

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

1992

Time Present, Time Past, Time Future: Understanding the Scope of Discovery in Texas Courts

William V. Dorsaneo III

Southern Methodist University, Dedman School of Law

Elizabeth Thornburg

Southern Methodist University, Dedman School of Law

Recommended Citation

William V. Dorsaneo, III & Elizabeth G. Thornburg, Time Present, Time Past, Time Future: Understanding the Scope of Discovery in Texas Courts, 29 Hous. L. Rev. 245 (1992)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

HOUSTON LAW REVIEW

TIME PRESENT, TIME PAST, TIME FUTURE: UNDERSTANDING THE SCOPE OF DISCOVERY IN TEXAS COURTS

William V. Dorsaneo III
*Elizabeth G. Thornburg***

Table of Contents

I. INTRODUCTION	246
II. DISCOVERY RELEVANCE	248
A. <i>Relevance Defined</i>	248
B. <i>Recent Relevance Decisions</i>	250
1. <i>Similarity problems</i>	250
2. <i>Net worth</i>	251
3. <i>Other financial information</i>	253
4. <i>Impeachment</i>	254
5. <i>Physical and mental examinations</i>	257
C. <i>The Balancing Process Revisited</i>	261
III. RULE 166B EXEMPTIONS	262
A. <i>Overview</i>	262
B. <i>Attorney's Work Product</i>	264
1. <i>What is work product?</i>	264
2. <i>What are the time parameters of work product?</i>	268
3. <i>Whose work can be work product?</i>	273
4. <i>Summary</i>	274

* Professor of Law, Southern Methodist University. B.A., University of Pennsylvania, 1967; J.D., University of Texas, 1970.

** Assistant Professor of Law, Southern Methodist University. B.A., College of William & Mary, 1976; J.D., Southern Methodist University, 1979.

C. Consulting Experts	275
D. Party Communications	278
E. Witness Statements	282
IV. TEXAS RULES OF CIVIL EVIDENCE PRIVILEGES	284
A. Attorney-Client Privilege	284
B. Physician-Patient Privilege and Confidentiality of Mental Health Information	288
C. Other Privileges under the Texas Rules of Civil Evidence	291
V. NON-RULE PRIVILEGES	292
A. Hospital Committee and Other Medical Records .	292
B. Other Privileges	295
1. Lobbying activities	295
2. Reporter's privilege	296
3. Non-disclosure of records of financial institutions	297
4. Law enforcement privilege	298
VI. CONCLUSION	298

*Time present and time past
Are both perhaps present in time future,
And time future contained in time past.*
T.S. Eliot, *Four Quartets*

I. INTRODUCTION

Texas discovery practice has changed dramatically in our lifetimes. This change was not instantaneous. During the last fifteen to twenty years, changes in philosophy and practice have been building momentum—a momentum driven by the desire for a broadened scope of discovery, for a system in which the goal of discovery is to provide all parties with full knowledge of the facts and issues prior to trial.¹ The most crucial and publicly visible turning point, however, came with the 1984 amendments to the discovery rules. After 1984, the momentum continued in case law and additional rule changes, all of which reinforced the philosophy of broad discovery. Recently, however, the Texas Supreme Court has hinted that the

1. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990, orig. proceeding) (citing *Gutierrez v. Dallas Indep. Sch. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987)).

tide may be turning. Its recent opinions are beginning to retreat to a point at which parties may successfully protect relevant information from their opponents.²

A retreat would be ill-considered. While Texas discovery practice had been structured to severely limit the exchange of information, changes in the last decade allowed the discovery process to come closer to fulfilling its promise of putting "unequal opponents on a more equal footing."³ Changes in discovery practice broadened the scope of relevance and narrowed the exemptions from discovery, helping those who, absent discovery, lack information crucial to their cases.⁴ Such changes do not undermine the adversary system but help to correct one of its inherent flaws—the unequal distribution of information relevant to the dispute—by requiring a sharing of all such relevant information prior to trial.⁵

The current state of the Texas discovery rules, both their advances and their retreats, can be better understood in historical context. Knowing the background of the rules and the past trends in the case law helps in understanding the current status of the rules and may help in predicting the future direction of the discovery rules. This article discusses the current scope of discovery in Texas, with an eye to where it came from and where it may be going. More specifically, Part I examines the scope of discovery relevance, with particular emphasis on problematic recurring relevance issues; Part II explores the discovery exemptions set out in Rule 166b of the Texas Rules of Civil Procedure; Part III discusses the privileges established by the Texas Rules of Civil Evidence; and Part IV looks at various non-rule privileges that have been asserted as a bar to discovery. We expect that this article will serve as a useful tool for lawyers and judges trying to cope with day-to-day discovery issues and will also provide an analytical framework for examining new discovery issues as they arise.

2. See, e.g., *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 751-52 (Tex. 1991, orig. proceeding) (holding that work product protection is perpetual).

3. Arthur B. LaFrance, *Work-Product Discovery: A Critique*, 68 DICK. L. REV. 351, 351 (1964).

4. See Alex W. Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 TEX. L. REV. 781, 785-86 (1992) (asserting that full disclosure prevents parties from hiding facts and that protection from discovery is quite limited).

5. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 329 (1989) (stating that discovery is an attempt to "overcome the . . . inequality of information—that undermines adversarial fact-finding").

II. DISCOVERY RELEVANCE

A. *Relevance Defined*

Any discussion of discovery relevance must grow from an understanding of trial relevance, and both the scope of discovery and the scope of trial relevance have broadened considerably in recent years. Relevant evidence in the trial sense is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁶ This broad standard of relevance must be kept in mind when considering whether information is relevant for purposes of discovery.

Rule 166b of the Texas Rules of Civil Procedure sets out the parameters of the scope of discovery relevance.⁷ Litigants generally may discover "any matter which is relevant to the subject matter in the pending action whether it relates to the claim or defense of any other party."⁸ Discovery relevance is even broader than trial relevance. Information is not exempt from discovery because it will be inadmissible at trial.⁹ Rather, non-privileged information is discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence."¹⁰ This standard of discoverability encompasses any information that might conceivably be material to a claim which has been or might be pled in the lawsuit.

This broad definition of discovery relevance is limited, however, by the requirement that the information sought be "reasonably" calculated to lead to admissible evidence.¹¹ In applying this reasonableness test, courts have balanced the probative value of the information sought and the burden upon the party seeking discovery against the burden on the party from whom discovery is sought.¹² The discovering party's need

6. TEX. R. CIV. EVID. 401. Further, the Texas Rules of Civil Evidence provide generally that all relevant evidence is admissible unless some specific provision makes it inadmissible or unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or delay. *See id.* 402-403.

7. *See* TEX. R. CIV. P. 166b. This rule is modeled in part on the federal rule's scope of discovery. *See* FED. R. CIV. P. 26.

8. TEX. R. CIV. P. 166b(2)(a).

9. *Id.*

10. *Id.*

11. *Id.*

12. *E.g.*, *Independent Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 803 (Tex. App.—Fort Worth 1987, orig. proceeding [leave denied]); *Gordon v. Blackmon*, 675 S.W.2d 790, 793 (Tex. App.—Corpus Christi 1984, orig. proceeding). Note that large portions of the court's opinion in *Gordon* are lifted verbatim from

for the information is usually given great weight, and the courts repeatedly emphasize that discovery is favored.¹³

The appellate courts generally give trial courts greater leeway in relevance decisions than in ruling on privilege-based objections to discovery. For example, in *C-Tran Development Corp. v. Chambers*,¹⁴ the plaintiff sued various defendants for breaching a contract to pay a ten percent commission on goods sold by the defendants to purchasers in China.¹⁵ The trial court ordered discovery of all of the plaintiff's contractual or potential contractual relationships with suppliers or manufacturers of oil field equipment during 1984 and 1985.¹⁶ The plaintiff challenged this discovery order in the mandamus proceeding, but the court of appeals denied its motion for leave to file the petition.¹⁷ The court stated:

Despite the apparent relaxation of the "abuse of discretion" standard in mandamus proceedings, we feel we should not substitute our judgment for that of a trial court in a ruling on relevancy. We are especially hesitant to hold a trial judge has abused his discretion when the standards governing his decisions are not clearly defined.¹⁸

the *dissenting* opinion in *Jampole v. Touchy*, 673 S.W.2d 569, 578 (Tex. 1984, orig. proceeding) (Barrow, J., dissenting).

13. See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343, 347-48 (Tex. 1987, orig. proceeding) (holding that a blanket protective order prohibiting discovery sharing was an abuse of discretion and noting that modern discovery rules were designed to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent") (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)); *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984, orig. proceeding) (allowing discovery of all impact tests for 1967-79 on a variety of General Motors passenger cars in a case involving a 1976 Vega hatchback and explaining that "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed"); see also *General Motors Corp. v. Lawrence*, 651 S.W.2d 732, 733-34 (Tex. 1983, orig. proceeding) (allowing discovery of test results pertaining to in-cab gas tanks with protruding cab filler necks from 1949-72, regardless of direction of impact, in a suit concerning a 1966 Chevrolet chassis cab truck).

14. 772 S.W.2d 294 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding).

15. *Id.* at 295.

16. *Id.*

17. *Id.* at 296.

18. *Id.* (citations omitted); see also *Jeanne v. Millard*, No. 01-88-00606-CV, 1988 Tex. App. LEXIS 1817, at *4-*5 (Tex. App.—Houston [1st Dist.], July 22, 1988, orig. proceeding) (not designated for publication) (stating that "[i]n light of . . . the amorphous notions of relevancy and materiality we cannot conclude that the respondent clearly abused his discretion"). But see *General Motors Corp. v. Lawrence*, 651 S.W.2d 732, 734 (Tex. 1983, orig. proceeding) (stating that "[w]e hold Judge Lawrence's discovery order was overly broad . . . Surely [such] information . . . is not relevant to this action").

B. Recent Relevance Decisions

Within this framework of deference to the trial court and balancing of materiality and burden, Texas courts have decided a number of discovery relevance issues in the last few years. The most litigated areas are issues of similarity of the discovery sought to the plaintiff's claims, discovery regarding a defendant's net worth, discovery of information sought for purposes of impeachment, and a litigant's ability to compel someone to submit to a court-ordered physical or mental examination.

1. *Similarity problems.* Lawsuits, by their very nature, concern a specific claim involving a specific set of facts. Litigants seeking discovery, however, are often interested in learning about related incidents, products, or claims. Accordingly, courts have been faced with relevance controversies: how factually similar, or how close in time, does the discovery sought need to be to the plaintiff's claim in order to be discoverable?

In product liability cases, for example, courts have rejected attempts to limit discovery to the precise product in issue in the case.¹⁹ If the information sought pertains to conditions similar to those at issue in the case, the information is relevant and discoverable.²⁰ If the manufacturer used other designs which were safer than the one used in the product at issue, information concerning those designs is discoverable because it is relevant to show feasible alternatives.²¹ Similarly, in a

19. This trend may have begun with *General Motors Corp. v. Lawrence*, which, although it limited the discovery that had been allowed by the literal language of the trial court's order, permitted discovery of crash test results from 1949 through 1972 in a suit concerning a 1966 truck and required production of tests concerning different types of crashes from the crash that injured the plaintiff. 651 S.W.2d at 733-34.

20. Cf. *McInnes v. Yamaha Motor Corp.*, 659 S.W.2d 704, 710 (Tex. App.—Corpus Christi 1983) (holding that the trial court should have admitted evidence of complaints to the defendant concerning wheel wobble regardless of the speed at which the wobble occurred in the other incidents because the other incidents occurred under the same or similar circumstances), *aff'd on other grounds*, 673 S.W.2d 185 (Tex. 1984), *cert. denied*, 469 U.S. 1107 (1985); *Rush v. Bucyrus-Erie Co.*, 646 S.W.2d 298, 302 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (holding that the trial court erred in excluding evidence of two previous fatal accidents because the accidents occurred under similar circumstances); *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 855 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.) (finding no error in the court's decision that testimony regarding the same product model was admissible).

21. See *Jampole v. Touchy*, 673 S.W.2d 569, 573-74 (Tex. 1984, orig. proceeding) (noting that "[t]he automobiles need not be identical in order for tests on one to be relevant in determining whether the design of another is defective" and that "wheth-

breach of warranty/DTPA case, a court refused to limit discovery to windows identical to the one in issue or to the plaintiff's own warranty, instead allowing discovery of past warranty claims and complaints concerning several types of glass units manufactured by the defendants.²²

Additionally, pleading ingenuity can sometimes increase the scope of discovery relevance. For example, in a bad-faith insurance case, the defendant insurance company opposed the plaintiff's attempt to obtain discovery of its files showing other insurance claims that had been denied, arguing that only the plaintiff's individual file was relevant.²³ In a pure breach of contract case, the defendant's objection would probably have been sustained. However, given the plaintiff's claim of an improper pattern of claim denials, the court allowed discovery of all the company's files in which denial was predicated on the same exclusion.²⁴

2. *Net worth.* In 1988, the Texas Supreme Court decided that a defendant's net worth is discoverable in a suit involving the possible recovery of punitive damages.²⁵ Because one purpose of punitive damages is to punish the defendant, the defendant's ability to pay damages is relevant to the proper amount of damages to be assessed.²⁶ The court held, therefore, that the plaintiff should have been allowed discovery of "financial statements and other documents bearing on the defendant's net worth."²⁷ Further, the court rejected the requirement that the plaintiff do more than plead a cause of action that potentially entitled him to punitive damages before net worth discovery could be obtained.²⁸ In response to an argument that plaintiffs may make frivolous punitive damage claims to obtain net worth discovery, the court noted that the trial judge retained the authority "to consider on motion whether a party's

er a safer fuel system design suitable for one vehicle is adaptable to another is a question of feasibility to be decided by the trier of fact, not a question to be resolved in ruling on discovery requests"); *see also* Cantrell v. Hennessy Indus., Inc., 829 S.W.2d 875, 877 (Tex. App.—Tyler 1992, n.w.h.) (finding the denial of discovery regarding safety devices on different tire-changing machines to be reversible error). Refer to notes 124-30 *infra* and accompanying text.

22. Independent Insulating Glass/Southwest, Inc. v. Street, 722 S.W.2d 798, 803-04 (Tex. App.—Fort Worth 1987, orig. proceeding [leave denied]).

23. Aztec Life Ins. Co. v. Dellana, 667 S.W.2d 911, 915 (Tex. App.—Austin 1984, orig. proceeding).

24. *Id.*

25. *See* Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988, orig. proceeding).

26. *Id.* at 471-73.

27. *Id.* at 471.

