the lawyer and the lawyer's representative;
3. by the client or a representative of the client, or the client's lawyer or a representative of 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;
4. between representatives of the client or between the client and a representative of the client; or
5. among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)

ATTORNEY

To assert the privilege, the party must first prove the existence of a professional relationship between the lawyer and the client.[4] "Lawyer" is defined by the rule as "a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation."[5]

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[2] See 8 Wigmore, Evidence Section 2290 (McNaughton rev. 1961); *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001). .

[3] *In re Ford Motor Co.*, 988 S.W.2d 714, 718 (Tex. 1998); In re Columbia Valley Regional Medical Center, 2001 WL 253615 (Tex.App. – Corpus Christi, 2001)(The purpose of the attorney-client communication privilege is to promote the free flow of communications between an attorney and client on matters involved in litigation by insuring the communications will not be subject to subsequent disclosure.)

[4] *Huie v.DeShazo*, 922 S.W.2d 920,922 (Tex. 1996)(An attorney representing a trust did not have an attorney-client relationship with a beneficiary of the trust); *Parker v. Carnahan*, 772 S.W.2d 151,156 (Tex. App. – Texarkana 1989, writ denied) (Just signing a tax return in lawyer's office did not create an attorney-client relationship).

[5] Tex. R. Evid. 503(a)(3).

REPRESENTATIVE OF ATTORNEY

The rule defines this as: (1) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or (2) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.[6] The rule has been interpreted to extend anyone employed by the lawyer to assist in the legal representation. This includes secretaries, paralegals, and private investigators.[7] Note that care must be taken to ensure that the attorney's representatives do not breach the confidential relationship by discussing matters with outside third parties. Disclosure to outside parties by the representatives may be enough to violate the privilege.[8]

REPRESENTATIVE OF THE CLIENT

A client includes a person, public officer, corporation, association or other organization or entity, either public or private.[9] A client's representatives includes:

1. a person having the authority to obtain legal services or to act on legal advice rendered on behalf of the client, and
2. any other person who, for purposes of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.[10]

Courts use the "subject matter" test in examining these communications to determine if the privilege applies. This test covers a broader scope than the old "control group" definition that pertained to the privilege.[11] The new test covers more types of communications between more levels of a corporation than before. Under the subject-matter test, an employee's communication is deemed to be that of the corporation/client if:

" . . . the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."[12]

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[6] Tex. R. Evid. 503(a)(4).
[7] *Bearden v. Boone*, 693 S.W.2d 25, 27-28 (Tex. App. Amarillo 1985, orig. proceeding); *IMC Fertilizer Inc. v. O'Neill*, 846 S.W.2d 950 (Tex. App. – Houston [14th Dist.] 1993, no writ).
[8] See *IMC Fertilizer Inc.*, 846 S.W.2d at 592.
[9] *Markowski v. City of Marlin*, 940 S.W.2d 720, 726 (Tex. App. –Waco 1997, writ denied); *Atchison, Topeka and Santa Fe Ry. Co. v. Kirk*, 705 S.W.2d 829 (Tex.App. – Eastland 1986, writ denied) (The post-accident communications of an agent, representative, or employee of party made in connection with the prosecution, investigation, or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen is privileged. The fact that an agent may not have been investigating every aspect of a collision was immaterial to the privilege.)
[10] Tex. R. Evid. 503(a)(2).
[11] See *In re Monsanto Co.*, 998 S.W.2d 917, 922 (Tex. App. – Waco 1999, orig. proceeding).
[12[Id. at 922, See also *National Tank v. Brotherton,* 851 S.W.2d193, 198 (Tex. 1993) (quoting *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487, 491-92 (7th Cir.1970), *aff'd per curiam by an equally divided court,* 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971).

The broad scope afforded this protection can also apply to communications between the client and his insurer. Recently, a physician's liability insurer was a determined to be a "representative of the client" within the meaning of the attorney-client privilege. [13] The Court was asked to compel production of letters the doctor had sent to his insurer discussing other malpractice claims. The Court held that the letters were not discoverable because the insurer was expressly hired to provide legal representation for the doctor and that the letters were in furtherance of that service. The Court extended the definition of "representative of the client" because the nature of the relationship between the doctor and the insurer was directly related to the legal representation.

WHO MAY CLAIM THE PRIVILEGE?

The privilege may be invoked by client. This means that privilege may be claimed by the client, his representatives including guardians and personal representatives. Corporations may assert the privilege through a representative. A corporation's privilege continues to exist even after the corporation has ceased doing business or been absorbed by another during a merger. A lawyer may only assert the privilege on behalf of the client.[14] However, the lawyer is presumed to have the client's authority to claim the privilege.[15]

WHAT IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE?

There is a three-part test used to determine what communications are actually subject to the Attorney-client privilege.

1) There must be a communication between the lawyer and the client. This includes discussions of legal advice and the facts concerning the case.[16]

2) The communication must be confidential. Communications made in front of a third person that is not an agent or representative of the client waives the privilege.[17] A communication is considered confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional

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[13] *In re Fontenot*, 13 S.W.3d 111 (Tex. App. – Fort Worth 2000, no writ).
[14] *Turner v. Montgomery*, 836 S.W.2d 848 (Tex.App.-Houston [1st Dist.] 1992, no writ)(Attorney cannot claim attorney-client privilege to protect himself; he may do so only on behalf of client.) *Cole v. Gabriel*, 822 S.W.2d 296 (Tex.App.- Fort Worth 1991, no writ)(Lawyer-client privilege may be claimed by lawyer only on behalf of client; attorney as witness has no personal interest in matter, so that refusal of court to sustain his objections on grounds of attorney-client privilege is not denial of any privilege or immunity nor in any way erroneous as to him, although it might be so as to his client.)
[15] *Cole v. Gabriel*, 822 S.W.2d 296 (Tex. App. – Fort Worth, 1991, no writ).
[16] *Pittsburg Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App. – Houston [14th Dist.] 1993, no writ).
[17] *Ledisco Fin. Servs., Inc. v. Viracola,* 533 S.W.2d 951, 959 (Tex. App. – Texarkana 1976, no writ).

legal services to the client or those reasonably necessary for the transmission of the communications."[18]

3) The communication must be made to facilitate the rendition of professional legal services.[19] The privilege will not apply if the attorney is acting in capacity other than as a lawyer.[20] But it will apply if the lawyer represented the client in a criminal matter that then involves civil proceedings.[21]

Once the privilege attaches, it covers the entire communication. A party cannot be required to produce unprotected portions of the communication if it is combined with privileged information.[22] The privilege has also been held to extend to all discussions with the lawyer pertaining to potential litigation, regardless of whether they pertain to the actual matter at issue.[23]

JOINT DEFENSE PRIVILEGE

The "joint-defense privilege" included within the attorney-client privilege protects confidential communications by the client, a representative of the client, the client's lawyer, or a representative of 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.[24] This protection is granted even if the two parties' interests are not completely aligned. It is only necessary that they share a common interest regarding the subject matter of the communication. [25]

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[18] Tex. R. Evid. 503(a)(5).

