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Has the Fog Cleared - Attorney Work Product and the Attorney-Client Privilege: Texas's Complete Transition into Full Protection of Attorney Work in the Corporate Context.

Fred A. Simpson

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ARTICLE

HAS THE FOG CLEARED? ATTORNEY WORK PRODUCT AND THE ATTORNEY-CLIENT PRIVILEGE: TEXAS'S COMPLETE TRANSITION INTO FULL PROTECTION OF ATTORNEY WORK IN THE CORPORATE CONTEXT

FRED A. SIMPSON*

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* Partner in the Houston Litigation Section of Jackson Walker L.L.P. Mr. Simpson acknowledges the basic research and writing of Gregorio W. ("Willie") Hernandez, Staff Attorney with the IBM Corporation, Dallas, Regional Counsel's Office. Mr. Simpson also acknowledges the invaluable editing, comments, and suggestions of Richard L. Hathaway, J.D. Candidate 2001.

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"Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[1]

I. Introduction

Over the past three years, Texas has attempted to resolve the confusion surrounding the attorney work product and attorney-client privileges as applied to corporate in-house counsel.[2] Prior to recent changes in both the Texas Rules of Evidence and Rules of Civil Procedure, the fluid nature of information allowed protection from discovery often subjected in-house corporate counsel to the headaches associated with corralling a moving target.[3] In determining whether a corporate employee's information fell within the attorney-client privilege, courts asked whether to include the employee in the corporation's "control group" as defined by Texas

1. Hickman v. Taylor, 329 U.S. 495, 510 (1947).

2. *See* Tex. R. Evid. 503(a)(2)(B) (explaining that for the purposes of the attorney-client privilege a representative of the client is "any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client"); Tex. R. Civ. P. 192.5 cmt. 8 (addressing the 1999 changes to the discovery rules and noting that work product was defined for the first time and exceptions created thereto); *In re* Monsanto Co., 998 S.W.2d 917, 924 (Tex. App.—Waco 1999, orig. proceeding) (reflecting on recent changes and noting that "[b]ecause the rules have been recently revised with respect to discovery and the method of claiming privileges, we are to a large extent free to write on a clean slate in implementing the rules"); *cf.* Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 St. Mary's L.J. 997, 1044 (1999) (noting "the parameters of the attorney-client privilege have recently changed").

3. *See* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 Tex. Tech L. Rev. 139, 144 (1999) (bemoaning the control group test and indicating that a corporation in Texas practically had no attorney-client privilege because of the limited scope of the test); Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 Def. Couns. J. 553, 553 (1995) (noting that many corporations do not know the extent of protections availed to confidential communications with counsel).

Rule of Evidence 503.[4] Correspondingly, in analyzing the work product exemption, courts asked whether in-house counsel created the particular document "in anticipation of litigation."[5] However, courts and litigants remained confused about whether the work product protection included ordinary work product or simply opinion work product.[6] Fortunately, in 1998 and 1999 the Texas Supreme Court addressed the concerns of in-house corporate counsel by reviewing and ultimately amending the rules governing work product and attorney-client communications.

Historically, Texas diverged from both the Federal Rules of Evidence and Civil Procedure.[7] This conflict left many corporate at-

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4. TEX. R. CIV. EVID. 503(a)(2) (1984, amended 1998); *see* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 197-98 (Tex. 1993) (orig. proceeding) (arguing that Texas Rule of Evidence 503(a)(2) clearly adopted the control group test illustrated in federal courts prior to *Upjohn Co. v. United States*, 449 U.S. 383 (1981)); Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 140-41 (1999) (explaining the control group test and noting that until recently "courts have restricted the control group to only those sufficiently high up in management who, in effect, 'personified' the corporation"); Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 885-86 (1999) (noting Justice Owen's dissent in *Valero Transmission v. Dow*, 960 S.W.2d 642 (Tex. 1997), claiming that the current state of the attorney-client privilege under the control group test makes its application difficult).

5. *See* Huie v. DeShazo, 922 S.W.2d 920, 927 (Tex. 1996) (declaring "[t]he determinative factor for the work-product privilege is instead whether litigation was anticipated"); *see also* Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 920 (1983) (contending that work product, when argued as a privilege, is limited in application to material prepared in anticipation of litigation); *see, e.g.*, Valero Transmission v. Dowd, 960 S.W.2d 642, 644 (Tex. 1997) (orig. proceeding) (arguing that the party-communication privilege hinges on the objective belief that a reasonable person would anticipate litigation and act appropriately); Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 555 (Tex. 1990) (focusing on the anticipation of litigation exemption for experts); Toyota Motor Sales, U.S.A., Inc. v. Heard, 774 S.W.2d 316, 317-18 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding [leave denied]) (noting the difficulty experienced by courts in applying the anticipation of litigation standard for the attorney work product exemption).