28. *Id.* at 473.

discovery request involves unnecessary harassment or invasion of personal or property rights."²⁹

Since *Lunsford*, several cases have dealt with the discoverability of net worth information. In *Miller v. O'Neill*,³⁰ the court of appeals rejected the trial court's attempt to delay the discovery of net worth data until after a finding of liability in a bifurcated trial.³¹ The court likewise found no evidence to support a claim of harassment or violation of privacy rights.³² Finally, the court rejected an overbreadth claim and allowed discovery of income tax returns and financial statements, including net worth statements of the defendants and any partnerships and professional corporations in which they had an interest for the years 1977 to 1987.³³ Similarly, in *Hanna v. Meurer*,³⁴ the court of appeals rejected an argument that discovery regarding financial information was a per se invasion of privacy rights.³⁵ Thus, the court allowed a deposition to be taken to discover information regarding the defendants' net worth.³⁶

If the pleadings do not support a claim for punitive damages, however, net worth is not discoverable. In *Al Parker Buick Co. v. Touchy*,³⁷ the court of appeals, while recognizing that information regarding net worth is discoverable in cases in which punitive or exemplary damages may be awarded, granted mandamus relief from the trial court's order compelling production of financial statements showing the net worth of the defendant's employer.³⁸ The plaintiff's petition, although sufficient for the recovery of compensatory damages under the theory of respondeat superior, contained merely a conclusory request for punitive damages and failed to allege facts that would establish the employer's liability for punitive damages.³⁹ Because the plaintiff's petition was legally insufficient to support an award of exemplary damages, the court explained that the requested discovery had no probative value under the pleadings

29. *Id.*

30. 775 S.W.2d 56 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).

31. *Id.* at 58.

32. *Id.* at 59.

33. *Id.*

34. 769 S.W.2d 680 (Tex. App.—Austin 1989, orig. proceeding) (en banc) (per curiam).

35. *Id.* at 681.

36. *Id.*

37. 788 S.W.2d 129 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

38. *Id.* at 130.

39. *Id.*

and should have been denied by the trial court.⁴⁰ The court emphasized that a party is not required to establish a prima facie case against the opposing party before becoming entitled to pretrial discovery of that party's net worth, but "in the absence of pleadings that sufficiently allege that the relator is liable for exemplary damages, the relator's net worth is not a 'relevant matter.'"⁴¹

In contrast, in *Delgado v. Kitzman*,⁴² a personal injury case arising out of an automobile collision, the plaintiff's pleading alleging that the defendant was "consciously indifferent" to the safety of others was held to be sufficient to show the defendant's potential liability for punitive damages.⁴³ The trial court's order protecting the defendant from having to disclose any financial information was held to be an abuse of discretion in the absence of evidence substantiating the defendant's objection to such discovery.⁴⁴

3. *Other financial information.* The Texas Supreme Court expressly left open in *Lunsford* the question of exactly what type of financial evidence would be discoverable.⁴⁵ Commentators have suggested that general financial information, sales figures, and even liability insurance may be admissible and are almost certainly discoverable.⁴⁶

The Texas Supreme Court, however, has now made it clear that "net worth" discovery is not as broad as the commentators have suggested. In *Sears, Roebuck & Co. v. Ramirez*,⁴⁷ for example, the Texas Supreme Court held that the trial court had abused its discretion in ordering production of Sears' tax returns.⁴⁸ Sears had produced annual reports reflecting its net worth and introduced an affidavit claiming that the annual reports were accurate.⁴⁹ Further, Sears proffered evidence that it would take an employee two or three weeks to duplicate the requested five years' worth of tax returns.⁵⁰ The plaintiff did

40. *Id.* at 131.

41. *Id.*

42. 793 S.W.2d 332 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

43. *See id.* at 333.

44. *Id.* at 334.

45. *See Lunsford v. Morris*, 746 S.W.2d 471, 473 n.4 (Tex. 1988, orig. proceeding).

46. *See, e.g., Gerald R. Powell & Cynthia A. Leiferman, Results Most Embarrassing: Discovery and Admissibility of Net Worth of the Defendant*, 40 BAYLOR L. REV. 527, 529-34 (1988).

47. 822 S.W.2d 558 (Tex. 1992, orig. proceeding) (per curiam).

48. *Id.* at 207.

49. *Id.*

50. *Id.*

not introduce evidence to challenge these assertions by Sears.⁵¹ Under these facts, the court found that Sears should not have been ordered to produce the returns.⁵² Thus, the court allowed Sears to avoid producing admittedly relevant information because it was "sensitive," because production would be somewhat burdensome, and because the substance of the information had been provided in a different and demonstrably reliable form.⁵³

In *Chamberlain v. Cherry*,⁵⁴ one court of appeals went even further. Because the plaintiff had not demonstrated that financial statements reflecting the defendant's net worth were unavailable, the appellate court upheld the trial court's denial of discovery of income tax returns.⁵⁵ This result turns the proper burdens upside down and should not be followed by other courts.

4. *Impeachment.* Some courts seem particularly hesitant to allow discovery when the information sought relates to the impeachment of a potential witness. Twenty-two years ago, in *Russell v. Young*,⁵⁶ the Texas Supreme Court disallowed discovery when "the potential witness is not a party to the lawsuit and [his or her] credibility has not been put in issue and where the records do not relate directly to the subject matter of the pending suit and are sought to be discovered for the sole purpose of impeachment of such witness by showing his [or her] bias and prejudice."⁵⁷ Unfortunately, the court muddled its analysis by noting that until a person is called as a witness, there is no one to impeach; hence, the desired impeachment evidence was not relevant.⁵⁸ Later, in *Ex parte Shepperd*,⁵⁹ the court distinguished *Russell*, holding in a condemnation case that appraisal reports prepared by the government's appraisal witnesses, relating to land that was not the subject of the condemnation proceedings in which discovery was sought, were discoverable.⁶⁰ Likewise, two courts of appeals correctly followed

51. *Id.*

52. *Id.*

53. *Id.*

54. 818 S.W.2d 201 (Tex. App.—Amarillo 1991, orig. proceeding).

55. *Id.* at 207.

56. 452 S.W.2d 434 (Tex. 1970, orig. proceeding).

57. *Id.* at 435.

58. *Id.* at 437.

59. 513 S.W.2d 813 (Tex. 1974).

60. See *id.* at 816 (noting that *Russell* involved an attempt at "wholesale discovery of the private records of a non-party" and that the records were sought only to show bias).

Shepperd rather than *Russell*, allowing discovery of information for purposes of impeaching expert witnesses.⁶¹

Not all courts, however, limited the scope of the *Russell* impeachment exception. In *W.W. Rodgers & Sons Produce Co. v. Johnson*,⁶² the court of appeals applied *Russell* and concluded that a request for production of "all statements, affidavits, and summaries of interviews of witnesses to the accident and any addendum, report, memo or summary" was properly refused because the documents were sought solely for impeachment purposes.⁶³ This approach reflects an incorrect understanding of *Russell* but, the court's decision influenced trial courts within its jurisdiction.⁶⁴

Even if the approach the court took in *Rogers and Sons* were correct, information not sought *solely* for impeachment should be discoverable. In *Kupor v. Solito*,⁶⁵ the estate of Ruby Lillian Durham and her daughters brought a wrongful death suit against the defendant.⁶⁶ Durham was a patient at the defendant's dialysis center.⁶⁷ One day, "as she was receiving her dialysis treatment, the intravenous needle which returned the filtered blood to her body came out of her arm. She was unattended for a period of twenty-five minutes . . . [while t]he dialysis machine continued to pump her blood onto the floor and walls."⁶⁸ When the attendants returned, she was dead.⁶⁹ During the defendant's deposition, the plaintiffs tried to discover certain information communicated to the defendant by the attendants the day after Durham died.⁷⁰ The defendant objected to these questions, arguing that the information was sought for purposes of impeachment because the plaintiffs had admitted during the deposition that they might use the information for impeachment purposes.⁷¹ The court rejected this argument,

61. See *State ex rel. Department of Highways & Pub. Transp. v. Bentley*, 752 S.W.2d 602, 606 (Tex. App.—Tyler 1988, orig. proceeding); *State ex rel. Department of Highways & Pub. Transp. v. Sullivan*, 722 S.W.2d 743, 744 (Tex. App.—Houston [14th Dist.] 1986, orig. proceeding).

62. 673 S.W.2d 291 (Tex. App.—Dallas 1984, orig. proceeding).

63. *Id.* at 294-95.

64. For example, the trial judge in *Walker v. Packer*, who sits in Dallas, denied discovery of evidence sought for impeachment believing that she was required to do so by *Russell*. 827 S.W.2d 833, 838 (Tex. 1992, orig. proceeding).

65. 687 S.W.2d 441 (Tex. App.—Houston [14th Dist.] 1985, orig. proceeding).

66. *Id.* at 442.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 443.

holding that when information is sought for other purposes in addition to impeachment, the information is discoverable.⁷²

The Texas Supreme Court has recently attempted to clarify the meaning of *Russell*. In *Walker v. Packer*,⁷³ a medical malpractice case, the court characterized *Russell* as dealing with "wholesale discovery of financial records of a potential medical expert witness who was not a party to the lawsuit."⁷⁴ The plaintiffs in *Walker* requested documents to impeach one of the defendant's expert witnesses, a faculty member in obstetrics at the University of Texas Health Science Center at Dallas (UTHSC).⁷⁵ The doctor "testified at his deposition that expert witness fees earned by obstetrics faculty members are deposited into a 'fund,'" and "that obstetrics faculty members [are] paid 'indirectly from this fund.'"⁷⁶ He further testified "that he was unaware of any obstetrics department policy restricting faculty members from testifying for plaintiffs in medical malpractice cases."⁷⁷ Later, in an unrelated lawsuit, another obstetrics faculty member testified that the department's official written policy "requires a doctor to obtain authorization from other faculty members before testifying for any plaintiff in a medical malpractice suit."⁷⁸ Based on this information, the plaintiffs in *Walker* sought to depose the manager of the fund and to obtain documents reflecting the policy.⁷⁹

The trial judge believed that the information "'would be relevant to this cause of action'" but denied discovery based on her understanding of *Russell*.⁸⁰ The Texas Supreme Court, however, distinguished the situation in *Walker* on the basis that the Walkers sought a narrow and specific kind of information and had shown a specific need for the information while the discovery disapproved in *Russell* was impermissibly "global."⁸¹ It may be that the supreme court merely applied the usual relevance rules to impeachment evidence: the trial court should balance the importance of the information sought against the burden of producing the information.⁸² This standard would be an appropriate one. However, *Walker* cannot

72. *Id.*

73. 827 S.W.2d 833 (Tex. 1991, orig. proceeding).

74. *Id.* at 838.

75. *Id.* at 837.

76. *Id.*

77. *Id.*

78. *Id.* at 838.

79. *Id.*

80. *Id.*

81. *Id.*

82. Refer to notes 11-12 *supra* and accompanying text.

be seen as a ringing endorsement of the discoverability of impeachment evidence. First, the court distinguished rather than overruled *Russell*. Second, the court suggested that if the doctor changes his deposition testimony and admits the existence and details of the UTHSC policy ("unequivocally admits [his] bias or interest"), the information requested would no longer be relevant either to show bias or to show that his original deposition testimony was untrue.⁸³

5. *Physical and mental examinations.* In most types of discovery, information is discoverable if it is "relevant." When the party seeks to compel a physical or mental examination under Rule 167a of the Texas Rules of Civil Procedure, however, the party also must show that the party's condition is "in controversy" and that there is "good cause" to allow the examination.⁸⁴ Texas courts have generally been much more hesitant to find good cause than they have been to find relevance, in part because of the history of the physical and mental examination provisions in the Texas discovery rules. When the Texas Supreme Court first adopted the rules of civil procedure, the court expressly rejected compelled examinations as too severe an intrusion on personal privacy.⁸⁵ Although these provisions were incorporated into the rules in 1973, Texas courts have historically viewed the provisions with suspicion and accordingly interpreted them fairly strictly.⁸⁶

In 1988, the Texas Supreme Court decided *Coates v. Whittington*,⁸⁷ a case interpreting Rule 167a. In the underlying lawsuit, plaintiff Myrna Coates sued Drackett Products when she was injured while using Drackett's oven cleaner.⁸⁸ Coates sought damages for both physical injuries and mental anguish.⁸⁹ Drackett moved for an order compelling Coates to submit to a mental examination based on Drackett's contention that Coates' mental anguish was a pre-existing condition and may have motivated her to injure herself with the oven clean-

83. See *Walker*, 827 S.W.2d at 839 nn.5-6 (quoting TEX. R. CIV. EVID. 613(b)).

84. TEX. R. CIV. P. 167a(a).

85. Documents on file with authors.

86. See, e.g., *C.E. Duke's Wrecker Serv., Inc. v. Oakley*, 526 S.W.2d 228, 231-32 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (asserting that Rule 167a(a) does not grant an absolute right and falls within the ambit of judicial discretion).

87. 758 S.W.2d 749 (Tex. 1988, orig. proceeding).

88. *Id.* at 750.

89. *Id.*

er.⁹⁰ The supreme court rejected Drackett's argument that a mental examination was proper.⁹¹

First, the court rejected Drackett's argument that by requesting damages for mental anguish Coates had put her mental condition "in controversy":

To permit Drackett to compel a mental examination because Mrs. Coates has claimed mental anguish damages would open the door to involuntary mental examinations in virtually every personal injury suit. Rule 167a was not intended to authorize sweeping probes into a plaintiff's psychological past simply because the plaintiff has been injured and seeks damages for mental anguish as a result of the injury. Plaintiffs should not be subjected to public revelations of the most personal aspects of their private lives just because they seek compensation for mental anguish associated with an injury.⁹²

Neither Coates' claim for mental anguish nor Drackett's contributory negligence claim placed Coates' mental state in controversy so as to justify a mental examination.⁹³

Second, the court determined that there was not "good cause" to order the examination.⁹⁴ The court explained that the requirement of good cause for a compulsory mental examination may be satisfied only when three elements are proved by the discovering party.⁹⁵ First, the examination must be "relevant to issues that are genuinely in controversy in the case," and the requested examination must be "likely to lead to . . . evidence of relevance to the case."⁹⁶ Second, the discovering party "must show a reasonable nexus between the condition in controversy and the examination sought."⁹⁷ The court found that Drackett had failed to make either of these relevance-

90. *Id.*

91. *Id.* at 752-53. The court also held that, because Rule 167a requires that a mental examination be conducted by a "physician," a psychologist may not conduct a compulsory mental examination under the rule. *Id.* at 751. As amended, effective September 1, 1990, Rule 167a changes this result by adding licensed psychologists to the list of persons authorized to conduct a court-ordered examination in non-family law cases when the party responding to the motion has identified a psychologist as an expert who will testify. TEX. R. CIV. P. 167a(a),(d)-(e). In addition, in *Moore v. Wood*, 809 S.W.2d 621 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding), the court held that a person could not be compelled, under Rule 167a, to submit to an examination by a "vocational rehabilitation specialist." *Id.* at 623-24.

92. *Coates*, 758 S.W.2d at 752.

93. *Id.*

94. *Id.* at 752-53.

95. *Id.* at 753.