[19] *In re Bloomfield Mfg. Co.,* 977 S.W.2d 389 (Tex. App -San Antonio 1998, no writ)(For an instrument to be protected by the attorney-client privilege, it needs to constitute a communication between an attorney and client and owe its existence to an effort to transmit information from one to the other.)

[20] See *In re Texas Farmers Ins. Exch.,* 990 S.W.2d 337, 340 (Tex. App. – Texarkana 1999) (Lawyer acting as investigator); *Clayton v. Canida*, 223 S.W.2d 264, 266 (Tex. App. – Texarkana 1949, no writ) (Lawyer acting as accountant.)

[21][*Wood v. McCown*, 784 S.W.2d 126 (Tex.App.-Austin 1990, no writ)(Attorney-client privilege facilitates attorney-client communications that are unrestrained by any apprehension that such confidences will later be revealed, and therefore, privilege is permanent unless waived. Civil plaintiffs were not entitled to production of documents from criminal defense file held by counsel who defended civil defendant during earlier criminal prosecution related to same incident where attorney-client privilege had attached to documents in criminal prosecution and no waiver of privilege was apparent from record.)

[22] See *Pittsburg Corning Corp*., 861 S.W.2d at 427, see also *GAF Corp. v. Caldwell,* 839 S.W.2d 149, 151 (Tex.App.--Houston [14th Dist.] 1992, orig. proceeding).

[23] *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159 (Tex. App. – Houston [14.Dist.] 2000, no writ)(The lawyer-client privilege extends to all matters concerning litigation or business transactions, regardless of whether the matters are pertinent to the matter for which the attorney was employed. Under attorney-client privilege, the statements and advice of the attorney to the client are as protected as the communications of the client to the attorney.)

[24][Tex. R. Evid. 503(b)(1)(C).

[25][*Ryals v. Canales*, 767 S.W.2d 226 (Tex. App. – Dallas 1989, no writ).

WHAT IS NOT COVERED BY THE PRIVILEGE?

There are several exceptions to the attorney-client privilege where communications cannot be concealed. Courts will closely scrutinize the privilege claim to deter wrongful uses of it.[26] For example, a person cannot cloak a material fact with the privilege merely by communicating it to an attorney.[27]

This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.

Other exceptions to the attorney-client privilege include:

- Communications made in furtherance of crime or fraud. (503(d)(1) TRCP 192.5(c)(5)). The party seeking to offer the evidence must put on prima facie proof that the violation is sufficiently serious to defeat the privilege. *In Re Monsanto Co.,* 998 S.W.2d 917, 934 (Tex. App. – Waco 1999, orig. proceeding).

- Communications that are relevant to an issue between parties who assert claims through the same deceased client. (503(d)(2) TCRP 192.5 (c)(5). All other lawyer-client communications survive the client's death.

- Communications relevant to a breach of a duty either by a lawyer to the client or by a client to the lawyer. (503 (d) (3); TRCP 192.5(c)(5). *Scrivner v. Hobson*, 854 S.W.2d 148, 152 (Tex. App. – Houston [1st Dist.] 1993, orig. proceeding).

- Attestation of a document by a lawyer. If the lawyer was the witness to the document, his testimony about its signing is not privileged. 503 (c)(4); TRCP 192.5(c)(5).

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[26] *Texas Dept. of Mental Health and Mental Retardation v. Davis*, 775 S.W.2d 467 (Tex.App. – Austin 1989, no writ)(Because it tends to prevent full disclosure of truth, application of attorney- client privilege is narrowly construed.)

[27] *National Tank Co. v. Brotherton,* 851 S.W.2d 193, 199 (Tex.1993).

- Communications with a lawyer between two clients who either jointly retained or consulted with the lawyer and that are common to the two parties' interests and relevant to the dispute are discoverable. 503 (c)(5); TRCP 192.5 (c)(5), *Scrivner,* 854 S.W.2d at 152

- Documents that pre-existed the attorney-client relationship are not privileged. *MortgageAmerica Corp. v. American Nat'l Bank,* 651 S.W.2d 851, 858 (Tex. App. – Austin 1983, writ ref'd n.r.e.)

- Non-confidential matters of employment, such as the terms, conditions and purpose of the lawyer's employment are discoverable. *Allstate Tex. Lloyds v. Johnson, 784* S.W. 2d 100, 105 (Tex. App. – Waco 1989, orig. proceeding).

- Communications with client's employees is discoverable if the employees do not meet the definition of client under 503(a) and 503(b).

- The names and location of persons with knowledge of relevant facts is not privileged. TRCP 192.3 (c), *Smith v. Southwest Feed Yards,* 835 S.W.2d 89, 90 (Tex. 1992); *Giffin v. Smith*, 688 S.W.2d 112, 113 (Tex. 1985).

- Settlement agreements are not covered by the privilege.[28][28]

MEDIATION MATERIALS

Materials prepared for mediation may not be subject to the privilege.[29] A recent decision held that a series of videotaped interviews presented during a mediation were discoverable.[30] In that case an aircraft purchaser filed contract action against aircraft manufacturer, claiming the aircraft did not meet contract specifications as to cabin temperature control. After mediation failed, the purchaser filed a motion to compel discovery of edited videotapes provided by manufacturer for the mediation and of the unedited core videotapes. The trial court granted the motion. Manufacturer filed a writ of mandamus claiming that the videos were subject to the attorney-client privilege because they were made to facilitate legal services. The Court of Appeals disagreed holding that the tapes were made for express purpose of presentation of factual

[28] *Ford Motor Co. v. Leggat*, 904 S.W.2d 643 (Tex. 1995) (Settlement agreements, including amounts, are not subject to the attorney-client privilege where they are relevant. Agreements were not given the attorney-client privilege even though drafted by attorneys.)

[29] Generally, mediation materials are considered confidential. See **TX CIV PRAC & REM § 154.073** § 154.073. Confidentiality of Certain Records And Communications

> (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

[30] *In re Learjet Inc.,* 2001 WL 1439997 (Texarkana 2001).

information at a mediation proceeding in which witnesses involved in the dispute were designated as testifying expert witnesses.

The tapes consisted of questions by the attorney to current and former employees about action they took in the case. The attorney stopped the taping from time to time to conduct off the record conversations with the employees. The Court held that the attorneys actions, and the fact that the tapes did not have any materials regarding trial strategy or legal analysis, demonstrated the attorney-client privilege did not apply.

Avary ex rel. Estates of Bourgeois v. Bank of America, N.A., 2002 WL 442064 (Tex.App. – Dallas 2002, no writ) The court held that if a communication made by a participant in an alternative dispute resolution (ADR) procedure does not relate to the subject matter of the dispute or does not relate to or arise out of the matter in dispute, it may not be confidential under the confidentiality provisions of the ADR statute.