6. *See Nat'l Tank Co.*, 851 S.W.2d at 202-03 n.11 (contemplating Rule 166b(3)(a) and concluding, via dicta, that the rule is unclear in its application to ordinary work product); Ernest E. Figari, Jr. et al., *Texas Civil Procedure*, 47 SMU L. REV. 1677, 1700-01 (1994) (noting that the Texas Supreme Court, in *National Tank*, left open "the question of whether 'work product' in Texas is limited solely to opinion work product, or whether it includes instead both opinion and ordinary work product").

7. *See Nat'l Tank Co.*, 851 S.W.2d at 198 (proclaiming that Texas Rule of Civil Evidence 503 clearly utilizes the control group test rather than the subject matter test and concluding that the Texas Rules of Civil Procedure provide for sufficient protection of ordinary work product despite failing to define work product as the Federal Rules of Civil Procedure do); Missy K. Atwood, Comment, *Rule 166b: The Discovery of Work Product Based on Substantial Need and Undue Hardship*, 42 BAYLOR L. REV. 573, 576-77 (1990)

torneys, as well as Texas courts, in a state of confusion based on their interpretations of these rules.[8] Fortunately, the Texas Rules of Evidence changed in 1998 by broadening the application of the attorney-client privilege.[9] Prior to 1998, Rule 503 of the Texas Rules of Evidence required courts to apply the control group test in determining the scope of the attorney-client privilege in the corporate context, rather than the "subject matter" test allowed under the federal rule.[10] The Texas Supreme Court explained the contrast in *National Tank Co. v. Brotherton*,[11] refusing to adopt the federal approach at that time.[12] Five years later, however, the supreme court changed course by incorporating the subject matter

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(comparing Federal Rule 26(b)(3) and former Texas Rule 166b(3) and concluding that an examination of the federal rule, although not dispositive, is instructive when analyzing the Texas rule); Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 885 (1999) (analyzing *National Tank* and stating the court's deference to the legislature with regards to Texas Civil Rule of Evidence 503 by indicating "it must follow the control group standard rather than the subject matter test").

8. *See Valero Transmission*, 960 S.W.2d at 642-43 (addressing the control group test of the attorney-client privilege and the anticipation of litigation standard of the work product exemption and noting that the control group test is largely misunderstood amongst the courts). After *National Tank*, the party-communication privilege of the work product exemption could be interpreted such that there is no anticipation of litigation necessary. *See id.*

9. *See* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 153 (1999) (noting the positive effects of the new rule of evidence as it "encourages corporations to engage in critical self-evaluation without fear of creating a road map for future litigation, and it permits employees at all levels of a corporation to seek advice . . . without the inhibition that they . . . will have to testify as to the contents of their communications"); David J. Hatem & Romeo G. Camba, *Attorney-Client Privilege, Work Product Doctrine, and In-House Counsel*, CONSTRUCTION LAW., Oct. 1999, at 22, 22 (comparing the control group test and the subject matter test and concluding that the Supreme Court's rejection of the control group test was justified as the control group standard was too narrow and did not protect nonmanagers and middle management who would likely have important information), WL 19-OCT CONSLAW 22.

10. *See Nat'l Tank Co.*, 851 S.W.2d at 198 (proclaiming that the "Texas Rule of Civil Evidence 503, which was promulgated in November 1982, almost two years after the *Upjohn* decision, clearly adopts the control group test"); *In re* Monsanto Co., 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (focusing on the new rule of evidence which became effective on March 1, 1998 and indicating that the subject matter test would apply when the privilege applied).

11. 851 S.W.2d 193, 198 (Tex. 1993).

12. *See Monsanto*, 998 S.W.2d at 922 (noting how the new rule of evidence follows a different test overruling *National Tank*).

test into the amended Rule 503, potentially increasing the application of the attorney-client privilege in a corporate environment.[13]

Similarly, in 1999, the Texas Supreme Court reviewed the Texas Rules of Civil Procedure pertaining to two other privilege-like exemptions available to lawyers: the attorney work product exemption,[14] and a rule unique to Texas, the party communications exemption.[15] The court merged the two exemptions into Rule of Civil Procedure 192.5.[16] The new rule allows for greater protection and a clearer definition of work product and potential exceptions. These latest attempts by the Texas Supreme Court to clarify the work product and attorney-client privileges should finally resolve the confusion amongst practitioners and the courts.