96. *Id.*

97. *Id.*

based showings.⁹⁸ Third, the discovering party must show that it is not possible to obtain the desired information by any other less intrusive means.⁹⁹ Drackett likewise failed to meet this test.¹⁰⁰

The supreme court also explained that circumstances may exist under which a mental examination could be ordered. If, for example, "a plaintiff intends to use expert medical testimony to prove his or her alleged mental condition, that condition is placed in controversy and the defendant would [therefore] have good cause for an examination under Rule 167a."¹⁰¹

When fairness clearly requires an examination, courts have allowed it. In two cases decided after *Coates*, *Sherwood Lane Associates v. O'Neill*¹⁰² and *Exxon Corp. v. Starr*,¹⁰³ mandamus was granted to compel an independent examination by a psychiatrist of the defendants' choice on the grounds that the examination was permissible under *Coates*.¹⁰⁴ In *Sherwood Lane*, the underlying lawsuit involved a premises liability action arising from an alleged sexual assault in a vacant unit of an apartment complex. Two psychologists, designated by the plaintiff as expert witnesses, had treated the plaintiff and had admitted her to a psychiatric hospital.¹⁰⁵ In determining that the trial court's denial of an independent examination constituted an abuse of discretion, the court of appeals stated:

The minor has already been examined by her expert witnesses. Unless relators are allowed the requested relief, their expert's analysis will be limited to a review of the minor's records and the testimony of the minor's psychologists. Relators' expert would be precluded from examining matters not covered by the minor's psychologists' examinations and would be precluded from making his own observations. The trial court's action severely restricts relators' opportunity to discover facts that may contradict the opinions of the minor's expert witnesses. In turn, such restriction severely limits relators' ability to contest the minor's claim for mental injury damages.¹⁰⁶

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 782 S.W.2d 942 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

103. 790 S.W.2d 883 (Tex. App.—Tyler 1990, orig. proceeding).

104. *Id.* at 887; *Sherwood Lane*, 782 S.W.2d at 945.

105. *Sherwood Lane*, 782 S.W.2d at 943.

106. *Id.* at 945.

Similarly, in *Starr* the plaintiff alleged that as a result of an explosion caused by the negligence of the defendants, he had suffered both physical injuries and severe mental injury which required institutionalization.¹⁰⁷ The trial court denied the defendant's request for a compulsory psychiatric examination.¹⁰⁸ The court of appeals held that because the plaintiff's mental condition was "clearly in controversy" and that the defendant showed "good cause" for the examination, the defendant was entitled to have the plaintiff examined by a psychiatrist of his own choosing.¹⁰⁹ "To deny such a psychiatric examination presents precisely the dangers outlined by the . . . Court [in *Sherwood Lane*]; in effect it would be to deny them a fair trial."¹¹⁰

Shortly before the *Coates* decision, one court of appeals upheld an order subjecting a plaintiff claiming physical injuries to a court-ordered physical examination. In *May v. Lawrence*,¹¹¹ plaintiff Freeland May sued Lufkin Cresoting Company (LCC) for damages based on his physical injuries arising out of a vehicular accident involving May and an employee of LCC.¹¹² The court reasoned that by asserting physical injuries, May placed his condition in controversy and provided LCC with good cause for an examination to determine the existence and extent of the asserted injury.¹¹³

Two cases involving the drug testing of parents in child custody disputes further illustrate the availability of court-ordered examinations. In *Walsh v. Ferguson*,¹¹⁴ the court rejected such an order, finding that the wife's claims of drug use by her husband were not sufficient to show that the husband's mental or physical condition was in controversy or that good cause existed for the blood and urine tests.¹¹⁵ At the trial court hearing, the wife offered no evidence to support her claim that her husband used drugs.¹¹⁶ In *Monaghan v. Crawford*,¹¹⁷ however, because evidence was offered to support the claim of drug use, the court of appeals upheld the dismissal of an application to modify a child custody order because the

107. *Starr*, 790 S.W.2d at 884.

108. *Id.* at 886.

109. *Id.* at 887.

110. *Id.* at 888.

111. 751 S.W.2d 678 (Tex. App.—Tyler 1988, orig. proceeding).

112. *Id.* at 679.

113. *Id.* at 678-79 (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 119 (1964)).

114. 712 S.W.2d 885 (Tex. App.—Austin 1986, orig. proceeding).

115. *Id.* at 887.

116. *Id.*

117. 763 S.W.2d 955 (Tex. App.—San Antonio 1989, no writ).

mother filing the application refused to submit to court-ordered drug testing.¹¹⁸

C. *The Balancing Process Revisited*

Any decision that involves a balancing of interests is inherently a mushy one, and so for the most part, the question of discovery relevance defies any attempt to draw clear lines or to extrapolate from one case to the next. What is clear, however, is that relevance issues can be of crucial importance to the outcome of a case. A party denied discovery of significant information may be unable to prove a meritorious case while another party subjected to gigantic discovery burdens may give up on litigation because of its costs.

In weighing the burden of discovery, Texas courts seem to consider the parties' resources. Thus, in product liability cases against large corporate defendants, those defendants may be required to undertake significant amounts of work to comply with discovery requests. General Motors, for example, has been compelled to produce all impact tests from 1967 to 1979 on a variety of General Motors passenger cars in a case involving a 1976 Vega hatchback¹¹⁹ and to produce test results relating to in-cab gas tanks with protruding cab filler necks from 1949 to 1972 in a suit concerning a 1966 Chevrolet chassis cab truck.¹²⁰ On the other hand, individual litigants may not be required to shoulder such a significant burden. One court, for example, refused to order an ex-husband to produce business records relating to his income and the property he acquired during a period of two years following a divorce decree.¹²¹

This kind of comparative approach can further the purpose of open discovery. Commentators have noted that those parties with established power in society tend to appear in court as defendants.¹²² When a lawsuit begins, those defendants usually have the bulk of relevant information without the need to do formal discovery, while plaintiffs tend not to have such information. Unless the discovery process operates to equalize access

118. *Id.* at 957-58.

119. *Jampole v. Touchy*, 673 S.W.2d 569, 575 (Tex. 1984, orig. proceeding).

120. *General Motors Corp. v. Lawrence*, 651 S.W.2d 732, 733 (Tex. 1983, orig. proceeding).

121. *Gordon v. Blackmon*, 675 S.W.2d 790, 793-94 (Tex. App.—Corpus Christi 1984, orig. proceeding).

122. See, e.g., 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5422, at 674; Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1564 (1991).

to information, the result of any adversary trial process will be twisted by the lack of full information.¹²³

Consider, for example, a recent appellate case. In *Cantrell v. Hennessy Industries, Inc.*,¹²⁴ the plaintiff was left blind and permanently disfigured when an automobile tire exploded in his face while he was changing the tire on a machine manufactured by the Coats Company.¹²⁵ The plaintiff argued that Coats failed to equip the machine with a pressure-limiting device which would restrict the amount of air pressure to safe levels and that such a device was technically feasible.¹²⁶ The trial court, ruling on discovery objections by Coats, limited discovery to documents regarding the exact model of machine that injured the plaintiff and excluded discovery and evidence of other Coats tire-changing machines that had pressure-limiting devices.¹²⁷ Having successfully prevented discovery, Coats argued to the jury that the plaintiff had not proven that safety devices were available or feasible,¹²⁸ and the jury found that the machine was not defective.¹²⁹ Under current discovery law, the trial court's unduly restrictive concept of relevance was held to be erroneous and the case was reversed on appeal.¹³⁰ Without the availability of this kind of discovery, the product would be just as defective as it was (or was not) before, but the plaintiff would be unable to prove his case. A broader concept of discovery relevance, therefore, does not undermine the adversary system but assures that it can function more accurately.

III. RULE 166B EXEMPTIONS

A. Overview

Texas has five specific types of exemptions from discovery under Texas Rule of Civil Procedure 166b(3). The first, work

123. As one of the architects of the federal discovery rules noted, discovery was intended to redistribute information and to subordinate the concept of a lawsuit as a game between opposing counsel. See Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939) (stating that "[e]ach party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game").

124. 829 S.W.2d 875 (Tex. App.—Tyler 1992, n.w.h.).

125. *Id.* at 876.

126. *Id.* at 876-77.

127. *Id.* at 877.

128. *Id.*

129. *Id.* at 878.

130. *Id.* at 877-78.

product of an attorney,¹³¹ is not fully defined in either the rule or the relevant case law. The second exemption protects pure consulting experts: experts who neither testify nor have their work product reviewed by testifying experts.¹³² The third exemption protects the written statements of potential witnesses, although a separate provision allows a person to acquire copies of her own statement.¹³³ The fourth exemption, known as the "party communication privilege," protects communications made in the course of investigations into events which later give rise to legal claims or defenses.¹³⁴ Finally, the fifth exemption protects "any matter protected from disclosure by privilege."¹³⁵

This scheme of categorization creates potential overlap between the different paragraphs of Rule 166b. The Texas discovery rules separate what the federal courts call "work product" into a number of separate categories and leave the residual category named "work product" undefined. Thus, it is unclear how the different Rule 166b exemptions relate to each other. For example, is a witness statement taken by a lawyer a mere witness statement or is it also work product? Can a photograph taken by a lawyer be work product? What happens to work product materials given to a testifying expert? Ideally, such overlaps should be insignificant. However, another 1988 change in the rules makes categorization very important. The last unnumbered paragraph of 166b(3) now provides:

Upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means, a party may obtain discovery of the materials otherwise exempted from discovery by subparagraphs c [witness statements] and d [party communications] of this paragraph 3.¹³⁶

This paragraph creates an escape hatch for the witness statement and party communication exemptions, but provides no such escape for work product, expert information, or privilege exemptions.¹³⁷ Parties seeking discovery will therefore try to

131. TEX. R. CIV. P. 166b(3)(a). For a general discussion of the Rule 166b privileges, see WILLIAM V. DORSANEO III, 3A TEXAS LITIGATION GUIDE § 89A.03 (1992).

132. *Id.* 166b(3)(b); see also *id.* 166b(2)(e) (allowing discovery of a consulting expert's opinions and bases for them when the testifying expert is relying on them).

133. *Id.* 166b(3)(c).

134. *Id.* 166b(3)(d).

135. *Id.* 166b(3)(e).

136. *Id.* 166b(3).

137. *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 751 (Tex. 1991,

characterize potentially exempt information as a party communication or a witness statement, whereas parties resisting discovery will try to shield information with claims of work product, expert status, or privilege. The result is a large potential for litigation.

B. Attorney's Work Product

1. *What is work product?* When the Texas discovery rules were promulgated in 1940, the rules contained an exemption for trial preparation materials that basically corresponded with what is now the party communication exemption.¹³⁸ In 1957, the rules added the now-defunct "investigative information" exemption.¹³⁹ The investigative information exemption protected from discovery all information learned during the course of trial preparation. The existence of this exemption so thoroughly protected all trial preparation materials that there was no need to distinguish among the various possible types of exempt information or to invoke any other privilege. Although the "work product" language was added to the rules in 1973,¹⁴⁰ the provisions were rarely treated separately. Most Texas cases applied the investigative information exemption instead of applying the undefined work product exemption.

As long as the investigative information exemption existed, it stood as a major roadblock to an evenhanded sharing of information. The exemption even protected the names of witnesses and potential parties.¹⁴¹ While the 1971 amendments to the Texas Rules of Civil Procedure specifically permitted discovery of the identity and location of potential witnesses and parties,¹⁴² the investigative information exemption continued to have a very broad effect and the work product privilege continued to be largely ignored.¹⁴³

orig. proceeding) (holding that the substantial need exception does not apply to work product); *Riggs v. Sentry Ins.*, 821 S.W.2d 701, 710 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (asserting that there is no compelling need exception to work product).

138. Tex. R. Civ. P. 167, 3 TEX. B.J. 548-49 (1940).

139. See Tex. R. Civ. P. 186a, 20 TEX. B.J. 189 (1957).

140. See Tex. R. Civ. P. 186a, 35 TEX. B.J. 1042 (1972).

141. See *Ex parte Hanlon*, 406 S.W.2d 204, 206-08 (Tex. 1966) (reversing the trial court's contempt order for failing to divulge the name of a potential party); *Ex parte Ladon*, 160 Tex. 7, 10-11, 325 S.W.2d 121, 124 (1959) (reversing the trial court's contempt order against an attorney who refused to divulge the names of witnesses).

142. Tex. R. Civ. P. 167, 33 TEX. B.J. 708-09 (1970).

143. See James B. Sales, *Pretrial Discovery in Texas Under the Amended Rules: Analysis and Commentary*, 27 S. TEX. L. REV. 305, 315 (1986) (explaining that the work product exemption was often merged with the party communication exemption).

In 1984, the rule drafters eliminated the investigative information exemption and tried to distinguish among the remaining exemptions.¹⁴⁴ The work product exemption was not defined, nor was it defined in the 1988 or 1990 amendments to Rule 166b. However, the 1984 changes (1) made the remaining exemptions and their relationship to each other more important and (2) gave these exemptions separate paragraphs in an effort to clarify the parameters of each.¹⁴⁵ The amendments that went into effect in 1988 and 1990 attempted to further define each exemption.¹⁴⁶

Much of the early case law is unclear on the scope of the work product exemption. The key issue is whether "work product" includes only attorney opinion work product—those materials which show the lawyer's mental impressions, personal beliefs, and litigation strategy—or if it also includes ordinary work product—any work produced by the lawyer or his agents regardless of whether it discloses counsel's mental impressions and opinions. The Texas Supreme Court has characterized notes, lists, and memoranda prepared by an attorney as "work product in every sense of the term."¹⁴⁷ The meaning of this reference is unclear, however, because we do not know the nature of the notes, lists, and memoranda to which the court referred. Some courts have expressed the broader viewpoint that while the work product exemption "is not an umbrella for materials gathered in the ordinary course of the lawyer's business,"¹⁴⁸ the exemption "protects from disclosure specific documents, reports, communications, memoranda, mental impressions, conclusions, opinions or legal theories prepared and assembled in actual anticipation of litigation or for trial."¹⁴⁹

More recent cases seem to focus more narrowly on the attorney's mental impressions.¹⁵⁰ For example, in *Leede Oil & Gas, Inc. v. McCorkle*,¹⁵¹ the court of appeals held that the

144. In the 1984 amendments to the Texas Rules of Civil Procedure, the exemptions from discovery were moved from former Rule 186a to Rule 166b(3). Tex. R. Civ. P. 166b(3), 47 TEX. B.J. 10 (Special Pull-out Section Feb. 1984).

145. *Id.*

146. See Tex. R. Civ. P. 166b(3), 53 TEX. B.J. 597 (1990); Tex. R. Civ. P. 166b(3), 50 TEX. B.J. 857 (1987).

147. *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987, orig. proceeding).

148. *Evans v. State Farm Mut. Auto. Ins. Co.*, 685 S.W.2d 765, 767 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

149. *Brown & Root U.S.A., Inc. v. Moore*, 731 S.W.2d 137, 140 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding).

150. See, e.g., *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990, orig. proceeding) (noting that attorney work product privilege protects "only the mental impressions, opinions, and conclusions of the lawyer and not the facts").