In re Acceptance Ins. Co., 33 S.W.3d 443 (Tex. App. – Fort Worth 2000, no writ) Held that the trial court violated the confidentiality requirements of the Alternative Dispute Resolution Act (ADR) by requiring a liability insurer's claims specialist to testify about the manner in which she negotiated and her communications with other participants and with other representatives of the insurer during the mediations. The manner in which mediation participants negotiate should not be disclosed to the trial court.

In re Daley, 29 S.W.3d 915 (Tex.App. – Beaumont 2000, no writ) The confidentiality provision of statute precluding disclosure of all matters relating to mediation is restricted to those matters occurring during the settlement process. Statutory provision mandating confidentiality of certain records and communications in mediation is not so broad as to bar all evidence regarding everything that occurs at mediation from being presented in the trial court, and rather than a blanket confidentiality rule for participants, the statute renders confidential only a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution (ADR) procedure.

THE WORK PRODUCT PRIVILEGE

- no exemption for witness statements
- work product applies only to materials prepared, mental impressions developed, or communications made in anticipation of litigation or for trial.

The attorney work product privilege is derivative of the attorney-client privilege. In fact, the two are often confused. While they cover many of the same issues, there are important differences. The work product privilege covers only the work done to represent the client's interests. By contrast, the attorney-client privilege covers communications with the client. The work product privilege requires evidence that the materials were

prepared in anticipation of litigation. The attorney-client privilege does not. This is an important distinction.[31]

WHAT IS WORK PRODUCT?

Rule 192.5 defines work product as:

(1) Material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, or agents; or
(2) A communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.[32]

The rule replaces TRCP 166b(3) that formerly granted protection to the identity, mental impressions and opinions of consulting experts, witness statements and party communications. The new rule focuses on the "core work product" of an attorney preparing for trial.[33]

Core work product is defined by the rules as:

"the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions or legal theories."[34] Items fitting this definition are not discoverable. This protection is absolute.[35] The following have been held to be protected as "core work product":

- An attorney's litigation file[36]
- Indexes, notes and attorney memos[37]
- Attorney correspondence in connection with a lawsuit[38]
- Attorney trial notes [39]

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[31] *Goode v. Shoukfeh*, 943 S.W.2d 441, 448 (Tex. 1997).
[32] *Texaco Refining & Marketing, Inc. v. Sanderson*, 739 S.W.2d 493 (Tex.App.-Beaumont,1987) (Communications obtained in oil refiner's investigation into fire were discoverable, in lawsuit arising out of fire, upon finding that materials were not prepared in connection with investigation or defense of present, litigious claim or that materials were prepared in anticipation of litigation based on "good cause" belief that suit would be prosecuted; good-faith belief, which is based upon past experiences, that lawsuit may be filed in the future, fails to establish good cause which would deny and defeat discovery when anticipated litigation has not yet been filed.)
[33] *Wiley v. Williams*, 769 S.W.2d 715,717 (Tex. App. – Austin 1989, orig. proceeding).
[34] TRCP 192.5(b)(1)
[35] *Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).
[36] *National Un. Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993).
[37] *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987)
[38] *Humphreys v. Caldwell*, 888 S.W.2d 469, 471 (Tex. 1994).
[39] *Goode v. Shoukfeh*, 943 S.W.2d 441, 449 (Tex. 1997).

ASSERTING THE WORK PRODUCT PRIVILEGE

To assert the work product privilege, the attorney must demonstrate that the material sought was prepared in anticipation of litigation. The first part of this inquiry is to determine the earliest date on which the party could reasonably anticipated litigation would follow an event. This date can often be traced to the time of the occurrence underlying the suit, i.e. an injury. However, some cases have held that the injury date does not always set the time a party anticipated litigation. [40]

Not all materials prepared after the occurrence date are immediately afforded the work product protections. The attorney must demonstrate that the materials were actually prepared in anticipation of the litigation.[41] To do this, the materials must pass a two-part test.

(1) **Objective test**

The Court must determine that a reasonable person would have anticipated litigation based on the circumstances. The mere fact that an injury occurred may not be enough to satisfy this prong of the test.[42] There must be proof from the nature or severity of the injury that there is a "substantial chance" that litigation will follow.[43] Courts will look to "outward manifestations" of a party's intent to sue to determine if this portion of the test is met. "Outward manifestations" requires something more than an abstract fear or unwarranted fear of litigation. The party seeking the protection does not have to prove that they were absolutely convinced that litigation would follow to support their concern.[44]

To satisfy this portion of the test, most Courts require some type of affidavit or other proof to demonstrate that litigation typically follows a particular set of

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[40] See *Jackson v. Downey*, 817 S.W.2d 858, 860 (Tex. App. – Houston [1st Dist.] 1991)(Date of occurrence in insurance claim denial case was date claim was denied, not date of injury.); *National Sur. Corp. v. Dominguez*, 715 S.W.2d 67, 68-69 (Tex. App. – Corpus Christi 1986, orig. proceeding)(Occurrence date was when surety denied coverage in case regarding wrongful denial of bond.)

[41] *National Tank v. Brotherton,* 851 S.W.2d 193, 202 (Tex. 1993).

[42] Id. at 203.*Kupor v. Solito*, 687 S.W.2d 441 (Tex.App.- Houston [14th Dist.]1985)(Rule making non-discoverable communications between a party and his agents, representatives or employees in connection with prosecution, investigation or defense of claim did not apply in wrongful death suit to communications by physician with attendants at dialysis center where deceased was killed, where by physician's own admission those communications were not made in connection with prosecution or defense of a lawsuit, since at time they were made there was no pending claim nor lawsuit.); *Scott v. Twelfth Court of Appeals*, 843 S.W.2d 439 (Tex.1992)(Trial court did not abuse its discretion in ruling that forklift manufacturer's investigations of accident between date it learned of accident and date compensation carrier demanded reimbursement were not made in anticipation of litigation, and therefore were not privileged; manufacturer's risk manager knew that representative of employer had stated that forklift guard was defective, but he did not know whether the potential plaintiffs, the injured employee and the compensation carrier, shared this view.); *Enterprise Products Co. v. Sanderson*, 759 S.W.2d 174 (Tex.App.-Beaumont 1988)(Whether there is good cause to believe that lawsuit will be filed, rendering information non-discoverable, depends upon relevant, manifested, overt facts of particular situation.)

[43] Id. at 204.

[44] Id. at 206.

circumstances. This evidence should be included in any motion seeking to invoke the privilege.

(2) **Subjective test**

The Court must also make a subjective determination that the party resisting discovery actually had a good faith belief that litigation would ensue and conducted their investigation for that purpose.[45]

To satisfy the subjective test, it is best to include testimony or affidavits from the people actually making the determination that litigation would follow an event. The testimony should outline the steps taken after other similar cases, a brief description of why litigation was anticipated and a short outline of how the investigation could assist in trial preparation.