Having learned from both the federal rules and case law, Texas decided to follow the federal model. For example, Revised Texas

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13. *See* Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 886-87 (1999) (discussing how the new Rule 503 implements the subject matter test); *cf.* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE, HORNBOOK SERIES § 87.1, at 319-20 (John W. Strong ed., 1992) (noting the application of the "control group" test in restricting the attorney-client privilege of the corporate client).

14. *See* TEX. R. CIV. P. 166b(3)(a) (1984, repealed 1999) (establishing the protective nature of the work product doctrine); *see, e.g.*, Huie v. DeShazo, 922 S.W.2d 920, 927 (Tex. 1996) (distinguishing the work product doctrine from the attorney-client privilege and finding that the trial court erred in failing to analyze the work product doctrine in this case); Humphreys v. Caldwell, 888 S.W.2d 469, 471 (Tex. 1994) (per curiam) (addressing the trial court's failure to recognize the work product doctrine as it applied in this case); Oyster Creek Fin. Corp. v. Richwood Inv. II, Inc., 957 S.W.2d 640, 645-46 (Tex. App.—Amarillo 1998, orig. proceeding) (recognizing the work product doctrine as a protection for attorneys); Dillard Dep't Stores, Inc. v. Sanderson, 928 S.W.2d 319, 321-22 (Tex. App.—Beaumont 1996, orig. proceeding) (agreeing with the trial court and rejecting relator's argument for protection offered by the work product doctrine).

15. *See* TEX. R. CIV. P. 166b(3)(d) (1984, repealed 1999) (creating the party communications exception applied in Texas); *see, e.g.*, Valero Transmission, L.P. v. Dowd, 960 S.W.2d 642, 643-44 (Tex. 1997) (orig. proceeding) (applying the party communications exemption); Republic Ins. Co. v. Davis, 856 S.W.2d 158, 164-65 (Tex. 1993) (addressing an application of the party communications exception); *In re* 5 Byrd Enterprises, Inc., 980 S.W.2d 542, 544 n.4 (Tex. App.—Beaumont 1998, orig. proceeding) (restating the work product doctrine and the party communications exemption); D.N.S. v. Schattman, 937 S.W.2d 151, 156-57 (Tex. App.—Fort Worth 1997, orig. proceeding) (displaying the party communications exemption and the test applied during its use); 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]) (noting the root of the party communications exemption).

16. *See* TEX. R. CIV. P. 193.3(c) (allowing a party to "withhold from another party a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative").

Rule of Evidence 503 now incorporates the subject matter test and rejects the control group test.[17] Likewise, Texas Rules of Civil Procedure 192 and 193, repealing 166b, establish, define, and provide for a work product privilege and its exceptions.[18] Practitioners have little guidance, however, in interpreting and applying the new rules outside of federal case law. The lack of guidance relative to these privileges means that practitioners may miss an opportunity to protect their work product or communications. The following discussion fills the gaps in the substantive rules surrounding the attorney work product doctrine and the attorney-client privilege, thereby encouraging practitioners to utilize these tools more freely.

This Article examines the history and current application of the attorney-client privilege and the newly adopted work product privilege. The discussion of each privilege analyzes the law from its origin to its current standing by investigating reported cases and their judicial comments. In an effort to clarify the present status of the two privileges, and their use, the following analysis addresses each privilege separately. Part II explores the historical background of the attorney-client privilege in Texas and the federal realm. Likewise, Part III addresses the historical origins of the work product exception in Texas and its privileged status in federal jurisdictions. Part IV reports on the recent changes in Texas effecting both the attorney-client privilege and the new work product privilege. Finally, Part V concludes by addressing the potential effects of the newly adopted rules and evaluates effective ways to utilize the rules to protect corporate clients.

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17. TEX. R. EVID. 503(a)(2)(B) cmt. (stating that the new rule "adopts a subject matter test for the privilege of an entity, in place of the control group test previously used"); *see* HULEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL, V-25 (5th ed. 2000) (editorializing that the Texas Rule now generally follows the federal attorney-client privilege); Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 886-87 (1999) (advancing the argument that the "new rule expressly adopted the subject matter test").