151. 789 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

trial court had properly ordered the production of selected portions of notes taken at conferences with a deceased fact and expert witness which had been prepared by the plaintiff's attorneys.¹⁵² The court stated:

The portions of the notes under consideration are neutral recitals of facts; they contain no commentary. They do not show how Leede will use the facts, if at all. They do not remotely suggest Leede's trial strategy. They do not give a clue as to the lawyer's reaction to the testimony. The most that can be said is that the lawyer thought these facts important enough to [be] put in writing. The mere fact that lawyer effort has gone into obtaining the material does not make it work product.¹⁵³

In *Southern Pacific Transportation Co. v. Banales*,¹⁵⁴ the court of appeals held that a videotape of a practice deposition was not per se work product.¹⁵⁵ However, the court noted that the videotape could contain information which could be classified as work product and, therefore, held that the trial court abused its discretion in failing to review the videotape *in camera* before compelling discovery.

It was incumbent upon the trial court to examine the contents of the video to discern whether it contained strategy, evaluation of the strengths and weaknesses of the case or mental impressions which would be protected. Likewise, the trial court should view the videotape to determine whether it contained information tending to mold the witness' testimony, which would not be worthy of protection.¹⁵⁶

Similarly, in *Axelson, Inc. v. McIlhany*,¹⁵⁷ the court of appeals held that photographs taken by a lawyer were not "work prod-

152. *Id.* at 687.

153. *Id.* The Texas Supreme Court recently cited *Leede* with approval in *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991, orig. proceeding). The court repeated in *Owens-Corning* that the work product immunity is intended to "shelter the mental processes, conclusions, and legal theories of the attorney" and also commented that "the protection granted under the work product doctrine does not extend to facts the attorney may acquire." *Id.* at 750 & n.2. On the other hand, *Owens-Corning* involved "work product" protection for 11,000 pages of documents. *Id.* at 749. Could all of the documents be pure opinion work product? Maybe, with 90,000 asbestos cases pending against Owens-Corning, they could be solely strategic in nature. *See id.* at 751 n.3. Perhaps, however, the supreme court just was not focusing on this issue because it was unnecessary for purposes of the holding in the case.

154. 773 S.W.2d 693 (Tex. App.—Corpus Christi 1989, orig. proceeding).

155. *Id.* at 694.

156. *Id.*

157. 755 S.W.2d 170 (Tex. App.—Amarillo 1988, orig. proceeding), *overruled in part*, 798 S.W.2d 550 (Tex. 1990, orig. proceeding).

uct" unless they reflected the mental impressions, opinions, or legal theories of the attorney.¹⁵⁸

The recent decision in *Owens v. Wallace*¹⁵⁹ deals with the issue of intangible work product. In *Owens* the defendant had sent interrogatories to the plaintiffs asking the plaintiffs to "state each and every fact upon which [they] intend[ed] to rely" in proving various allegations in their petition.¹⁶⁰ The plaintiffs objected on the basis that answering these interrogatories would reveal their attorney's trial strategy.¹⁶¹ The appellate court disagreed: "The information sought, the facts underlying the lawsuit, is clearly discoverable That the interrogatories asked what facts the plaintiffs intend to rely upon, does not change the discoverable nature of the information."¹⁶²

The *Owens* court may have missed the point of the work product argument. The work product objection was based on the interrogatories' inquiry into opposing counsel's "reliance" on certain facts rather than about the revelation of all the relevant "facts." The potential problem with the interrogatories is that they ask on what facts the plaintiffs will "rely." Had the interrogatories asked for a summary of the expected trial testimony of plaintiffs' witnesses, the basis for the work product objection would have been clearer. From a policy standpoint, however, the result in *Owens* was probably correct. Now that pretrial orders can require things such as written statements of the parties' contentions, lists of fact and expert witnesses and summaries of their testimony, and the exchange of trial exhibits,¹⁶³ the revelation of this kind of information has become more an issue of timing than of privilege, a question of when this information should be revealed rather than whether it should be revealed.¹⁶⁴ The information should clearly be provided to opposing counsel at some point; trial courts need some discretion to decide when such disclosure is appropriate in each case.

158. *Id.* at 173.

159. 821 S.W.2d 746 (Tex. App.—Tyler 1992, orig. proceeding).

160. *Id.* at 747.

161. *Id.*

162. *Id.* at 748. *Cf.* Texas Tech Univ. Health Sciences Ctr. v. Schild, 828 S.W.2d 502, 503-04 (Tex. App.—El Paso 1992, orig. proceeding) (holding that an interrogatory requesting the defendant to "[p]roduce a description and/or photograph of each and every exhibit that you may introduce as evidence at trial" is a request for work product).

163. See TEX. R. CIV. P. 166(d), (h), (i), (l).

164. Thornburg, *supra* note 122, at 1574. Allowing this kind of discovery also makes Texas law consistent with federal law. See *id.* at 1568-69 n.236.

The dilemma will be a recurring one. There are a number of consequences of the courts' interpretation of the work product and other discovery exemptions. Some information is discoverable and some is not. Some of the Rule 166b exemptions are subject to a substantial need/undue hardship override and some are not, as in federal court, "ordinary work product" is subject to override while "opinion work product" is not.¹⁶⁵

2. *What are the time parameters of work product?* At least until recently, Texas has taken a case-specific approach to work product. It therefore becomes crucial to determine when work product protection begins and when it ends. The exemption begins when the particular litigation begins or when the party has good cause to believe a suit will be filed.¹⁶⁶ The occurrence of the accident itself does not automatically create good cause to anticipate litigation.¹⁶⁷ In the context of party communications, the Texas Supreme Court applied a two-part test¹⁶⁸ for determining when good cause exists in the context of party communications:

The first prong requires an objective examination of the facts surrounding the investigation. Consideration should be given to outward manifestations which indicate litigation is immi-

165. In federal court "ordinary work product" is generally subject to override though some courts have held that "opinion work product" is exempt from discovery. See, e.g., *Duplan Corp. v. de Chavanoz*, 509 F.2d 730, 733-36 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); see also *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014-15 (1st Cir. 1988) (noting that some federal courts have held that the protection for some opinion work product is "ironclad"); D.M.M., Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333, 337 (1978) (noting that "[s]everal courts have held that opinion work product is immune without exception from discovery"). Opinion work product includes "an attorney's strategy, including his intended lines of proof and cross-examination plans. 'Opinion work product' also encompasses an attorney's evaluation of the strengths and weaknesses of his case and the inferences he has drawn from interviews of witnesses." D.M.M., *supra*, at 337 (footnotes omitted). Ordinary work product includes work product that does not disclose such attorney thought processes. See Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 791 n.196 (1983) (citing *Doe v. United States (In re Doe)*, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982)).

166. See *Texas Dep't of Mental Health & Mental Retardation v. Davis*, 775 S.W.2d 467, 471 (Tex. App.—Austin 1989, orig. proceeding [leave denied]) (stating that good cause requires proof of both objective evidence and a subjective good faith belief that suit would be filed); *Toyota Motor Sales, U.S.A., Inc. v. Heard*, 774 S.W.2d 316, 318 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding [leave denied]) (reviewing the anticipation of litigation standards used by the courts and stating that the trial court must ultimately make a judgment call).

167. *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801, 802 (Tex. 1986, orig. proceeding).

168. *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38 (Tex. 1989, orig. proceeding).

nent. The second prong utilizes a subjective approach. Did the party opposing discovery have a good faith belief that litigation would ensue? There cannot be good cause to believe a suit will be filed unless elements of both prongs are present. Looking at the totality of the circumstances surrounding the investigation, the trial court must then determine if the investigation was done in anticipation of litigation.¹⁶⁹

A few recent appellate cases have applied this test to attorney work product. In *Texas Department of Mental Health & Mental Retardation v. Davis*,¹⁷⁰ "a severely retarded quadriplegic adult drowned in a whirlpool bath at Travis State School."¹⁷¹ Within hours of the death, W. Kent Johnson, Director of Legal Services for the Texas Department of Mental Health and Mental Retardation (TDMHMR), ordered an investigation of the incident.¹⁷² School and TDMHMR employees conducted tape-recorded interviews of several employees on the days immediately following the death and compiled a report to Johnson shortly thereafter.¹⁷³ TDMHMR did not receive a claim from the dead man's parents until twenty days after his death, and suit was filed twelve days later.¹⁷⁴ During discovery, the plaintiffs sought production of "'any notes, reports, memoranda, or other documents,' pertaining to the occurrence [that were] 'obtained by [TDMHMR] through its employees' after the death, but before [TDMHMR] received notice of the [parents'] claim."¹⁷⁵ TDMHMR resisted producing the tape-recorded interviews and the report, relying on the work product exemption.¹⁷⁶ The trial court found that the material was not protected, and the court of appeals agreed.¹⁷⁷

Johnson, the TDMHMR lawyer, submitted an affidavit constituting the only evidence to support the claim that the investigation was done in anticipation of litigation.¹⁷⁸ Johnson stated that "[w]hen the circumstances of Mr. Espinoza's death were explained to me, I formed the opinion that there was significant potential for litigation against the State and its employees . . . [and] [f]or that reason I immediately requested that

169. *Id.* at 41.

170. 775 S.W.2d 467 (Tex. App.—Austin 1989, orig. proceeding).

171. *Id.* at 469.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 469, 474-75.

178. *Id.* at 472.

an investigation be conducted.'"¹⁷⁹ Johnson further stated, "I make requests of this sort only when I am convinced that litigation will ultimately be filed.'"¹⁸⁰

The court rejected this argument.¹⁸¹ First, Johnson's statement was found to imply that he "routinely" requests an investigation in certain circumstances.¹⁸² Second, at the time Johnson requested the investigation, the parents had not indicated that they intended to sue.¹⁸³ Therefore, considering "the totality of the circumstances," the court held that the trial court could reasonably have found that the facts failed to show a reasonable anticipation of litigation, thus making the work product exemption inapplicable.¹⁸⁴

A few months earlier, the same court of appeals found that the facts proved *did* show reasonable anticipation of litigation in the work product context. In *Wiley v. Williams*,¹⁸⁵ the underlying lawsuit arose from the collapse of a bay in a building under construction that resulted in injuries to several workers.¹⁸⁶ On the morning that the construction bay collapsed, the defendant called its lawyer, informed the lawyer that a serious accident had occurred, and asked the lawyer to represent the defendant in connection with any legal problems that might arise from the accident.¹⁸⁷ The lawyer then hired an investigator.¹⁸⁸ The plaintiffs sought to discover the handwritten notes of the lawyer's conversations with the investigator and transcriptions of statements recorded by the investigator.¹⁸⁹

At a hearing on a motion to compel discovery, the lawyer testified that the existence of a general contractor and two subcontractors with indemnification clauses would make the claim difficult to settle.¹⁹⁰ He further testified that "he concluded at the time that he was hired it was extremely likely there would be litigation stemming from the accident."¹⁹¹ In

179. *Id.*

180. *Id.*

181. *See id.*

182. *Id.*

183. *Id.* Indeed, as the court notes, the parents may not even have been informed of the death at the time the investigation began. *Id.*

184. *Id.* Although the court of appeals referred to the material at issue in this case as "work product," it is probably more accurately described as a combination of party communications and witness statements.

185. 769 S.W.2d 715 (Tex. App.—Austin 1989, orig. proceeding (leave denied)).

186. *Id.* at 716.

187. *Id.* at 718.

188. *Id.*

189. *Id.*

190. *See id.*

191. *Id.*

this case, the trial judge concluded that the information was protected by the work product doctrine. The court of appeals then refused to disturb that finding in a mandamus proceeding.¹⁹² Because this case is pre-*Flores*, the holding is suspect for its lack of an "objective, outside manifestation of litigation" requirement.¹⁹³ However, the *Davis* court cited *Wiley* without disavowing it, so *Wiley* may have some remaining vitality.¹⁹⁴

Importantly, however, the Texas Supreme Court has not yet specifically decided whether the same "anticipation of litigation" rules that apply to party communications apply to work product. The language of the rules themselves does not require a symmetrical result. The party communication and witness statement exemptions specifically require the protected material to have been made "subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation, or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made a part of the pending litigation."¹⁹⁵ The work product exemption, on the other hand, is not even defined, much less provided with time parameters. The court could, if it chose to do so, use a different or more flexible test for "anticipation of litigation" in cases involving work product, especially if it clearly defines work product as including only opinion work product.

At the other end of the time spectrum, the Texas Supreme Court has recently ruled that work product immunity does *not* end when the lawsuit ends. In *Owens-Corning Fiberglas Corp. v. Caldwell*,¹⁹⁶ the court held that work product protection is

192. *Id.*

193. Refer to notes 148-49 *supra* and accompanying text.

194. See Texas Dep't of Mental Health & Mental Retardation v. Davis, 775 S.W.2d 467, 471 (Tex. App.—Austin 1989, orig. proceeding). For other cases applying the "anticipation of litigation" test to work product, see *Star-Telegram, Inc. v. Schattman*, 784 S.W.2d 109, 111 (Tex. App.—Fort Worth 1990, orig. proceeding) (holding that handwritten notes made by an attorney for the defendant's corporate parent were discoverable because the notes were made not in anticipation of litigation but to give advice regarding corrective measures to ensure compliance with federal employment law); *Boring & Tunneling Co. of Am., Inc. v. Salazar*, 782 S.W.2d 284, 287 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (rejecting past experience and deviation from usual custom as a basis for anticipation of litigation because they were solely subjective in nature); *Axelsson, Inc. v. McIlhany*, 755 S.W.2d 170, 177 (Tex. App.—Amarillo 1988, orig. proceeding) (refusing to hold that documents prepared for an investigation were made in anticipation of litigation when the investigation was separate from the impending lawsuit), *overruled in part*, 798 S.W.2d 550 (Tex. 1990, orig. proceeding).

195. TEX. R. CIV. P. 166b(3)(c)-(d).

196. 818 S.W.2d 749 (Tex. 1991, orig. proceeding).

of "continuing duration."¹⁹⁷ In that case, Owens-Corning was sued in two asbestos personal injury actions.¹⁹⁸ It produced 35,700 pages of documents and asserted privilege for 11,000 pages of documents.¹⁹⁹ One of the asserted privileges was work product.²⁰⁰ After a special master reviewed the documents *in camera*, the trial court held that only one page was protected by work product because the other documents had been prepared in anticipation of different lawsuits.²⁰¹ The Texas Supreme Court, however, held that the "underlying purpose would be totally defeated if the work product privilege were limited to documents that were prepared in the particular case for which discovery is sought."²⁰²

Whether the reasoning of *Owens-Corning* also undermines case-specific analysis of the starting point of the work product immunity remains to be seen. The supreme court stated that "any party which is a repeat litigant clearly must be allowed to develop an overall legal strategy for all the cases in which it is involved."²⁰³ Consistent with this reasoning, the court could continue to require that before information becomes work product in the first place, the attorney must have been contemplating specific litigation. In the alternative, the court could apply its policy views more broadly and find that a party contemplating the potential of multiple lawsuits does not have to be "anticipating" any particular one when creating work product. As noted above, the language of the discovery exemptions leaves the court leeway to choose either course.²⁰⁴

197. *Id.* at 751-52.

198. *Id.* at 749.

199. *Id.* at 749-50.

200. *Id.* at 750.