REGULARLY CONDUCTED INVESTIGATIONS

The work product privilege may still apply to investigations that are regularly conducted after an occurrence.[46] However, the test still must be met and there must be proof that the investigation actually will assist in trial preparation.[47] This means that not every investigation is given the privilege. For example, an investigation prepared for a party other than that involved in the suit will be discoverable, even if it stems from the same occurrence.[48] If the investigation was done for another lawsuit, the privilege does not apply.[49] Tests done for reasons other than the lawsuit are also not covered by the privilege even if they involve the same facts or stem from the occurrence.[50]

ITEMS NOT COVERED BY THE WORK PRODUCT PRIVILEGE

There are several ways that work product may be discoverable. First, if the items do not reflect an attorney's thought processes, they may be discovered. TRCP

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[45] Id. at 204; *Mole v. Millard,* 762 S.W.2d 251 (Tex.App.- Houston [1st Dist.]1988)(Unusual circumstances of hospital patient's death and startled reaction of patient's family to her death were not "outward manifestations of litigation" which would allow hospital to then assert party communications privilege to pretrial discovery requests in related medical malpractice action.)

[46] *Cupples Products Co., Div. of H.H. Robertson Co. v. Marshall*, 690 S.W.2d 623 (Tex.App.-Dallas 1985)(Any investigation by agent of party, made subsequent to occurrence out of which the claim being presently litigated has arisen, is privileged.); *Zenith Radio Corp. v. Clark*, 665 S.W.2d 804 (Tex.App.-Austin 1983)(Fact that fire marshal is a state employee does not mean that all information which he obtains while performing his tasks is privileged simply because at some later time the state is, or may become involved in litigation arising from the fire; in order for court to determine whether or not fire marshal's report was protected from discovery, it is necessary that facts be available to show whether report was prepared in connection with the state's lawsuit.)

[47] Id.

[48] *Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App. - Houston [1st Dist.] 1997).

[49] *Turbodyne Corp. v. Heard*, 720 S.W.2d 802, 804 (Tex. 1986).

[50] *Allen v. Humphreys*, 559 S.W.2d 798, 802-802 (Tex. 1977).

192.5(b)(2). Second, there are several other categories of evidence that do not fit in the core work product definition.

HARDSHIP EXCEPTION

The requesting party may obtain non-core work product if they demonstrate a need and hardship.[51] To meet this test, the requesting party must show:

(1) Only non-core work product is sought; [52]
(2) A substantial need for the materials to prepare their case; and [53]
(3) Obtaining the materials would create an undue hardship for the party.[54]

OFFENSIVE USE

A party's privilege may be waived if they seek to obtain affirmative relief based on the work product.[55] Parties seeking to break this privilege must prove three things. First, that their opponent is seeking affirmative relief. Second, that the evidence the party refuses to produce is outcome-determinative. And finally, that there is no alternative source for the evidence.[56] All three elements must be present for the privilege to be waived. If they are present, it may enable the Court to dismiss a suit if the party asserting the privilege is the plaintiff.[57]

INFORMATION THAT PREDATES THE LAWSUIT

A party is not entitled to assert the privilege if the materials predated the lawsuit. The party seeking the materials must also demonstrate that they were not created in anticipation of litigation.

WITNESS INFORMATION

The work product privilege does not extend to cover the identity of trial experts and witnesses. It also does not protect disclosure of witness or party statements. TRCP 192.5(c)(1). A witness statement is defined as (1) a written statement signed, adopted, or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical,

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[51] *In re Monstanto Co.*, 998 S.W.2d 917, 930 (Tex. App. – Waco 1999, orig. proceeding)
[52] *In re Team Transport, Inc.,* 996 S.W.2d 256, 259 (Tex. App. – Houston [14th Dist.] 1999, orig. proceeding).
[53] *Flores v. 4th Ct. of Appeals,* 777 S.W. 2d 38, 42 (Tex. 1989), *overruled on other ground, Dillard Dept. Stores, Inc. v. Sanderson,* 928 S.W.2d 319, 321 (Tex. App. – Beaumont 1996, orig. proceeding)(Witnesses credibility issue were sufficient to demonstrate substantial need.); *Leede Oil and Gas, Inc. v. McCorkle*, 789 S.W.2d 686, 687 (Tex. App. – Houston [1st Dist.] 1990 orig. proceeding)(Death of witness interviewed by attorney made neutral facts from his interview in lawyer's file discoverable.).
[54] *Flores,* 777 S.W.2d at 42.
[55] *Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).
[56] *Texas DPS Officers Ass'n v. Denton,* 897 S.W.2d 757,761 (Tex. 1995).
[57] Id. at 763.

or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. TRCP 192.3(h). An attorney's notes taken during the conversation with a witness is not discoverable.

TRIAL EXHIBITS

Trial exhibits that are required to be disclosed per a court order are not subject to the privilege. TRCP 192.5(c)(2).

IDENTITY OF FACT WITNESSES

The privilege does not exclude discovery of party and fact witnesses' names, address and telephone numbers. TRCP 192.5(c)(3).

PHOTOGRAPHS

Photographs and other electronic image recordings that a party intends to offer as evidence are not privileged. TRCP 192.5(c)(4).

HUSBAND AND WIFE PRIVILEGE

- Communication to spouse is privileged if:
    - Made privately to spouse
    - Not intended for disclosure
- Spousal privilege may be asserted by either spouse and their representatives.

Communications between spouses may be kept confidential. Tex. R. Evid. 503 sets out a two-part definition for the privilege. The communication must be made privately to the other spouse and not be intended for disclosure outside of the relationship.[58] The person claiming the privilege must prove that a marriage existed.[59] The privilege may be asserted by the spouse who made the statement, her guardian or representative or the other spouse. There is a presumption that one spouse has the authority to claim the privilege on behalf of the other spouse.[60] The privilege survives the death of the spouse and remains present on conversations that take place before a divorce.[61]

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[58] *Lanham v. Lanham*, 145 S.W. 336 (Tex.1912) (Letters written by husband in his lifetime to his wife complaining of her lack of sincere affection for him, and of her conduct to his mother, held confidential communications, and inadmissible in aid of her contest of her husband's will.)

[59] *Lara v. State*, 740 S.W.2d 823, 837 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd)(Must prove all elements of common law marriage to assert the privilege.)

[60] Tex. R. Evid. 503 (a) (3).

[61] *Wiggins v. Tiller*, 230 S.W.2d 253, 254 (Tex. App. – San Antonio 1921, no writ); *Freeman v. State*, 786 S.W.2d 56 (Tex.App.-Houston [1st Dist.] 1990)(While divorce removes bar of disqualification of former spouse from testifying, it does not terminate privilege for confidential communications made during the marriage. Rules of Crim.Evid.504.)