18. TEX. R. CIV. P. 192.5 cmt. 8 (noting that former Rule 166b failed to define work product but the new Rule 192.5 clearly defines and establishes work product protection); TEX. R. CIV. P. 193.2 cmt. 3 (stating that work product is now included as a privilege).

II. ATTORNEY-CLIENT PRIVILEGE: HISTORICAL OVERVIEW

A. *Origins of the Privilege*

The attorney-client privilege stands as the oldest known common law privilege regarding confidential communications.[19] Traced from Roman origins[20] and established in its modern form in Elizabethan England,[21] the attorney-client privilege supports the public policy of ensuring that attorneys obtain relevant information from their clients without the risk of being forced to testify.[22] The United States Supreme Court articulated the purpose as encouraging "full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice."[23] Initially, the attorney-client privilege contemplated application only to individuals.[24] As the rule developed in the United States, however,

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19. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542-45 (McNaughton rev. 1961) (proclaiming the origin of the most modern version of the confidential communication to date from Elizabeth I's reign); *see also* 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 87, at 313-14 (John W. Strong ed., 4th ed. 1992) (advancing the argument that the notion behind a lawyer's loyalty to the client was deeply-rooted in Roman law and that this idea may have influenced the English tradition).

20. 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 87, at 313-14 (John W. Strong ed., 4th ed. 1992) (contemplating the history of the attorney-client privilege and contending that its origins are based on Roman ideas and are firmly rooted).

21. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542-45 (McNaughton rev. 1961) (establishing an authoritative history of the attorney-client privilege and determining that the privilege began to develop during the reign of Elizabeth I).

22. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 2, 3 (3d ed. 1997) (indicating that the client now holds the privilege and is designed to ensure that lawyers do not testify against their clients).

23. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *accord* Trammel v. United States, 445 U.S. 40, 51 (1980) (proclaiming "[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out"); Fisher v. United States, 425 U.S. 391, 403 (1976) (rationalizing the purpose of the attorney-client privilege "to encourage clients to make full disclosure to their attorneys"). The court indicates that the rationale for the privilege has a long history in the United States. *See Upjohn Co.*, 449 U.S. at 389 (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

24. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (noting that the privilege was "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

the scope of the privilege broadened until it included corporations.[25]

1. Broadening the Privilege into the Corporate Realm

In *United States v. Louisville & Nashville Railroad Co.*[26] the Interstate Commerce Commission's appointed agents demanded from the vice president of the Louisville & Nashville Railroad the opportunity to evaluate records, memoranda, and accounts.[27] The vice president denied the Commission's request.[28] The government petitioned for mandamus, praying that the railroad produce the documents sought by the Commission.[29] The railroad answered, claiming that they did allow the examiners to look at the company's non-privileged and non-confidential records prior to suit.[30] The railroad refused to comply with the discovery order on the basis that the correspondence requested contained not only confidential conversations between the president of the railroad and various department heads, but also contained confidential and privileged communications between the company and its attorneys.[31]

The Court held that "[t]he desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now."[32] The Court's holding failed to address application of the attorney-client privilege

25. *See* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 141 (1999) (stating that "[t]he first case involving the corporate attorney-client privilege was presented to the United States Supreme Court in 1915"); Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 872-73 (1999) (crediting *Louisville* with originating the privilege in the corporate realm); *see also* United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915) (contending that Congress did not grant the Interstate Commerce Commission authority to read confidential correspondence between the railroad company and its counsel); Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 319-20 n.7 (7th Cir. 1963) (listing a plethora of cases advanced by the defendant recognizing the attorney-client privilege as applicable to corporations).

26. 236 U.S. 318 (1915).

27. *Louisville & Nashville R.R.*, 236 U.S. at 325-26.

28. *Id.* at 326.

29. *Id.*

30. *Id.* at 327.

31. *Id.* at 327-28.

32. *Louisville & Nashville R.R.*, 236 U.S. at 336.