201. *Id.*

202. *Id.* The court of appeals, in *Wood v. McCown*, 784 S.W.2d 124 (Tex. App.—Austin 1990, orig. proceeding), had earlier held that the work product exemption does not terminate at the end of a *criminal* case when an attorney's trial notes, witness interview notes, and personal notes reflecting legal research for the accused's defense are sought in a subsequent civil case. *Id.* at 129. The court's reasoning, however, is potentially applicable to both civil and criminal cases:

In both the criminal and civil contexts, the potential chilling effect upon an attorney's willingness to record and retain his mental impressions, factual investigations, or legal research is considerable when a lawyer knows that his work product will be subject to discovery after the conclusion of his client's case.

Id.

203. *Owens-Corning*, 818 S.W.2d at 751 (footnote omitted).

204. Note also that the Texas Supreme Court in *Owens-Corning* shows that it is aware of the differences among the different Rule 166b exemptions. *Id.* at 751.

3. *Whose work can be work product?* Another undefined element of work product involves identifying the parties whose work can constitute work product. Specifically, it is not always clear whether work done by the agents of an attorney can receive work product protection. At the federal level, materials prepared by an attorney's agents in anticipation of litigation are entitled to a qualified immunity from discovery:

[T]he doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.²⁰⁵

Texas courts have agreed with this conclusion in principle. For example, in *Bearden v. Boone*²⁰⁶ the court of appeals found that the work product doctrine protected information gathered by an investigator hired by an attorney.²⁰⁷ More recently, in *Wiley v. Williams*²⁰⁸ the court of appeals held that the "work product doctrine protects materials prepared by agents for the attorney as well as those prepared by the attorney himself."²⁰⁹

Difficult problems arise, however, when the attorney's agent acts not only for the attorney but also for others. In *Brown & Root U.S.A., Inc. v. Moore*,²¹⁰ the court of appeals rejected an attempt to cloak investigations in work product protection.²¹¹ The plaintiff in the underlying action sued his employer for exemplary damages on the basis of gross negligence allegations.²¹² A claims examiner who had been working for the worker's compensation carrier had interviewed various witnesses and turned transcripts of the interviews over to the employer's attorney.²¹³ The employer claimed that these transcripts were work product and argued that the investigator "wore two hats," one as claims investigator for the compensation carrier and another in his role as the agent of the

205. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975).

206. 693 S.W.2d 25 (Tex. App.—Amarillo 1985, orig. proceeding).

207. *Id.* at 28.

208. 769 S.W.2d 715 (Tex. App.—Austin 1989, orig. proceeding (leave denied)).

209. *Id.* at 717.

210. 731 S.W.2d 137 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding).

211. *See id.* at 140.

212. *See id.* at 138.

213. *Id.*

employer's attorney conducting a separate gross negligence investigation.²¹⁴ The court rejected the work product claim, finding that the interviews had been prepared in the ordinary course of investigating the compensation claim and that the investigator was at all times the agent of the insurance company.²¹⁵

4. *Summary.* The parameters of the work product exemption from discovery continue to be a muddle for the Texas courts. Part of the confusion stems from the old investigative information exemption.²¹⁶ Because this exemption protected both communications and underlying facts, Texas lawyers did not develop the habit of distinguishing between a communication and the content of the communication, between the container and the thing contained. Current law, however, requires such thinking. Assume, for example, that a lawyer wrote a memo stating, "I plan to call Mr. Smith as a witness at trial to testify that the light was green." The work product exemption would protect that memo as it embodies the lawyer's trial strategy, and the opponent could not secure a copy of it by sending a document production request asking for a copy of the memo. However, should the opponent send an interrogatory asking the color of the light, the question could not be avoided on the ground that it would reveal work product.

While only one of the authors of this article has argued for the abolition of the work product exemption as we now know it,²¹⁷ we both agree that if there is to be a work product exemption, it should be narrowly construed. The best solution under the current Texas scheme would be to include only pure opinion work product—attorney mental impressions and trial strategy—as "work product." Thus, the purely strategic materials most arguably necessary for the operation of an adversary trial would be protected while a more even-handed sharing of factual information relevant to the dispute between the parties would be available. This solution, if accompanied by a sensible, non-paranoid attitude about what can be discerned about strat-

214. See *id.* at 139.

215. See *id.* at 139-40.

216. Rule 186a protected "information obtained in the course of an investigation of a claim or defense by a person employed to make such investigation." Tex. R. Civ. P. 186a, 20 TEX. B.J. 189 (1957). It was thus much more protective of parties resisting discovery than the federal approach embodied by *Hickman v. Taylor*, 329 U.S. 495 (1947), in which the Supreme Court noted that the attorney client privilege and work product exemption protect communications but not the underlying information itself. *Id.* at 508.

217. See Thornburg, *supra* note 122, *passim*.

egy from reading an essentially factual document, might also reduce the cost to the judicial system of the constant demands for *in camera* inspection of documents on the ground that they somehow reveal the attorney's thought processes.²¹⁸

Having adopted a narrow definition of work product immunity, the courts could be more flexible as to its time parameters. Because the courts would be protecting strategic decisions and trial plans, not information, the "anticipation of litigation" requirement need not be so case specific. Rather, consistent with *Owens-Corning Fiberglas Corp. v. Caldwell*,²¹⁹ the court could protect the pure opinion work product that allowed the attorney to develop strategy for a series of interrelated cases.

C. Consulting Experts

Any party may discover by interrogatory the names and addresses of all experts expected to be called as witnesses at trial by the other party, as well as the subject matter of each witness' testimony.²²⁰ A party may also discover the identity, location, mental impressions, and opinions of non-testifying experts whose work has been reviewed by testifying experts.²²¹ The identity of persons designated as pure consulting experts, on the otherhand, is outside the scope of discovery.²²² The party claiming privilege must establish that the consulting expert was retained in anticipation of litigation.²²³ Moreover, Rule 166b makes clear that none of the exemptions listed in paragraph 3 of the rule are to be construed to render non-discoverable the identity and location of any expert expected to testify or any consulting expert whose opinions or impressions have been reviewed by a testifying expert.²²⁴

218. For a discussion of the cost to the litigants and to society resulting from work product immunity, see *id.* at 1550-73.

219. 818 S.W.2d 749 (Tex. 1991, orig. proceeding).

220. TEX. R. CIV. P. 166b(2)(e), 168; *Werner v. Miller*, 579 S.W.2d 455, 456 (Tex. 1979, orig. proceeding).

221. TEX. R. CIV. P. 166b(3)(b). Earlier versions of the exemption had made non-testifying experts' material discoverable only if the testifying experts relied on their work. TEX. R. CIV. P. 166b(3)(b), 50 TEX. B.J. 857 (1987) (stating that non-testifying experts' opinions "are discoverable if the expert's work product forms a basis either in whole or in part of the opinions of an expert who will be called as a witness"). The change making material discoverable only if "reviewed" was intended to limit evasions and quibbles about when an expert has actually "relied" on another expert's work.

222. TEX. R. CIV. P. 166b(3)(b); *Werner*, 579 S.W.2d at 456.

223. *Owens v. Wallace*, 821 S.W.2d 746, 748 (Tex. App.—Tyler 1992, orig. proceeding).

224. TEX. R. CIV. P. 166b(3).

The relationship between the expert witness exemption and other discovery exemptions has also created some dilemmas for the courts. In *Aetna Casualty & Surety Co. v. Blackmon*,²²⁵ the court of appeals tried to sort out the overlap between the Rule 166b exemptions and the discoverability of information relied on by testifying experts. Aetna had designated an employee as a testifying expert on Aetna's internal procedures and its conduct in an underlying lawsuit.²²⁶ The plaintiffs noticed the employee/expert's deposition, seeking documents on which the employee/expert relied.²²⁷ Ordinarily the materials relied on by a testifying expert are discoverable.²²⁸ However, absent the employee's expert status, some of the documents would have been protected by the work product, party communication, or attorney-client privileges.²²⁹ While unwilling to hold that Aetna waived its privileges as to any document in the expert's possession, the court did hold that Aetna waived any privilege it might have had for documents on which the expert would rely.²³⁰ The court thus properly dispatched a strategy that would have limited a party's ability to adequately depose an expert witness when that witness was prepared to testify using otherwise privileged materials.

Because the discoverability of expert information depends on categorizing the expert, disputes arise over attempts to move experts from one category to another. There are limits on the ability of parties to redesignate experts whose work was originally discoverable as consulting-only experts. A redesignation may be deemed invalid if its real purpose is to defeat the legitimate objectives of discovery. In *Tom L. Scott, Inc. v. McIlhany*,²³¹ the Texas Supreme Court explained that because the consulting expert privilege is intended as a shield to prevent a litigant from taking undue advantage of an opponent's industry and effort and not a sword to be used to defeat proper discovery, a redesignation pursuant to a settlement that is made primarily to gain control of damaging expert testimony is against public policy and invalid.²³² A court of appeals

225. 810 S.W.2d 438 (Tex. App.—Corpus Christi 1991, orig. proceeding).

226. *Id.* at 439.

227. *Id.*

228. TEX. R. CIV. P. 166b(2)(e)(2); *Aetna*, 810 S.W.2d. at 440.

229. TEX. R. CIV. EVID. 503; *Aetna*, 810 S.W.2d at 440.

230. *Id.*

231. 798 S.W.2d 556 (Tex. 1990, orig. proceeding).

232. *Id.* at 559-60. The court also stated: "[i]f we were to hold otherwise, nothing would preclude a party in a multi-party case from in effect auctioning off a witness' testimony to the highest bidder." *Id.* at 560 (quoting *Williamson v. Superior Court*, 582 P.2d 126, 132 (Cal. 1978)).

reached the same result in a case in which redesignation of the expert was not a condition of a settlement agreement.²³³

The Texas Supreme Court has also limited a party's ability to designate employees as consulting experts and to use the consulting expert privilege to suppress factual information by designating someone as a dual-capacity witness.²³⁴ The court discussed the proper treatment of these witnesses in *Axelson, Inc. v. McIlhany*.²³⁵ The court first held that a dual-capacity witness' factual knowledge that was acquired by being a factual participant in the events material to the lawsuit is discoverable and that this information is not protected from discovery by changing the designation of a person with knowledge of relevant facts to a pure consulting expert.²³⁶ The court reasoned that the consulting expert exemption protects only the identity, mental impressions and opinions of consulting experts, not their firsthand factual knowledge.²³⁷

The court also addressed whether an employee of a party can be designated as a consulting-only expert and stated:

Under this rule, a consulting-only expert must be informally consulted or retained or specially employed in anticipation of litigation. An employee who was employed in an area that becomes the subject of litigation can never qualify as a consulting-only expert because the employment was not in anticipation of litigation. On the other hand, an employee who was not employed in an area that becomes the subject of litigation and is reassigned specifically to assist the employer in anticipation of litigation arising out of the incident or in preparation for trial may qualify as a "consulting-only" expert. In any event, a party may discover facts known by an employee acting as a "consulting-only" expert.²³⁸

This limitation on the use of employees as consulting experts needs further development. For example, courts must decide when employees have worked in the same "area" as the subject of litigation, whether the limitation applies to former employees, and whether the same limitation applies to workers who

233. See *Harnischfeger Corp. v. Stone*, 814 S.W.2d 263, 265 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding) (holding that a consulting expert originally hired by another party as a testifying expert in a companion case is subject to full discovery by the original party).

234. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990, orig. proceeding). A dual-capacity witness is a witness who possesses first-hand knowledge of relevant facts and who also serves as consulting-only expert for a party. *Id.*

235. 798 S.W.2d 550 (Tex. 1990).

236. *Id.*

237. *Id.*

238. *Id.* at 555.

are technically "independent contractors." The court should resolve these continuing issues consistent with the policy behind *Axelson* of denying a party the ability to hide relevant information behind the expert witness exemption.

D. Party Communications

Rule 166b(3)(d) defines the party communications exemption, which protects from discovery

[c]ommunications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which the suit is based and in connection with the prosecution, investigation or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made a part of the pending litigation. This exemption does not include communications prepared by or for experts that are otherwise discoverable. For the purpose of this paragraph, a photograph is not a communication.²³⁹

The party communications exemption is clearly case specific.²⁴⁰ The exemption applies only if the communication in question was made in anticipation of the prosecution or defense of the claim made part of the pending litigation.²⁴¹ Thus, when a person actually made the communication in question, he or she must have been thinking about the particular lawsuit in which the exemption would later be asserted.²⁴²

For example, in *Eddington v. Touchy*,²⁴³ arising from a suit by an attorney against an insurance company for tortious interference with his contingency contract with his client, the court granted mandamus relief from the trial court's protective order denying a request for production of documents relating to the insurance company's investigation and settlement of a personal injury claim.²⁴⁴ Because the insurer did not show that the investigative file for the prior claim was prepared in anticipation of the suit for tortious interference, the documents did not fall within the party communications exemption of Rule 166b(3)(d) and were not privileged in the separate cause of

239. TEX. R. CIV. P. 166b(3)(d).

240. William V. Dorsaneo III, *Work Product & Privilege: How to Protect It, How to Discover It*, ADVOCATE, Oct. 1988, at 27, 30.

241. *Id.*

242. *Id.*

243. 793 S.W.2d 335 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding [leave denied]).

244. *Id.* at 337.

action.²⁴⁵ The court pointed out that "[n]one of the investigative privileges protect documents from discovery in litigation separate from the 'pending litigation.'"²⁴⁶

As with the work product exemption, the most difficult problems in determining whether information is protected as a party communication center on the duration of the exemption. When does a party anticipate litigation sufficiently to invoke the exemption, and when does it end? The Texas Supreme Court addressed the first problem in *Flores v. Fourth Court of Appeals*.²⁴⁷ In *Flores*, the court had to decide whether an investigative report, prepared after notice of injury was filed with the Industrial Accident Board but before an appeal to a district court, was prepared "in anticipation of litigation" so as to be exempt from discovery in the worker's compensation case in district court.²⁴⁸

To determine whether the report was protected as a party communication, the court established a two-part test.²⁴⁹ First, there must be an objective basis, founded on outward manifestations from the potential claimant, to believe that litigation is imminent.²⁵⁰ Second, the party must have a subjective good faith belief that litigation by the particular plaintiff will ensue.²⁵¹ Information will not be protected by the party communication exemption unless both tests are met.²⁵²

In applying this test in *Flores*, the court considered the facts that: (1) "the report was printed on a standard form"; (2) "it was usual and customary to prepare such a report in every case that was set for a prehearing conference"; and (3) Flores had not outwardly shown that he intended to sue until he filed

245. *Id.* at 336-37.

246. *Id.* (citing *Turbodyne Corp. v. Heard*, 720 S.W.2d 802, 804 (Tex. 1986, orig. proceeding)); see also *Allen v. Humphreys*, 559 S.W.2d 798, 803 (Tex. 1977, orig. proceeding) (holding that documents prepared in connection with other lawsuits were discoverable in a workers' compensation action); *Victoria Lloyds Ins. Co. v. Gayle*, 717 S.W.2d 166, 168 (Tex. App.—Houston [1st Dist.] 1986, orig. proceeding) (finding that an insurer's claims file, which was not discoverable in the insured's action for personal injuries, was not privileged in a later action brought by the insured alleging the insurer's misrepresentations and fraud); *Service Lloyds Ins. Co. v. Clark*, 714 S.W.2d 437, 438-39 (Tex. App.—Austin 1986, orig. proceeding) (allowing discovery of insured's investigation files in the insured's later suit for bad faith insurance practices).