ITEMS NOT PROTECTED BY HUSBAND AND WIFE PRIVILEGE

There are several areas where the privilege does not protect communications. They include:

- Non-confidential communications.[62]
- Communications made in the presence of a third party.[63]
- Nonverbal communications. [64]
- Communications regarding crime or fraud.[65]
- In lawsuits between the spouses.[66]
- In crimes against spouse or children. [67]
- Mental competency hearings. [68]
- Communications made before the marriage. [69]
- Conversations with children of the marriage. [70]
- Actions of the spouse. [71]

RECENT CASES CONCERNING THE HUSBAND AND WIFE PRIVILEGE

Marshall v. Ryder System, Inc., 928 S.W.2d 190 (Tex.App. – Houston [14th Dist.] 1996, no writ). Married claimants brought action against transportation companies and others for contamination of property with spilled diesel fuel and for failure to clean up spill site. It was discovered that husband had spiked monitoring wells with diesel fuel during the litigation. The defendants sought discovery of the husband's tampering with the wells. The husband asserted his Fifth Amendment privilege against self-incrimination. His wife claimed the marital privilege. The Court denied the wife's claim of privilege primarily based on the "offensive use" waiver and granted death penalty sanctions.

Weaver v. State, 855 S.W.2d 116 (Tex.App. – Houston (14th Dist.] 1993) This case dealt with a claim of spousal privilege from a couple in an apparent common law marriage. The court outlined the requirements of a common law marriage; i.e. (1) proof

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[62] *Bear v. State*, 612 S.W.2d 931, 932 (Tex. Crim. App. 19981)

[63] *Gibbons v. State,* 794 S.W.2d 887, 892 (Tex. App. – Tyler 1990, no writ); *Lowe v. State*, 676 S.W.2d 658 (Tex.App. – Houston. [1st.Dist.] 1984)(When a marital communication is made in front of a third party, the marital communication privilege is destroyed.)

[64] *Freeman v. State*, 786 S.W.2d 56, 59 (Tex. App. – Houston [1st Dist.] 1990, no writ).

[65] Tex. R. Evid. 504 (a) (4) (A).

[66] Tex. R. Evid. 504 (a)(4)(b), *Earthman's Inc. v. Earthman*, 526 S.W.2d 192, 206 (Tex. App. – Houston [1st Dist.] 1975, no writ); *First Bank of Springtown v. Hill*, 151 S.W. 652 (Tex.Civ.App.1912) (Conversations between husband and wife concerning her property rights and the admission of the husband of his wrongful transfer of her separate personalty are not privileged communications within Rev.St.1895, art. 2301.)

[67] Tex. R. Evid. 504 (a)(4)(c)

[68] Tex. R. Evid. 504(a)(4)(d)

[69] Tex. R. Evid. 504

[70] *Port v. Heard*, 764 F.2d 423, 428 (5th Cir. 1985).

[71] *Sterling v. State*, 814 S.W.2d 261 (Tex.App.-Austin,1991) (Marital communication privilege applies to utterances and not to acts. Rules of Crim.Evid., Rule 504(1).)

that the parties had a present agreement to be married, (2) that they live together as husband and wife, and (3) that they represented to others that they were in fact married.[72] Where all of these elements are not found, the privilege cannot be applied. In the present case, the "wife" was aware that she had not dissolved a previous marriage. Even though all the elements of a common law marriage were present, the prior marriage interrupted the formation of a valid marriage. The court held that this meant the "wife" could not assert the privilege.

The Court stated:

"The language of Rule 504(2) is clear and objective--it uses the word 'spouse.' We must then interpret the rule to mean what it says, and a spouse is one who is legally married to another. The rule does not say 'putative spouse,' 'significant other,' or 'girlfriend.'"

This decision indicates that courts will strictly examine the nature of the relationship to determine whether the privilege will apply.

COMMUNICATIONS TO CLERGY

- Only applies to communications made to clergy acting as a spiritual advisor
- May be asserted by individual making statement or their representative

Communications with clergy are privileged. In order to assert the privilege a party must prove two things. First, that the discussions were made with an individual that the party reasonably believes is a spiritual advisor. Second, that the conversations were done while the clergy was acting as a spiritual advisor.[73] The privilege has traditionally been given a broad scope. However, recent cases have sought to define and potentially narrow the privilege. In *Maldonado v. State*, 59 S.W. 3d 251 (Tex. App. – Corpus Christi 2001, writ ref'd), the court narrowed the privilege to only communications addressed to the clergy while he was acting in his professional capacity. This was a criminal case involving a man who was charged with indecency with a child. Prior to being arrested, the man was confronted by a church bishop about his actions with the child. At trial, the man sought to prevent testimony from the bishop about that meeting. The Court held that they bishop could testify because the conversations were not covered by the clergy privilege. The Court focused on the fact that the specific purpose of the meeting was to discuss the inappropriate behavior, not to seek spiritual guidance. Because the defendant did not present evidence that he made statements at the meeting with a reasonable expectation of confidentiality, the court refused to allow the privilege.

[72] For the elements of a common law marriage see Tex.Fam.Code Ann. § 1.91(a)(2) (Vernon 1975); *Phillips v. State,* 701 S.W.2d 875 (Tex.Crim.App.1985), *cert. denied,* 477 U.S. 909, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1987).

[73] Tex. R. Evid. 505(b)

TRADE SECRET PRIVILEGE

- person has a qualified privilege to protect a trade secret that they own
- a trade secret is a formula, pattern, device or compilation of information that is used in one's business

Trade secrets can be privileged.[74] The information cannot be generally known and an effort must be made to keep the information secret before the privilege will apply.[75] The Court may still order the information to be produced during discovery if the information is material to the case, necessary to the litigation and unavailable from another source.[76] When disclosure of a trade secret is compelled, the court must take steps to protect it.[77] This may include hiring an expert to assist the court in determining how to disclose or redact the information to protect the secrets.

ASSERTING TRADE SECRET PRIVILEGE

To establish a trade secret privilege, the information should be shown to satisfy the following test:

(1) the extent to which the information is known outside of his business;
(2) the extent to which it is known by employees and others involved in his business;
(3) the extent of the measures taken by him to guard the secrecy of the information;
(4) the value of the information to him and his competitors;
(5) the amount of effort or money expended by him in developing the information;

the ease or difficulty with which the information could be properly acquired or duplicated by others.[78]

OVERCOMING THE TRADE SECRET PRIVILEGE

When the party asserting the privilege demonstrates that the privilege exists, the burden shifts to the requesting party to present evidence that establishes that the information is necessary for fair adjudication of its claims. [79]

To overcome the privilege, the requesting party should present evidence that the materials are necessary to the litigation and cannot be reasonably obtained from an alternative source. The plaintiff failed to meet this burden while requesting a tire formula