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to corporations as legal entities. However, the Court's holding opened the door, allowing corporations to apply the privilege.[33]

Almost fifty years later, in *Radiant Burners, Inc. v. American Gas Ass'n*,[34] the Seventh Circuit heard another milestone case for the application of the attorney-client privilege to corporations. In that case, a conflict arose during the discovery process, regarding the presentation of documents.[35] Specifically, American Gas claimed the attorney-client privilege for some documents, thereby preventing Radiant Burners from discovering the information.[36]

The district court held that a corporation could not claim the attorney-client privilege.[37] The court argued that the personal nature of the attorney-client privilege prevented its use by a corporation, a strictly legal entity.[38] Additionally, the district court noted that because there was insufficient precedent on the scope of the attorney-client privilege, a court of its stature could not create a privilege for corporations.[39]

The Seventh Circuit disagreed and unambiguously expanded the scope of the attorney-client privilege to apply to corporate clients.[40] After evaluating a long list of case law and commentaries on the scope of the attorney-client privilege, the court held "[i]t is our considered judgment that based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations."[41] Thus, the Seventh Circuit en-

33. *See* Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963) (yielding to public policy and contending that the breadth of the attorney-client privilege allows its protection to be expanded to corporations); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (applying the privilege to a corporation where it engaged in communications with its attorney).

34. 320 F.2d 314 (7th Cir. 1963).

35. *Radiant Burners, Inc.*, 320 F.2d at 316.

36. *Id.*

37. *Id.* at 317.

38. *Id.*

39. *Id.* at 318.

40. *See Radiant Burners, Inc.*, 320 F.2d at 318 (disagreeing with the district court and saying "we find ourselves in disagreement with the broad holding 'that a corporation is not entitled to make claim to the (attorney-client) privilege'").

41. *Id.* at 323.

ded the controversy started by the district court's initial denial by expanding the privilege to corporations.[42]

Although courts began to recognize the attorney-client privilege as applying to corporations, the question of how to apply the rule nevertheless arose as the next area of controversy. Courts had to determine the scope of the privilege as it applied to corporations. The main concern focused on whether only upper management could claim the privilege or if those individuals involved with the subject of the litigation also received protection.[43] Initially, courts limited the scope of the privilege to executives and management, which the courts defined as a corporation's control group.[44]

2. Creation of the Control Group Test

The control group test first appeared in federal courts in *City of Philadelphia v. Westinghouse Electric Corp.*[45] There, the district court faced a motion for modification and clarification of a prior memorandum opinion.[46] From this motion, the court focused solely on a claim of privilege asserted by the company.[47]

The district court acknowledged the applicability of the attorney-client privilege to the corporation but limited the scope of the rule.[48] The court asked many questions regarding both the level of the employee seeking counsel and the type of information conveyed to counsel.[49] Where employees classified as executives or management approached an attorney with facts relevant to future litigation, the court inquired as to whether they acted on behalf of

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42. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE, HORNBOOK SERIES § 87.1, at 123 (John W. Strong ed., West 4th ed. 1992) (claiming "[t]he decision attracted wide attention and much comment, most of which was adverse, until reversed on appeal").

43. *Compare* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 484 (E.D. Pa. 1962), *aff'd sub. nom.* Gen. Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962) (establishing the control group test), *with* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam by an equally divided Court*, 400 U.S. 348 (1971) (formulating the subject matter test).

44. *See City of Philadelphia*, 210 F. Supp. at 484 (beginning the reign of the control group test).

45. 210 F. Supp. 483 (E.D. Pa. 1962), *aff'd sub nom.* Gen. Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962).

46. *City of Philadelphia*, 210 F. Supp. at 484.

47. *Id.*

48. *Id.*

49. *Id.* at 485.

the corporation.[50] If they did not, the court considered the information nothing more than the statement of a witness unprotected by the attorney-client privilege.[51]

The district court finally decided the scope of the attorney-client privilege after rejecting a plethora of tests advanced by corporate counsel. The court stated its newly developed test as follows:

> the most satisfactory solution . . . is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.[52]

The court further explained, "[i]n all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."[53]

From 1962 to 1981, federal courts applied both the control group test and subject matter test in determining the scope of the attorney-client privilege as applied to corporations.[54] The Supreme

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50. *Id.*

51. *City of Philadelphia*, 210 F. Supp. at 485 (citing Hickman v. Taylor, 329 U.S. 495 (1947)).