247. 777 S.W.2d 38 (Tex. 1989, orig. proceeding).

248. *Id.* at 38-39.

249. *Id.* at 40.

250. *Id.* at 40-41.

251. *Id.* at 41.

252. *Id.* It is currently unclear how this anticipation of litigation test will apply to plaintiff-created work product. For a discussion of the possibilities, see Albright, *supra* note 4, at 819-23.

his notice of intention to appeal.²⁵³ Therefore, the court found that the report was prepared in the ordinary course of business.²⁵⁴ The investigator's subjective conclusion that Flores would file suit—because it was unsupported by any outward, objective threats of suit—was insufficient to create a party communication protection.²⁵⁵

The *Flores* two-prong analysis was applied to determine the starting point for anticipation of litigation in the party communication context in *Powers v. Palacios*.²⁵⁶ The *Powers* court held that the trial court had properly granted a protective order with regard to the investigative claim file of the defendant's insurance company.²⁵⁷ A demand letter sent by the plaintiff's attorney eight months after the incident in question "was a sufficient outward manifestation to indicate the imminency of litigation and the good faith belief that litigation would ensue."²⁵⁸ Similarly, in *Child World v. Solito*,²⁵⁹ the court held a demand letter to be enough to form the basis for a "subjective good faith belief that the plaintiff would sue."²⁶⁰ The court was not convinced that the plaintiff's failure to actually file suit within the time threatened eliminated the defendant's good faith anticipation of litigation.²⁶¹

The court discussed the first prong of the *Flores* analysis in *American Home Assurance Co. v. Cooper*,²⁶² a case which arose from a truck driving team collision in which a woman was injured and her husband killed.²⁶³ The court of appeals reviewed the outward manifestations of imminent litigation, which included (1) plaintiff's hiring a lawyer, (2) plaintiff's lawyer notifying the International Accident Board (IAB) of a dispute over coverage, and (3) the filing of a third party action against the driver involved in the collision in which the insurance company (relator in the mandamus action) intervened.²⁶⁴ The court determined that "under the *Flores* analysis the trial court could have ruled either way within its broad discretionary

253. *Flores*, 777 S.W.2d at 41.

254. *Id.*

255. *Id.*

256. 794 S.W.2d 493, 494-95 (Tex. App.—Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991).

257. *Id.*

258. *Id.* at 495.

259. 780 S.W.2d 954 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding).

260. *Id.* at 956.

261. *Id.* at 956-57.

262. 786 S.W.2d 769 (Tex. App.—El Paso 1990, orig. proceeding [leave denied]).

263. *Id.* at 770.

264. *Id.* at 772.

powers.²⁶⁵ The trial court's order, compelling production of the adjuster's entire investigation file up to the filing date of its notice of intent to appeal the IAB award, was not an abuse of discretion.²⁶⁶

Note that in a suit against an insurance carrier for breach of the duty of good faith and fair dealing, the insurer's denial of coverage is the occurrence or transaction on which the plaintiff's suit is based.²⁶⁷ Therefore, documents generated before this time cannot be protected as party communications.²⁶⁸ Further, it is the date when the denial is *communicated* to the claimant and not the date that the insurer *decides* to deny coverage that controls.²⁶⁹

Pre-*Flores* cases that adopt a case-specific approach to party communications²⁷⁰ should still be reliable. However, pre-*Flores* cases that find a party's subjective belief in the likelihood of litigation to be sufficient²⁷¹ are now suspect.

Litigation over the ending point of the party communication privilege has been infrequent. Given its case-specific nature, however, the privilege may easily end when the lawsuit ends. In *Maryland American General Insurance Co. v. Blackmon*,²⁷² for example, the Texas Supreme Court discussed the exemption in general terms and commented that "[t]he protection of a party's right to defend a suit brought against him is the es-

265. *Id.*

266. *Id.* at 771-72. See also *Scott v. Twelfth Court of Appeals*, 35 Tex. Sup. Ct. J. 587, 588 (March 28, 1992) (overturning a court of appeals order denying discovery on the grounds that evidence before the trial court did not compel a ruling that the first prong of the *Flores* test was met on any particular date prior to the date on which the compensation carrier demanded reimbursement).

267. *Jackson v. Downey*, 817 S.W.2d 858, 859 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]) (citing *Gilbert v. Black*, 722 S.W.2d 548, 550 (Tex. App.—Austin 1987)).

268. *Id.* at 860.

269. *Id.*

270. See, e.g., *Turbodyne Corp. v. Heard*, 720 S.W.2d 802, 804 (Tex. 1986, orig. proceeding) (finding that documents prepared by the casualty insurer in connection with settlement of a claim with its insured are not protected from discovery in a later subrogation suit); *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801, 802 (Tex. 1986, orig. proceeding) (holding that information obtained in a post-accident investigation by a railroad was discoverable because it was not obtained at a time when the railroad had good cause to believe suit would be filed and stating that "[t]he mere fact that an accident has occurred is not sufficient to clothe all post-accident investigations, which frequently uncover fresh evidence not obtainable through other sources, with a privilege"); *Robinson v. Harkins & Co.*, 711 S.W.2d 619, 621 (Tex. 1986) (holding that an investigator's report prepared in connection with a potential workers' compensation claim was discoverable in a later personal injury action).

271. See *Lone Star Dodge, Inc. v. Marshall*, 736 S.W.2d 184, 189 (Tex. App.—Dallas 1987, orig. proceeding).

272. 639 S.W.2d 455 (Tex. 1982, orig. proceeding).

sence of the proviso in Rule 186a [now Rule 166b(3)(d)], and the privilege exists so long as that right exists.²⁷³ Thus, the exemption may disappear when the suit ends.²⁷⁴

Both the party communication and witness statement exemptions are subject to being overridden if the party seeking discovery can show that she "has substantial need of the materials" and that she is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."²⁷⁵ Texas lawyers have largely ignored this provision, but it is a significant safety valve for the potential burdens created by the party communication and witness statement exemptions. In *State v. Lowry*,²⁷⁶ for example, the Texas Supreme Court determined that certain insurers sued by the state for antitrust violations had made the necessary showing.²⁷⁷ The "need" prong was satisfied by showing that the information was gathered by the state in investigating the antitrust claims.²⁷⁸ The "hardship" prong was met because it would be burdensome and extremely difficult for the insurers to replicate the materials amassed by the state.²⁷⁹

E. Witness Statements

Rule 166b(3)(c) provides a qualified exemption from discovery for "[t]he written statements of potential witnesses and parties, . . . except that persons, whether parties or not, shall be entitled to obtain, upon request, copies of statements they have previously made concerning the action or its subject matter and which are in the possession, custody, or control of any party."²⁸⁰ As with party communications, the statement must have been made "subsequent to the occurrence or transaction upon which the suit is based and in connection with the pros-

273. *Id.* at 457.

274. *See id.* at 458. However, the exemption may end even earlier than the completion of the action. *See Insurance Co. of N. Am. v. Downey*, 765 S.W.2d 555, 557-58 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding) (holding that the trial court did not abuse its discretion when it found that severance of a bad faith claim from a contract claim made work product discoverable). *But see Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 751-52 (Tex. 1991, orig. proceeding) (finding that work product protection does not end when a lawsuit ends).

275. TEX. R. CIV. P. 166b(3). This treatment is consistent with the federal courts' treatment of ordinary work product. *See* FED. R. CIV. P. 26(b)(3).

276. 802 S.W.2d 669 (Tex. 1991, orig. proceeding).

277. *Id.* at 673.

278. *Id.*

279. *Id.* For a discussion of the federal case law interpreting the substantial need/undue hardship override to the work product exemption, see generally Special Project, *supra* note 165, at 800-11.

280. TEX. R. CIV. P. 166b(3)(c).

ecution, investigation, or defense of the particular suit, or in anticipation of the prosecution or defense of the claims made a part of the pending litigation."²⁸¹

There has been very little litigation over the witness statement exemption. In one unreported case, *Circus Vargas Corp. v. Solito*,²⁸² the court dealt with the "anticipation of litigation" problem in the witness statement context. In *Circus Vargas*, a car driven by John Karner struck a Circus Vargas truck that was parked on the shoulder of a highway by Marvin Wrighton.²⁸³ Mr. Karner died in the collision.²⁸⁴ Two weeks after the accident, a representative of Circus Vargas' insurance carrier contacted Mr. Wrighton by telephone and recorded his recollection of the accident.²⁸⁵ Six months after the accident, Karner's parents filed a wrongful death suit against Circus Vargas and, during discovery, sought copies of witness statements made prior to the date suit was filed.²⁸⁶

Circus Vargas objected to the request and filed an affidavit in which the insurer stated that (1) "[eighty-five percent] of automobile-related fatalities result in litigation;" (2) "the chances of litigation increase when a corporate truck is involved;" and (3) the representative believed litigation in this case to be a "near certainty."²⁸⁷ The court found this evidence insufficient to show anticipation of litigation for two reasons. First, the insurer's affidavit demonstrated merely "'generic' anticipation," devoid of some outward manifestation of future litigation by the Karners.²⁸⁸ Circus Vargas failed to establish that, prior to the taking of the statement, the Karners demanded damages, hired an attorney, or commenced investigation of the accident.²⁸⁹ Second, the court rejected the witness statement claim because Circus Vargas failed to produce evidence supporting its statement that eighty-five percent of automobile-related fatalities resulted in litigation.²⁹⁰ Because the anticipation of

281. *Id.*

282. No. 01-88-00240-CV, 1988 Tex. App. LEXIS 1064 (Tex. App.—Houston [1st Dist.], May 4, 1988, orig. proceeding) (not designated for publication).

283. *Id.* at *1.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at *1-*2.

288. *Id.* at *3.

289. *Id.* at *3-*4 (citing *Phelps Dodge Ref. Corp. v. Marsh*, 733 S.W.2d 359, 361 (Tex. App.—El Paso 1987, orig. proceeding)).

290. *Id.* at *3 (citing *Brown & Root U.S.A., Inc. v. Moore*, 731 S.W.2d 137, 140 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding)).

litigation requirement was not proven, the witness statement was not protected from discovery.²⁹¹

IV. TEXAS RULES OF CIVIL EVIDENCE PRIVILEGES

A. *Attorney-Client Privilege*

The attorney-client privilege, as it applies in civil cases, is set out in Rule 503 of the Texas Rules of Civil Evidence.²⁹² The rule gives a client

the 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 (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his 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 therein, (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.²⁹³

Surprisingly little litigation has been conducted over the attorney-client privilege in the discovery context.

As in all jurisdictions, one of the most difficult privilege questions arises when a party is an organization rather than a human being. In such cases, the court must decide who is a "representative of the client" so that communications to and from the representative qualify for the privilege. Rule 503 defines "representative of the client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."²⁹⁴ Commentators disagree over whether this definition limits client representatives to those in the "control group," that is, people high in the corporate hierarchy, or whether the definition refers to a "subject matter test," thereby providing a privilege to people with whom an attorney needs to communicate in order to render legal services.²⁹⁵ Read literally, the language of the rule could

291. *Id.* at *3-*4.

292. *See* TEX. R. CIV. EVID. 503(b).

293. *Id.*

294. *Id.*

295. *See, e.g.*, 33 STEVEN GOODE ET AL., GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 503.3, at 237-38 (Texas Practice 1988) (stating un-

include any employee who in some way "acts" on the lawyer's advice within the scope of her job duties. Such an interpretation would produce a very broad exemption indeed, especially because the privilege encompasses communications both to and from the client and even between client representatives. The exemption would also be very broad because the attorney-client privilege, unlike the Rule 166b exemptions, contains no anticipation of litigation requirement.²⁹⁶ So far, however, Texas courts show no sign of such an expansive reading of Rule 503.

The most extensive discussion of the privilege, as it relates to discovery, comes in *Texas Department of Mental Health & Mental Retardation v. Davis*.²⁹⁷ The communications in issue in *Davis* were reports written to TDMHMR's lawyer concerning an investigation of the death of a resident of the Travis State School.²⁹⁸ The court had to decide whether the communications were sufficiently "confidential" to be privileged and whether the persons communicating with the attorney were "representatives of the client."²⁹⁹

In deciding the issue of confidentiality, the court noted that in order for a communication to be confidential, the client must show, by direct or circumstantial evidence, that he did not intend the communication to be disclosed to third parties.³⁰⁰ Because the court found no evidence that TDMHMR intended the interviews and report to be confidential, that the interviewer believed the information he gathered to be confidential, or that the persons who signed the report believed it to be confidential, the court found the privilege to be inapplicable.³⁰¹ The court made this finding despite the existence of a letter from the lawyer to the assistant superintendent of the school requesting

equivocally that Texas adopted the control group test); HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL V-33 (3d ed. 1991) (stating that Rule 503(a)(2) may adopt both the control group and the subject matter test). For a general discussion of attorney-client privilege in the corporate context, see David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956); Glen Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899 (1980). The most-cited cases discussing the issue for federal courts are *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 608-11 (8th Cir. 1977, orig. proceeding) (en banc); and *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom. General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

296. TEX. R. CIV. EVID. 166(b).

297. 775 S.W.2d 467 (Tex. App.—Austin 1989, orig. proceeding [leave denied]).

298. *Id.* at 469.

299. *Id.* at 472.

300. *Id.* at 472-73.

301. *Id.* at 474.

that the assistant superintendent "[p]lease inform those staff members participating in this investigation that the results are to be treated as confidential and are to be reported to me only."³⁰² No evidence showed that these conditions were agreed to or that the investigation was in fact conducted under these conditions.³⁰³

The court also held that the evidence was not sufficient to establish that the people who prepared the report were client representatives.³⁰⁴ As noted above, Rule 503(a)(2) defines client representatives as persons "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."³⁰⁵ The investigation was conducted by three people: the chair of the school's client abuse committee, the school's Chief of Fire Safety, and a TDMHMR employee who was not an employee of the school.³⁰⁶ The court found insufficient proof that the three "were persons entitled to engage in confidential communication, or were persons whose participation was needed in order to facilitate rendition of any legal services."³⁰⁷ Therefore, the court upheld the trial court's decision that the report was not privileged.³⁰⁸

Texas courts also have decided various privilege-related issues in the discovery context and have analyzed the kinds of information protected by privilege. In *Allstate Texas Lloyds v. Johnson*³⁰⁹ and *Borden, Inc. v. Valdez*,³¹⁰ the courts noted that the attorney-client privilege does not include such nonconfidential matters as the terms and conditions of an attorney's employment and the purpose for which an attorney has been engaged.³¹¹ Similarly, in *Aetna Life & Casualty v. Cochran*,³¹² the court held that an insurance company's claims handling procedure manual was not privileged simply because

302. *Id.*

303. *Id.*; cf. *Boring & Tunneling Co. of Am., Inc. v. Salazar*, 782 S.W.2d 284, 290 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (holding that a letter from an attorney to an insurance adjuster, who had retained the attorney to represent the insured, was privileged because it was made to facilitate the rendition of legal services and under circumstances indicating a desire for confidentiality).