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[74] Tex. R. Evid.507
[75] *Rugen v. Interactive Business Sys*., 864 S.W.2d 548, 552 (Tex. App. – Dallas, 1993, no writ)
[76] *In re Continental Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998)
[77] *Automatic Drilling Machs., Inc. v. Miller*, 515 S.W.2d 256, 259 (Tex. 1974), *Chapa v. Garcia*, 848 S.W.2d 667, 668 (Tex. 1992). *In re Continental Gen. Tire, Inc.* (For example, the court limited access to the information to the parties in this lawsuit, their lawyers, consultants, investigators, experts and other necessary persons employed by counsel to assist in the preparation and trial of this case. Each person who was given access to the documents had to agree in writing to keep the information confidential, and all documents must be returned to owner at the conclusion of the case.)
[78] *Chapa v. Garcia,* 848 S.W.2d 667, 670 (Tex.1992); *Center for Economic Justice v. American Ins. Co.,* 39 S.W.3d 337 (Tex. App. – Austin 2001, no writ) (Involved suit seeking temporary injunction).
[79] *In re Continental Gen. Tire, Inc.*, 979 S.W.2d at 613.

in the *In re Continental Gen. Tire* case. The plaintiff had filed an affidavit from its expert stating various reasons why the formula was necessary. But the court found that the plaintiff failed to demonstrate that it had any other manufacturer's formulas to compare the secret with and that the expert could not link the formula to the physical properties of the tire in the case.[80]

RECENT CASES CONCERNING TRADE SECRET PRIVILEGE

John Paul Mitchell Systems v. Randalls Food Markets, Inc., 17 S.W.3d 721 (Tex.App. – Austin 2000, no writ) This case involved a hair care products manufacturer's suit against a retail grocery chain and a hair care products distributor. The suit alleged that the chain and the distributor had infringed on a trademark and had conducted unauthorized resale of its products. The manufacturer sought to discover a list of the distributor's suppliers. The distributor resisted discovery and asserted that the list was subject to the trade secrets privilege. The distributor's president testified that he maintained restricted access to the list, explained the time and money spent to develop the list, described list's value to distributor, and specified that information on list could not be readily obtained or duplicated. The hair care manufacturer argued that production of the list would be useful to tracking down witnesses to the trademark infringement allegations in the case. The court denied the request noting that the manufacturer had failed to carry its burden after the distributor's president testified. The court held that the manufacturer failed to describe with particularity how the lists would help reach conclusions in the case. It further held that there must be a showing that the information is necessary, not merely useful, to the litigation in order to warrant production.

In re Leviton Mfg. Co., Inc., 1 S.W.3d 898 (Tex.App. - Waco 1999, orig. proceeding). Court held that a showing of relevance alone is not adequate to obtain discovery of a trade secret. Ordering discovery of trade secret is improper if the party seeking the information has not met its burden under to show the information was necessary to a fair adjudication of the claim.

In re Frost, 998 S.W.2d 938 (Tex.App.- Waco 1999, orig. proceeding). The court held that once a party resisting discovery establishes that information is a trade secret, the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claims. The case involved two businesses involved in a breach of contract action. One party sought to discover the other's customer list, claiming that it was necessary to discuss its use with customers. The court held that this was insufficient to overcome the trade secret protection. The court ruled that disclosure of trade secrets placed a higher burden on the requesting party to show more than the relevancy of the information sought. Absent a clear connection to an important issue in the case, the trade secret privilege will not be waived.

[80] *In re Continental Gen. Tire, Inc*. at 615.

PHYSICIAN- PATIENT PRIVILEGE

- Requires communication between physician and patient
- Must concern physician's professional services
- May be asserted by the physician, patient or representative of the patient

The physician- patient privilege exists to encourage the full communication of information necessary for effective treatment and to prevent unnecessary disclosure of personal information.[81]

ASSERTING THE PRIVILEGE

The party asserting the privilege must show that the physician is licensed to practice medicine in any state or nation, or that the patient reasonably believed the physician was licensed.[82] A patient is defined as any person who sees or consults with a physician to receive medical care.[83] The privilege has been extended to chiropractors, dentists, podiatrists and emergency medical technicians.[84] A physician- patient relationship sufficient to create the privilege may exist even if the patient is not conscious.[85] But not every interaction with a health care provider creates the relationship. There must be evidence that the patient sought medical care to invoke the privilege.[86]

The privilege protects the patient's communications with the physician and records of the patient's identity, diagnosis, evaluation or treatment that are created or maintained by the physician.[87] Confidential communications made to a mental health professional are also privileged.[88]

EXCEPTIONS TO PHYSICIAN-PATIENT PRIVILEGE

There are seven exceptions to the physician-patient privilege.[89] They are:

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[81] Tex. R. Evid. 509; *R. K. v. Ramirez*, 887 S.W.2d 836, 840 (Tex. 1994).
[82] Tex. R. Evid. 509 (a)(2).
[83] Tex. R. Evid. 509 (a)(1); *Tarrant Cty. Hosp. Dist. v. Hughes,* 734 S.W.2d 675, 677 (Tex. App. – Fort Worth 1987, orig. proceeding).
[84] See Occupational Code Section 201.402; 258.102; 202.402; and Health and Safety Code Section 773.091.
[85] *Garay v. County of Bexar*, 810 S.W.2d 760, 764 (Tex. App. – San Antonio 1991, writ denied).
[86] *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675 (Tex.App. - Fort Worth 1987 no writ) (Physician-patient privilege contained in evidence rule was not applicable to discovery request in wrongful death action that hospital produce names of blood donors who gave blood used in transfusions received by patient who contracted acquired immune deficiency syndrome.)
[87] Tex. R. Evid. 509 (c); *In re Columbia Valley Reg'l Med. Ctr.*, 41 S.W.3d 797, 801 (Tex. App. – Corpus Christi 2001, orig. proceeding).
[88] Tex. R. Evid. 510 (b)(1).
[89] Tex. R. Evid. 509(e).

(1) ***Patient lawsuits -*** Communications are discoverable if the patient sues the doctor or is the complainant in a license revocation hearing and the information sought is relevant to those claims or defenses to them.[90]

(2) ***Written Consent –*** The privilege is waived if the patient or his representative signs a written consent to release the information.[91] However, note that a patient's release of information to one party does not waive the privilege to all potential uses.[92]

(3) ***Suits for Debt –*** Medical information can be discovered in a suit to collect medical expenses incurred by the patient. [93]

(4) ***Physical, mental or emotional condition relevant to claim –*** The privilege does not apply to medical information concerning a condition that the patient is seeking to prove exists as part of a claim or in defense of it.[94] This may also remove the privilege from someone not a party to the lawsuit. [95]

(5) ***Disciplinary investigations –*** Medical records of a doctor or nurse subject to a disciplinary investigation may be discovered. [96]

(6) ***Commitment proceedings –*** A patient's records may be discoverable in involuntary commitment proceedings and in court-ordered treatment or probable cause hearings.[97]

(7) ***Institutional neglect –*** Medical records of a patient suspected of being abused while in an institution may be discoverable in a suit regarding the abuse. [98]