304. *Davis*, 775 S.W.2d at 473.

305. TEX. R. CIV. EVID. 503(a)(2).

306. *Davis*, 775 S.W.2d at 470.

307. *Id.* at 473.

308. *Id.* at 474-75.

309. 784 S.W.2d 100 (Tex. App.—Waco 1989, orig. proceeding).

310. 773 S.W.2d 718 (Tex. App.—Corpus Christi 1989, orig. proceeding).

311. *Allstate Texas Lloyds*, 784 S.W.2d at 105; *Borden, Inc.*, 773 S.W.2d at 720-21.

312. No. 01-88-00490-CV, 1988 Tex. App. LEXIS 1348 (Tex. App.—Houston [1st Dist.] June 2, 1988, orig. proceeding) (not designated for publication).

the company's attorney had assisted in the preparation of the manual.³¹³ However, in *Wiley v. Williams*,³¹⁴ the court held that a file containing copies of letters between the attorney and the client's insurance carrier, conveying information regarding the progress and handling of the plaintiff's claims, were protected by the attorney-client privilege.³¹⁵ Further, in *Enos v. Baker*,³¹⁶ the court held that the attorney-client privilege extended to non-party client files so that a lawyer's spouse in a divorce case could not discover confidential communications between the lawyer and the lawyer's clients in an attempt to discover the value of the lawyer-spouse's law practice and prospective income.³¹⁷

Other opinions discuss duration and waiver issues. In *Wood v. McCown*,³¹⁸ arising from a civil suit alleging assault by an employee that was brought after the employee's conviction in a criminal proceeding arising from the same incident, the court held that documents protected by the attorney-client privilege in a criminal proceeding were similarly protected in the subsequent civil proceeding.³¹⁹ The court decided that "the privilege is permanent unless waived."³²⁰ In *Axelson, Inc. v. McIlhany*,³²¹ the Texas Supreme Court held that because there was evidence that documents reflecting the defendant's internal investigation of kickback schemes at a gas well site had been disclosed to the FBI, the IRS, and the *Wall Street Journal*, the attorney-client privilege had been waived.³²²

The court in *Ryals v. Canales*³²³ discussed the parameters of the joint defense privilege.³²⁴ The court noted that parties may assert the privilege when they are parties in the same lawsuit, parties who are about to be in the same lawsuit and are making their communications in anticipation of litigation, or parties with common defenses against a plaintiff.³²⁵ However, because the party opposing discovery and asserting this privilege had provided only conclusory allegations tracking the

313. *Id.* at *2.

314. 769 S.W.2d 715 (Tex. App.—Austin 1989, orig. proceeding [leave denied]).

315. *Id.* at 717.

316. 751 S.W.2d 946 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding).

317. *Id.* at 949.

318. 784 S.W.2d 126 (Tex. App.—Austin 1990, orig. proceeding).

319. *Id.* at 127.

320. *Id.* at 128.

321. 798 S.W.2d 550 (Tex. 1990, orig. proceeding).

322. *Id.* at 554.

323. 767 S.W.2d 226 (Tex. App.—Dallas 1989, orig. proceeding).

324. *Id.* at 227-30.

325. *Id.* at 228.

language of Rule 503, the privilege was not applied in the *Ryals* case.³²⁶

Texas courts have also had the opportunity to discuss the crime-fraud exception to the attorney-client privilege.³²⁷ In *Freeman v. Bianchi*,³²⁸ for example, the court held that a party asserting the crime-fraud exception must make a prima facie case of a serious violation and must show a relationship between the violation and the document in question.³²⁹

B. Physician-Patient Privilege and Confidentiality of Mental Health Information

Rule 509(b) of the Texas Rules of Civil Evidence provides the general rule that "[c]onfidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed."³³⁰ Rule 509(b) also states that "[r]ecords 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."³³¹ Rule 510 provides for corresponding privileges for mental health information.³³²

One of the exceptions to the privilege exists as to any communication or record relevant to a party's physical, mental, or emotional condition if a party to the lawsuit relies upon the physical, mental, or emotional condition as a part of a claim or defense.³³³ This exception, at minimum, attempts to prevent the offensive use of the privilege, *i.e.*, when a party places his or her physical or mental condition in issue and subsequently attempts to use the privilege to conceal evidence of the condition.³³⁴ The language of the rule itself is not limited to offen-

326. *Id.* at 230.

327. TEX. R. CIV. EVID. 503(d)(1).

328. 820 S.W.2d 853 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave granted]).

329. *Id.* at 861.

330. TEX. R. CIV. EVID. 509(b)(1); *see also* TEX. R. CIV. EVID. 510(b)(1). Regarding the establishment of the physician-patient relationship, *see* *Garay v. County of Bexar*, 810 S.W.2d 760, 764 (Tex. App.—San Antonio 1991, writ denied).

331. TEX. R. CIV. EVID. 509(b).

332. *Id.* 510(a)(2).

333. *Id.* 509(d)(4), 510(d)(5).

334. *See* *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985, orig. proceeding) (holding that medical records are privileged unless used offensively); *Dossey v. Salazar*, 808 S.W.2d 146 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [leave denied]) (holding that the psychotherapist-patient exceptions are intended to prevent offensive use of the privilege, but that the exception does not apply when a patient does not put a condition in issue); *Wimberly Resorts Property*,

sive use of privileged information and creates an exception whenever the information is "relevant."³³⁵

Texas courts are split on the proper application of this exception. For example, in *Scheffey v. Chambers*,³³⁸ Scheffey, a physician who was the defendant in the underlying medical malpractice litigation, admitted himself to a California hospital for treatment for cocaine addiction.³³⁷ The plaintiffs sought discovery of Dr. Scheffey's medical records, and the trial court entered an order allowing the subpoena of his medical records without an *in camera* inspection.³³⁹ The court granted mandamus relief on the basis that Dr. Scheffey did not bring the litigation and therefore was not using the privilege offensively.³³⁹

Justice Ellis, dissenting in *Scheffey*, stated that Rules 509(d)(4) and 510(d)(5) of the Texas Rules of Civil Evidence made the hospital records discoverable.³⁴⁰ Justice Ellis correctly pointed out that the statutory language creates the exception with regard to records or communications that may be relevant to "an issue of the physical, mental, or emotional condition of a patient in any proceeding in which any party relies on the condition as part of the party's claim or defense."³⁴¹ In other words, the evidence rules do not require the party claiming the privilege to be the person who raises the issue making the patient's condition relevant. In *Scheffey*, the medical records sought for discovery purposes related to the condition that allegedly rendered Dr. Scheffey unfit to perform surgery and were therefore relevant:

The nature and extent of Dr. Scheffey's cocaine addiction and its attendant physical and mental effects upon him form the

Inc. v. Pfeuffer, 691 S.W.2d 27, 29 (Tex. App.—Austin 1985, orig. proceeding) (holding that mental health records are privileged unless the plaintiff puts his health in issue).

335. TEX. R. CIV. EVID. 504(d)(4), 510(d)(5).

336. 790 S.W.2d 879 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding [leave denied]).

337. *Id.* at 880.

338. *Id.*

339. *Id.* at 881; see also *Dossey v. Salazar*, 808 S.W.2d 146, 147-48 (Tex. App.—Houston [14th Dist.] 1991, orig. proceeding [leave denied]) (holding that the defendant patient did not bring the action nor make mental health an issue, and therefore Rule 510(d)(5) was not applicable). Another court has taken the same approach, holding that despite its broad language, the exception to the mental health information privilege is limited to offensive, not defensive, uses of the mental health information. See *K.P. v. Packer*, 826 S.W.2d 664, 667 (Tex. App.—Dallas 1992, orig. proceeding).

340. *Scheffey*, 790 S.W.2d at 881 (Ellis, J., dissenting).

341. *Id.* at 882.

basis of the Watsons' case. If the Las Encinas Hospital records are not at the very least *discoverable*, then the Watsons would be precluded from challenging Dr. Scheffey's self-serving testimony that he was not under the influence of cocaine while treating any patients at his office or at any hospital. The Watsons would be further precluded from challenging Dr. Scheffey's self-serving testimony that his cocaine use had no effect on him during non-use periods and did not effect [sic] his care or treatment of Mr. Watson.³⁴²

A historical analysis of Rules 509 and 510 supports the view that the exception is meant to eliminate the privilege whenever the communication is relevant, regardless of which party "relies" upon the medical condition. For example, the original version of the exception in Rule 510 created an exception to the privilege if the information was relevant and if "the patient/client is attempting to recover monetary damages for any mental condition."³⁴³ The original exception, then, *was* limited to cases in which the patient-privilege holder was the litigant who put her mental condition in issue. In 1984, however, the exception was broadened to add cases in which, after the patient's death, "any party" relied on the physical, mental, or emotional condition of the patient as an element of a claim or defense.³⁴⁴ The Committee on the Administration of the Rules of Evidence specifically intended this change to broaden the exception to include cases in which the patient was not the party who raised the issue of mental condition.³⁴⁵ In 1988 the rule was again rewritten, as was Rule 509. This time the committee adopted the "any party" language, which was created to extend the exception to cases in which the patient does not raise the issue making the privileged communication relevant, and applied it to both living and dead patients.³⁴⁶ Now a communication falls within an exception to the privilege if it is relevant and if "any party relies upon the condition as a part of the party's claim or defense."³⁴⁷

In *Cheatham v. Rogers*,³⁴⁸ the court of appeals applied a related privilege exception. The case involved Miriam Young, a non-party mental health professional appointed by the court to

342. *Id.*

343. Tex. R. Evid. 510(d)(5), 46 TEX. B.J. 205 (1983).

344. Tex. R. Civ. Evid. 510(d)(5), 47 TEX. B.J. 937 (1984).

345. Letter from M. Michael Sharlot to Newell H. Blakely (Apr. 30, 1984) (Supplement to the Agenda for the May 18, 1984 Committee meeting) (on file with the authors).

346. TEX. R. CIV. EVID. 509(d)(4), 510(d)(5).

347. *Id.*

348. 824 S.W.2d 231 (Tex. App.—Tyler 1992, orig. proceeding).

counsel children as part of a divorce decree.³⁴⁹ When Young recommended that the father's access to the children be terminated, the father responded by seeking copies of Young's own psychological or psychiatric records and to depose her concerning these records.³⁵⁰ The father claimed that Young's own mental health was relevant to impeach her expert opinion and that the records were therefore discoverable under Rule 510(d)(6), which creates an exception for cases "when the disclosure is relevant in any suit affecting the parent-child relationship."³⁵¹ Young objected on the basis of the Rule 510 privilege, but the court rejected the privilege claim.³⁵²

Courts have also discussed the scope of the privilege. For example, in *Midkiff v. Shaver*,³⁵³ the trial court had determined that the plaintiffs' entire medical records were discoverable in a suit seeking damages for mental anguish that allegedly arose from the mishandling of the plaintiffs' insurance claim for water damage to a building and the building's contents.³⁵⁴ The court of appeals held that the discovery order was overly broad.³⁵⁵ Because the plaintiffs' allegation of mental anguish did not place their mental condition at issue, discovery should have been limited to only those medical records related to the medical attention sought by the plaintiffs for the symptoms of their mental anguish claims.³⁵⁶

C. Other Privileges under the Texas Rules of Civil Evidence

Texas recognizes a husband-wife communication privilege under which a person, whether or not a party, has a privilege during and after marriage to refuse to disclose and to prevent others from disclosing a confidential communication made to a spouse while the person was married, unless the communication was made in furtherance of crime or fraud.³⁵⁷ However, the privilege is not applicable to a proceeding between spouses, a commitment or similar proceeding, or a proceeding to establish competence.³⁵⁸ The Texas Rules of Civil Evidence also pro-

349. *Id.* at 232.

350. *Id.* at 232-33.

351. *Id.* at 233-34.

352. *Id.*

353. 788 S.W.2d 399 (Tex. App.—Amarillo 1990, orig. proceeding).

354. *Id.* at 400.

355. *Id.* at 403.

356. *Id.*

357. TEX. R. CIV. EVID. 504.

358. See *id.* 504(d)(2)-(4).

vide for a privilege for communications to clergy,³⁵⁹ a privilege to refuse to disclose the tenor of a person's vote at a political election conducted by secret ballot,³⁶⁰ and, under certain circumstances, a privilege from disclosure of a trade secret.³⁶¹

V. NON-RULE PRIVILEGES

In addition to the privileges contained in the rules of civil procedure and in the rules of civil evidence, a number of privileges are contained in statutes or case law and may be asserted during discovery. Examples of statutory privileges include hospital committee and other medical records privileges, the privilege protecting certain lobbying activities, a reporter's investigative file privilege, a bank's privilege from disclosure of information concerning customer transactions, and the law enforcement privilege.

A. Hospital Committee and Other Medical Records

Section 161.032 of the Health and Safety Code recognizes a privilege protecting the records and proceedings of certain medical organizations.³⁶² This statute provides that the records and proceedings of a medical committee are confidential and are not subject to court subpoena.³⁶³ This statutory privilege protects the deliberations of hospital committees.³⁶⁴ The privileged "records and proceedings" include documents that have been prepared by or at the direction of the committee for committee purposes, but do not protect all documents gratuitously submitted to a committee or created without committee impetus and purpose.³⁶⁵ The statute protects only the "deliberative process" and not routinely accumulated information.³⁶⁶

Courts have consistently held that committee minutes and reports are privileged.³⁶⁷ In considering other documents,

359. See *id.* 505.

360. See *id.* 506.

361. See *id.* 507.

362. See TEX. HEALTH & SAFETY CODE ANN. § 161.032(a) (Vernon 1992).

363. *Id.*

364. *Jordan v. Court of Appeals for the Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 647 (Tex. 1985, orig. proceeding).

365. *Id.* at 647-48.

366. *Barnes v. Whittington*, 751 S.W.2d 493, 496 (Tex. 1988); see also *Jordan*, 701 S.W.2d at 648.

367. See, e.g., *Jordan*, 701 S.W.2d at 648 (holding that committee reports are privileged to allow open and thorough review unless waived by disclosing them to a grand jury); *Harris Hosp. v. Schattman*, 734 S.W.2d 759, 761 (Tex. App.—Fort Worth 1987, no writ) (holding that minutes of a committee meeting were non-discov-

courts examine them to determine whether the hospital asserting the privilege has proven that the documents either disclosed committee deliberations or were prepared by or at the direction of the committee for committee purposes. Courts have held that: (1) letters or memoranda not requested or generated by a committee were not within the privilege;³⁶⁸ (2) reports made by a doctor at the request of one of the hospital's administrators, because there was no evidence that the request was made for committee purposes or with committee impetus, were not privileged;³⁶⁹ (3) a doctor's handwritten "Notes to the File" were not privileged because they were not shown to be created for or by the direction of a committee;³⁷⁰ (4) checklists used to keep track of when a doctor's license will expire, what letters of reference have been received, and various identification numbers, were discoverable as documents kept in the ordinary course of business;³⁷¹ (5) letters from members of various committees or departments to doctors who were under review by the committees or departments, discussing the committee's action or finding, were privileged;³⁷² and (6) letters from the hospital's chief of staff requesting information, letters providing the information, and letters discussing the information, where requested by a committee for a committee purpose, were privileged.³⁷³

The hospital committee privilege was held impliedly waived with respect to the record of a meeting of a hospital staff to

erable unless waived by disclosure); *Santa Rosa Medical Ctr. v. Spears*, 709 S.W.2d 720, 723 (Tex. App.—San Antonio 1986, orig. proceeding) (holding that committee reports are privileged unless voluntarily disclosed).