MENTAL HEALTH INFORMATION

Mental health information is generally considered privileged. However, there are six exceptions. They are:

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[90] Tex. R. Evid. 509 (e)(1).
[91] Tex. R. Evid. 509 (f).
[92] See *Alpha Life Ins. Co. v. Gayle*, 796 S.W.2d 834, 836 (Tex. App. – Houston [14th Dist.] 1990, orig. proceeding) (Patient's authorization to release records to insurance company did not allow insurance company to release the documents in a lawsuit in which the patient was not a party.)
[93] Tex. R. Evid. 509 (e)(3).
[94] *Rios v. Texas Depart. Mental Health and Mental Retardation,* 58 S.W. 3d 167 (Tex. App. – San Antonio 2001, orig. proceeding)(Deposition testimony by injured driver's physician about communications with driver was admissible under litigation exception to physician-patient privilege, at trial of defendant's negligence action against state agency and agency employee, where communications involved were relevant to condition upon which driver based claim for damages.)
[95] Tex. R. Evid. 509 (e)(4); *R. K. v. Ramirez*, 887 S.W.2d at 842; *Groves v. Gabriel,* 874 S.W.2d 660, 661 (Tex. 1994).
[96] Tex. R. Evid. 509 (e)(5); Medical Practice Act, Occupational Code Section 159.003(a)(5).
[97] Tex. R. Evid. 509(e)(6).
[98] Tex. R. Evid. 509 (e)(7); See also Health & Safety Code Section 242.002 (10).

(1) ***Patient lawsuits*** – Mental health records are not privileged in cases involving a patient suing the mental health care provider for malpractice or if the patient is the complainant in a license revocation proceeding.[99]

(2) ***Written waivers*** – A patient may waive the privilege in writing.[100]

(3) ***Suit for debt*** – Records are not privileged in doctor's suit to collect payment for services rendered to patient.[101]

(4) ***Communication made without privilege*** – Communications during court-ordered proceedings may be discoverable if a judge concludes that the patient was told they would not be kept confidential. [102]

(5) ***Information relevant to claim or defense*** – Mental health information related to a claim for physical, mental or emotional condition may be discoverable.[103]

(6) ***Institutional abuse*** – Mental health records are discoverable in cases regarding abuse or neglect of the patient.[104]

MEDICAL PEER REVIEW PRIVILEGE

The medical peer review privilege is designed to protect from disclosure internal efforts to investigate medical conduct. The privilege's scope has been expanded to encompass a wide range of information.

The basis for the peer review privilege is found in the Occupations Code Section 160.001. The section defines medical peer review committee or professional review body as a committee of a health care entity, of the governing board of a health care entity, or of the medical staff of a health care entity, which (1) operates under written bylaws approved by the policy-making body or the governing board of the health care entity and (2) is authorized to evaluate the quality of medical and health care services or the competence of physicians, including evaluation of the performance of those functions specified by the Health & Safety Code Section 85.204 and Occupation Code Section 151.002(a)(8).

An entire paper could be written on the subject of the peer review privilege. Unfortunately, this is not that paper. The following is a brief overview of the issues

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[99] Tex. R. Evid. 510 (d)(1).
[100] Tex. R. Evid. 510 (d)(2).
[101] Tex. R. Evid. 510 (d)(3).
[102] Tex. R. Evid. 510 (d)(4); *Dudley v. State*, 730 S.W.2d 51, 54 (Tex. App. – Houston [14th Dist.] 1987, no writ).
[103] *M.A.W. v. Hall*, 921 S.W.2d 911, 913 (Tex. App. – Houston [14th Dist.] 1996, orig. proceeding)
[104] Tex. R. Evid. 509 (e)(7); See also Health & Safety Code Section 242.002 (10).

involved in asserting and overcoming the privilege. Those wishing for more information should review the following Texas Supreme Court cases: *In re University of Tex. Health Ctr.*, 33 S.W.3d 822 (Tex. 2000); *Brownwood Reg'l Hosp. v. 11th Ct. of Appeals* Bro, 927 S.W.2d 24 (Tex. 1996); *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12 (Tex. 1996); and *Memorial Hosp. v. McCown*, 927 S.W.2d 1 (Tex. 1996).

ASSERTING PEER REVIEW PRIVILEGE

To assert the privilege, the party must demonstrate that the requested records were created, received, maintained or developed by a peer review committee. The documents are not subject to discovery by a patient with a suit against the doctor or by the doctor in a suit against a hospital.[105] Similar privileges apply for nurses. See the Nurse Practice Act, Occupations Code Section 301. 417.

WHAT IS NOT COVERED BY THE PRIVILEGE

Items subject to the peer review privilege may be discoverable and admissible if they are required to be disclosed by law. Disclosure is required for the following:

- Reports to or from licensing boards. Occ. Code Section 160.002
- Reports to another protected review committee. Id. Section 167.007(c)
- Civil rights actions against the peer review committee. Id. Section 160.007(b).
- Disclosure of action stemming from the peer review committee's actions to the doctor involved. Id. Section 160.007 (e)
- Disclosure to law enforcement officers conducting criminal investigations. Id. Section 160.007 (g)
- Where the privilege is expressly waived. Id. Section 160.007 (e)

RECENT CASES INVOLVING PEER REVIEW PRIVILEGE

In re Ching, 32 S.W.3d 306 (Tex.App. – Amarillo 2000, orig. proceeding) This case seems to cast doubt on whether the Occupation Code's provisions requiring disclosure in anticompetitive and civil rights action still exists. The court required some preliminary findings concerning the relevance of the peer review materials involved in the case. The court review was designed to prevent fishing expeditions and possible abuses of the privilege.

Wheeler v. Methodist Hosp., 2000 WL 1877658, 17 IER Cases 235 (Tex.App. – Houston [1st Dist.] 2000) (Note: This opinion has not been released for publication) Physician sued hospital for defamation in connection with hospital's report to National Practitioner Data Bank (NPDB) stating that physician had been summarily suspended for failing to adhere to terms of a practice improvement plan. The doctor sought to obtain records concerning a medical peer review of his actions. The court held that the doctor was entitled to discover documents concerning the actions the committee took against

[105] *Brownwood*, supra. at 27; *Irving Healthcare*, supra at 16-17.

him and documents that had either been shared, or originated from, a source outside of the committee. The privilege did not attach to documents from outside sources merely because they were submitted to the committee.

Stephan v. Baylor Medical Center at Garland, 20 S.W.3d 880 (Tex.App. – Dallas 2000, orig. proceeding) The case involved a physician claiming intentional infliction of emotional distress based on adverse action report. The physician sought discovery of the hospital's peer review and credentialing process to demonstrate that there was no basis for statement that he was incompetent and negligent. The court denied the request and held that the peer review's report held no bearing on the truth or falsity of the accusations.