368. See, e.g., *Barnes*, 751 S.W.2d at 496 (holding that letters, which requested information on the credentials and experience of two of a hospital's doctors, and a listing of letters, mailed and received by the hospital during the application process, were "routine administrative records" and that a letter from one of the doctor's insurance carriers was a "gratuitously submitted document"); *Jordan*, 701 S.W.2d at 648; *Doctor's Hosp. v. West*, 765 S.W.2d 812, 814-15 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding) (holding that letters from hospital administrators requesting background information concerning doctors, letters from doctors or administrators to the hospital providing recommendations or background information, letters requesting information from a doctor concerning a case under review, letters providing information concerning a medical procedure performed by a doctor, and letters from the hospital's assistant administrator to the Texas State Board of Medical Examiners were not shown to be privileged because they were not generated at the request of a committee for committee purposes).

369. See *Doctor's Hosp.*, 765 S.W.2d at 815.

370. See *Jordan*, 701 S.W.2d at 648.

371. See *Doctor's Hosp.*, 765 S.W.2d at 815.

372. See *id.*

373. *Freitag v. Trevathan*, No. 01-89-0012-CV, 1989 Tex. App. LEXIS 397, at *4 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (not designated for publication).

review the circumstances of a patient's suicide (a "psychological autopsy") in *Terrell State Hospital v. Ashworth*,³⁷⁴ a case which arose from a negligence action against a state hospital.³⁷⁵ After a patient's suicide, a representative of the patient's mother sent a list of questions concerning the patient's death to the hospital's superintendent, who reviewed the psychological autopsy before responding to the questions.³⁷⁶ Although the "psychological autopsy" itself was not disclosed, the superintendent's response included information, opinions, and conclusions found in the report.³⁷⁷ The court stated that while a partial disclosure of "any significant part" of privileged material can result in an implied waiver of additional non-disclosed material,³⁷⁸ such an implied waiver is "not an automatic, blanket waiver of all underlying materials," and the scope of the implied waiver is within the discretion of the trial court.³⁷⁹ Because the trial judge could have determined after examining the "psychological autopsy" that the superintendent's response disclosed a "significant part" of the material, and because the hospital failed to show a clear abuse of discretion, discovery of the entire report was allowed in the negligence action.³⁸⁰

The Medical Practice Act also makes the reports, determinations of, and communications to medical peer review committees confidential and privileged in civil judicial or administrative proceedings. As amended in 1987, section 5.06(j) of the Medical Practice Act provides:

[u]nless disclosure is required or authorized by law, records or determinations of or communications to a medical peer review committee are not subject to subpoena or discovery and are not admissible as evidence in any civil judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee.³⁸¹

Under this statute, any person seeking access to privileged information must plead and prove waiver of the privilege.³⁸² For example, in one case, the defendant physician and a hospital claimed that a district judge abused his discretion by order-

374. 794 S.W.2d 937 (Tex. App.—Dallas 1990, orig. proceeding).

375. *Id.* at 938-41.

376. *Id.* at 939.

377. *Id.* at 940.

378. *Id.*

379. *Id.* at 941.

380. *Id.* at 940-41.

381. TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.06(j) (Vernon Supp. 1992).

382. *Id.*

ing the production of documents concerning the competency and the credentials of the physician at the hospital, including materials relating to an investigation of the physician's medical conduct and documents concerning any withdrawal of his medical or surgical privileges.³⁸³ The court concluded that mandamus was appropriate, based in part on the applicability of article 4495b to hospital peer review committees.³⁸⁴ Significantly, the court was unwilling to engraft the limitations on the claims of privilege under article 4495b that are applicable to claims of privilege under Sections 161.031 and 161.032 of the Health and Safety Code.³⁸⁵

Various other public health statutes contain reporting and confidentiality requirements that might become relevant during discovery disputes. For example, the Communicable Disease Prevention and Control Act contains extensive reporting and confidentiality requirements concerning communicable disease test results.³⁸⁶

In addition, another statute makes the medical and donor records of a blood bank confidential.³⁸⁷ However, the statute also provides that the blood bank may be required by a court of competent jurisdiction, after notice and hearing, to provide a recipient of blood from the blood bank with results of tests—with donor identification deleted—of the blood of every donor of blood transfused into the recipient.³⁸⁸ Under certain circumstances, a court may order discovery relating to the donor.³⁸⁹

B. Other Privileges

1. *Lobbying activities.* The Texas Government Code prohibits the public disclosure of a written or otherwise recorded

383. See *Northeast Community Hosp. v. Gregg*, 815 S.W.2d 320, 321-22 (Tex. App.—Fort Worth 1991, orig. proceeding).

384. *Id.* at 326.

385. *Id.*

386. See TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992). But see *Gulf Coast Regional Blood Ctr. v. Houston*, 745 S.W.2d 557, 560 (Tex. App.—Ft. Worth 1988, orig. proceeding) (holding a health regulation prohibiting disclosure of donor information inapplicable to court proceedings because the legislature had enacted a separate statute limiting court actions on blood banks).

387. See TEX. HEALTH & SAFETY CODE ANN. § 162.003.

388. *Id.* § 162.010.

389. *Id.* § 162.011. Some pre-statute cases held that an order requiring a blood center to identify blood donors in a wrongful death action based on a blood transfusion resulting in death from AIDS is not a violation of the constitutional right to privacy. *E.g.*, *Gulf Coast Regional Blood Ctr.*, 745 S.W.2d at 554-60; *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 677-80 (Tex. App.—Ft. Worth 1987, orig. proceeding).

communication from a citizen of Texas to a member of the legislature, unless either party authorizes disclosure.³⁹⁰ This provision was held to prevent discovery, in a civil case, of documents submitted to lobbyists and copies of documents distributed to state representatives in support of proposed legislation.³⁹¹

2. *Reporter's privilege.* In *Channel Two Television Co. v. Dickerson*,³⁹² the court recognized and applied a qualified privilege protecting information that the press obtains through its investigations.³⁹³ The court held that because of the Texas constitutional provision that "no law shall ever be passed curtailing the liberty of speech or of the press,"³⁹⁴ once the privilege is asserted, the party seeking discovery of the reporter's investigative materials must demonstrate that there is a compelling and overriding need for the information.³⁹⁵ At a minimum, the party seeking discovery must make a "clear and specific showing in the trial court that the information sought is: (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other available sources."³⁹⁶ Because no such showing was made in the *Channel Two* case, the reporter's notes, outtakes, records, and other documents were not discoverable.³⁹⁷

Similarly, in *Dallas Morning News Co. v. Garcia*,³⁹⁸ the court of appeals discussed at length the parameters of the reporters' privilege and the burdens of establishing and refuting the privilege.³⁹⁹ The court required parties seeking to overcome a claim of reporters' privilege⁴⁰⁰ to show substantial evi-

390. TEX. GOV'T CODE ANN. § 306.004 (Vernon 1988).

391. See *Inwood W. Civic Ass'n v. Touchy*, 754 S.W.2d 276, 278 (Tex. App.—Houston [14th Dist.] 1988, orig. proceeding [leave denied]) (denying a homeowners' association discovery of Houston Cable's lobbying efforts in support of a law giving cable companies free access to utility easements across private property).

392. 725 S.W.2d 470 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding).

393. *Id.* at 472; see also *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that a television newsman-photographer was required to testify at a trial regarding civil disobedience which he had witnessed, but that the trial judge needed to ensure that the questioning was pertinent and proper).

394. TEX. CONST. art. I, § 8.

395. *Channel Two*, 725 S.W.2d at 472.

396. *Id.*

397. *Id.*

398. 822 S.W.2d 675 (Tex. App.—San Antonio 1991, orig. proceeding).

399. See *id.* at 677-85.

400. The reporters had met their burden of establishing the existence of the privilege by filing affidavits from the reporter/authors stating that they had assured certain news sources of confidentiality. *Id.* at 679. "The reporters also averred that the articles . . . were not based solely on the confidential sources, but were also based on numerous record sources and approximately 20,000 pages of documents .

dence of falsity, to show that they had exhausted alternative sources of information, and to show that the matters attributable to the confidential source were material and critical to the discovering party's case.⁴⁰¹ The *Garcia* court found that the plaintiffs had not yet made the required showing.

3. *Non-disclosure of records of financial institutions.* Section 1 of the Texas Banking Code provides the general rules of nondisclosure applicable to financial institutions.⁴⁰² A financial institution is prohibited from disclosing the records of a depositor, owner, borrower, or customer of the institution who is not a party to a proceeding unless the court orders disclosure and the depositor, owner, borrower, or customer consents in writing to such a disclosure.⁴⁰³ Section 5(a) provides a narrow exception to the general rules of nondisclosure contained in Section 1, allowing "the use or disclosure by a bank of information or records pertaining to deposits, accounts, or bank transactions if the use or disclosure . . . is made by the bank in the course of the litigation affecting its interests."⁴⁰⁴

In *Texas National Bank of Victoria v. Lewis*,⁴⁰⁵ the Corpus Christi Court of Appeals denied a bank mandamus relief.⁴⁰⁶ The trial court had ordered the discovery of "all documents contained in any files for 224 of the bank's customers" in a declaratory judgment action against a former employee, which sought a declaration that the former employee was owed no money under his contract.⁴⁰⁷ The employee filed a counterclaim, alleging various causes of action in tort and, during the course of discovery, requested the bank to produce the documents in question for his inspection.⁴⁰⁸ The trial court denied the bank's motion for protection.⁴⁰⁹ In denying mandamus, the court of appeals emphasized that the statute was unclear and that at the time the trial court had acted, no case

. . ." *Id.* at 679 n.3. The affidavits also recited that "many of the confidential sources feared retaliation against them if their identities [were] disclosed." *Id.*

401. *Id.* at 680.

402. TEX. REV. CIV. STAT. ANN art. 342-705, § 1 (Vernon Supp. 1992).

403. *Id.*

404. *Id.* § 5(a).

405. 793 S.W.2d 83 (Tex. App.—Corpus Christi 1990, orig. proceeding [leave denied]).

406. *Id.* at 86.

407. *Id.* at 84.

408. *Id.*

409. *Id.*

law was available to guide the trial court in its interpretation of the statute.⁴¹⁰ The appellate court found that:

The trial court fashioned an order allowing the discovery but provided some protection of confidentiality for the bank's customers. This balancing of interests under an ambiguous statute to achieve the necessary discovery while protecting the privacy addressed by the statute is a proper exercise of the trial court's discretion. The statute is not so clear and unequivocal that it imposes an absolute duty on the trial court to compel protection.⁴¹¹

4. *Law enforcement privilege.* In *Hobson v. Moore*,⁴¹² the Texas Supreme Court recognized in dictum a privilege for law enforcement officials to withhold the types of documents protected by section 3(a)(8) of the Open Records Act.⁴¹³ The Open Records Act exempts from disclosure records of law enforcement agencies and prosecutors that deal with the detection, investigation and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.⁴¹⁴

VI. CONCLUSION

The clear trend over the past several years has been to increase the scope of discovery, both by broadening the definition of relevance and by limiting the scope of privileges. Parties to litigation can now discover anything, if it is not privileged, that might be material to an issue in the lawsuit, unless the burden of producing the information is substantially greater than the potential importance of the information. This information may be different in substance or in time from the actual facts at issue in the lawsuit.

At the same time, amendments to the rules of procedure and developing case law have narrowed the scope of many privileges. The old investigative privilege was eliminated by rule amendment. The work product, party communication, and witness statement privileges have been made case-specific and subjected to both subjective and objective tests of "anticipation

410. *Id.* at 86.

411. *Id.*

412. 734 S.W.2d 340 (Tex. 1987, orig. proceeding).

413. *Id.* at 340-41.

414. TEX. REV. CIV. STAT. ANN. art. 6252-17A, § 3(a)(8) (Vernon Supp. 1992).

of litigation." Protection for expert witnesses is narrower than it used to be. Even the attorney-client privilege, at least as currently interpreted by case law, has been narrowed through the requirement of confidentiality and the limits on who can be a client's representative for purposes of attorney-client privilege.

Despite these developments, the philosophy driving the discovery system continues to be in a state of flux. Formerly, discovery was disfavored and privileges were highly protected. During the past fifteen years, Texas courts have promoted discovery, expecting litigants to be forthcoming with information and have viewed claims of privilege with suspicion. These developments have not been welcomed by everyone. As one appellate court noted: "Query: What has become of our traditional Texas adversative system of trying litigation? Answer: 'Gone with the wind.'"⁴¹⁵ This response, however, misjudges the needs of the adversary system. While the system may require an adversary presentation of evidence before an uninvolved decisionmaker, it does not require a completely adversarial process of information gathering.⁴¹⁶ Texas courts have reasoned correctly that the purpose of discovery is to reveal all relevant information, so that cases will be decided based on that information.

More recent cases, however, suggest that relevance may retreat and the privileges regain importance. For example: (1) the work product exemption has been held to be "perpetual," and the implications of that decision may dramatically lengthen the time parameters of many Rule 166b discovery exemptions; (2) discovery of relevant net worth information has been curtailed; and (3) while the scope of relevance for impeachment purposes has been clarified somewhat, it has been left in a kind of inspecific limbo that may lead trial courts to continue to deny discovery of relevant impeachment information.⁴¹⁷ Un-

415. *Texaco Ref. & Mktg., Inc. v. Sanderson*, 739 S.W.2d 493, 495 (Tex. App.—Beaumont 1987, orig. proceeding).

416. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (discussing the costs associated with an adversarial discovery system and proposing reforms for the discovery process).

417. Although the procedures required to litigate discovery disputes are beyond the scope of this article, one should also note that the Texas Supreme Court has recently changed the rules regarding the availability of mandamus review in a way that will make it easier for parties resisting discovery to obtain immediate review and harder for parties seeking discovery to obtain immediate review. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992, orig. proceeding). For a discussion and analysis of the policies underlying the new *Walker* limits on mandamus, see Elizabeth G. Thornburg, *Afterword*, in *THE TEXAS LITIGATION READER* at 152 (1992). See generally Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose*

fortunately, the pendulum may be about to change direction again, back to a time when discovery practice resembled court-sanctioned blind man's bluff or hide-and-seek. The result of such changes truly would be a fool's game.⁴¹⁸ What we need instead is a fair game. Let's hope we get one.

Time Has Come, 44 Sw. L.J. 1045 (1990).

418. Cf. Albright, *supra* note 4, at 781 (suggesting that the "anticipation of litigation" standard is antiquated and that the Texas courts' reliance upon this standard is misguided).