In re Osteopathic Medical Center of Texas, 16 S.W.3d 881 (Tex.App. – Fort Worth 2000, no writ) This was a premises liability case. The plaintiff fell while on the hospital premises and sought discovery of security reports generated about the incident. The hospital asserted the peer review privilege and provided an affidavit from its chairman claiming that the documents were subject to the privilege and submitted to a peer review committee. The Court agreed despite the fact that the report was not created by a doctor, was part of the hospital's regularly conducted business and that there was no statutory requirement that the documents be submitted to a peer review committee. The court seemed to focus on the fact that the hospital chairman's affidavit created the presumption that the documents were subject to the privilege and that the plaintiff did nothing to counter this assertion.

In re WHMC, 996 S.W.2d 409 (Tex.App. – Houston [14th Dist.] 1999 no writ). This case held that the hospital committee privilege does not apply to documents gratuitously submitted to a committee or created without committee impetus and purpose. However, where the hospital presented a nurse's affidavit that tracked the required language to assert the privilege, the burden shifted to the party seeking the documents to provide evidence to overcome the presumption that the privilege applies. It remains to be seen what evidence could exist to challenge the assertions that the privilege applies.

In re Pack, 996 S.W.2d 4 (Tex.App. – Fort Worth 1999, no writ) This case sought to put Texas Department of Human Service survey results of a nursing home inspection under the peer review privilege. The nursing home operator argued that the records were submitted to the home's quality assurance committees and should be privileged. However, the court held that because the information is available from another source, i.e. TDHS, simply submitting the information to the peer review committee does not create a privilege.

MISCELLANEOUS PRIVILEGES

POLITICAL VOTE

No one can be forced to reveal how they voted in a political election unless the vote was cast illegally. Tex. R. Evid. 506. If the vote was cast illegally, the person is not considered to meet the definition of a voter for any purpose.[106]

SOCIAL SECURITY INFORMATION

Social Security information may be subject to a privilege.[107] Any information collected by the Secretary of Health and Human Services or the Secretary of Labor may be covered by the statute. However, the statute is silent on how the privilege may be asserted and who potentially is covered by it.[108]

ENVIRONMENTAL AUDIT PRIVILEGE

There is a privilege that protects disclosure of the results of environmental audits conducted at real property facilities and operations in Texas.[109] The Environmental, Health, & Safety Audit Privilege Act grants the privilege to the owner or operator of the land subject to the audit. The owner and operator are the only entities that can assert the privilege.

LEGISLATIVE PRIVILEGE

A state legislative representative cannot be forced to testify about their legislative activities. [110]

ASSERTING PRIVILEGES UNDER THE NEW RULES

- don't obscure privileges with numerous unfounded objections
- withhold privileged evidence

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[106] *Simmons v. Jones*, 838 S.W.2d 298, 300 (Tex. App. – El Paso 1992, no writ)
[107] See 42 U.S.C. Section 1306(a).
[108] *TEIA v. Jackson*, 719 S.W.2d 245, 247 (Tex. App. – El Paso 1986, writ ref'd n.r.e.).
[109] See TRCS art 4447cc Section 5.
[110] *In re Perry*, 60 S.W.3d 857 (Tex. 2001) (A group of state residents filed suit challenging the senatorial and representative redistricting plans adopted by the Legislative Redistricting Board (LRB) as unconstitutional. The residents sought to depose the Governor and former Secretary of State regarding the LRB's consideration and formulation of the plans. The Supreme Court held that legislative immunity applied to the activities of the LRB's members and their aides in developing the redistricting plan, and such immunity encompassed evidentiary and testimony privilege, precluding compulsory disclosure in discovery.); *State v. Sims*, 871 S.W.2d 259 (Tex.App.-Amarillo 1994)(Texas has not adopted federal rule that, once public official has raised defense of official immunity, no discovery may be had of that official until trial court has made threshold determination that right or rights alleged to have been violated were clearly established.)

- submit support for each required element of privilege

- prepare privilege log

- "snap-back" inadvertently produced evidence

A completely new procedure for asserting claims of privilege was adopted when the rules of procedure were changed in 1999. Today, you cannot simply object to a discovery request that seeks potentially privileged information. TRCP 193.2(f). Instead, parties must "assert" the privilege and follow the new guidelines for preserving the privilege. TRCP. 193.3 A party asserting a privilege must:

(1) ***Withhold the privilege evidence*** **–** A party should provide as much responsive discovery as possible and withhold only that evidence subject to a privilege. Making too many objections and failing to produce anything responsive may waive the privilege.[111]

(2) ***Serve withholding statement*** – A party asserting a privilege must provide the opponent with a statement in response to the discovery request that certain items are being withheld. The statement can be filed separately from the formal discovery response. The statement must (1) identify that information responsive to the request was withheld, (2) identify the request to which the information relates, and (3) identify the privilege asserted.[112]

The party seeking to prove the privileged status of a communication has the burden of producing evidence on each element of the privilege.[113] The mere listing of a specific privilege in a response or a privilege log does not prove that privilege; proof of the facts that justify the claim of privilege is necessary.[114]

CHALLENGING ASSERTION OF PRIVILEGE

A party seeking privilege evidence should request a privilege log. Under the rules, the withholding party is required to produce the privilege log within 15 days of the request for it.[115] The log should contain a specific privilege for each withheld item and a description of the information or material being withheld.[116]

[111] TRCP 193.3(a)
[112] TRCP 193.3(a); *In re Monsanto*, 998 S.W.2d 917, 924 (Tex. App. – Waco 1999, orig. proceeding).
[113] *Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex. 1985).
[114] TRCP 193.4(a)
[115] TRCP 193.3(b)
[116] TRCP 193.3(b)(1)

SNAP-BACK PROVISION

A party may assert a privilege on evidence that is inadvertently produced during discovery.[117] This rule was designed to reduce costs and risks associated with responding to large document discovery requests. It allows the party responding to discovery to withdraw evidence subject to a privilege. To claim the privilege, the party must (1) serve an amended withholding statement within 10 days of learning of the inadvertent production of privileged evidence, (2) identify the information erroneously produced, (3) identify the privilege being asserted, and (4) request that all copies of the privileged evidence be returned.[118] Either party may request a hearing on the asserted privileges. [119] If neither party requests a hearing, the party requesting the discovery is presumed to have waived the discovery request.[120] If a hearing is set, the burden to provide the court with evidence to support the privilege request is on the party asserting the claim.[121] The party may rely on affidavits if they are served at least seven days before the hearing.[122] If the party intends to have live testimony, it must procure a court reporter, have the witness sworn and offer exhibits during the hearing with all the formalities of trial.[123] Where the documents themselves are required to prove the privilege, the party should provide a copy *in camera*. [124]

[117] TRCP 193.3 (d)
[118] TRCP 193.3 (d)
[119] TRCP 176.6 (d), (e), 192.6, 193.4
[120] TRCP 193.4 (b)
[121] TRCP 193.4(a)
[122] TRCP 193.4(a)
[123] Id.
[124] id.