52. *Id.*

53. *Id.*

54. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 74 (3d ed. 1997) (addressing both the subject matter and control group test while noting that federal courts utilized both tests and that hybrid variations of both tests were utilized in the courts). From 1962 to 1981 the federal courts were split on the determination of which test to utilize. *See* Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981) (rejecting the control group test as too limiting to uphold the spirit of the attorney-client privilege); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 387 (D.D.C. 1978) (contending that the *Harper & Row* test and the control group test are both inadequate but that the *Harper & Row* test was most applicable here). *Compare City of Philadelphia*, 210 F. Supp. at 484 (creating the control group test), Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975) (utilizing the control group test), *and* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35 (D. Md. 1974) (relying on the control group test), *with Harper & Row Publishers, Inc.*, 423 F.2d at 491 (announcing the subject matter test), Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd without opinion*, 534 F.2d 330 (7th Cir. 1976) (adopting the subject matter test), *and* Hasso v. Retail Credit Co., 58 F.R.D. 425 (E.D. Pa. 1973) (following the subject matter test). Some courts utilized the control group test as the initial threshold and the subject matter test subsequently. *Cf.* Duplan Corp. v. Derring Milliken, Inc., 397 F. Supp. 1146, 1163 (D.S.C. 1975) (analyzing the attorney-client privilege such that the

Court finally addressed this inconsistency in 1981 when it heard *Upjohn Co. v. United States*.[55] *Upjohn* brought an end to the control group test[56] and began a new era in federal case law applying the attorney-client privilege to corporations.[57]

B. *The Modern Federal Approach: A Rejection of the Control Group Test*

The control group test lasted for nearly twenty years before being excluded from federal case law.[58] During that time, federal district and circuit courts experienced serious problems applying the test.[59] In fact, less than ten years after the creation of the control group test, dissatisfied courts developed a new test for application

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control group test and subject matter test were applied *seriatim*). Other courts, while not rejecting the control group test, found policy reasons to apply a subject matter test. *Cf.* Xerox Corp. v. Int'l Bus. Machs. Corp., 64 F.R.D. 367, 388 (S.D.N.Y. 1974) (noting the decision in *Harper & Row* favorably and applying this test over the control group test).

55. 449 U.S. 383 (1981).

56. *See Upjohn*, 449 U.S. at 396-97 (rejecting the control group test and adopting a "case-by-case" determination of the scope of the attorney-client privilege).

57. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 75 (3d ed. 1997) (addressing the Court's decision in *Upjohn* and noting the overly limiting nature of the control group test); Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 142 (1999) (reporting that the *Upjohn* decision rejected the control group test as it applies in the federal context); David J. Hatem & Romeo G. Camba, *Attorney-Client Privilege, Work Product Doctrine, and In-House Counsel*, CONSTRUCTION LAW., Oct. 1999, at 22, 22 (stating that the United States Supreme Court rejected the control group test as being too limiting, but later indicating that the *Upjohn* decision "set forth" the subject matter test utilized by most courts), WL 19-OCT CONSLAW 22; Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 DEF. COUNS. J. 553, 556 (1995) (analyzing the attorney-client privilege and pointing out the *Upjohn* decision as the end of the control group test); Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 883 (1999) (relating the history of the control group test and indicating that *Upjohn* was the death knell for that test).

58. *See Upjohn Co.*, 449 U.S. at 396-97 (ending the control group test established by *City of Philadelphia*).

59. *Compare City of Philadelphia*, 210 F. Supp. at 484 (creating the control group test), *Virginia Elec. & Power Co.*, 68 F.R.D. at 400 (utilizing the control group test), *and Burlington Indus.*, 65 F.R.D. at 35 (relying on the control group test), *with Harper & Row Publishers, Inc.*, 423 F.2d at 491 (finding the control group test "not wholly adequate" and replacing it with the subject matter test), *and Hasso*, 58 F.R.D. at 428 (following the subject matter test). *See generally Upjohn Co.*, 449 U.S. at 396-97 (rejecting the control group test as too limiting to uphold the spirit of the attorney-client privilege); *In re* Ampicillin Antitrust Litig., 81 F.R.D. at 387 (contending that the *Harper & Row* test and the control group test are both inadequate but that the *Harper & Row* test was most applicable here).

of the attorney-client privilege to corporations.[60] Promoted by various jurisdictions as the *Harper & Row* test,[61] the subject matter test surpassed the control group test as the preferred approach for determining the scope of the attorney-client privilege in federal courts.[62]

1. Development of the Subject Matter Test

Harper & Row Publishers, Inc. v. Decker[63] stands as the case largely credited with establishing the subject matter test.[64] In its petition for writ of mandamus, Harper & Row Publishers sought to compel the district court to vacate its discovery order requiring production of various memoranda prepared by Harper & Row's attorneys.[65] At trial, Harper & Row claimed both attorney-client privilege and work product in order to exclude several documents from discovery.[66] Without evaluating most of the documents, the trial judge ordered discovery despite the claims of privilege.[67]

The Seventh Circuit granted review on Harper & Row's writ of mandamus under four issues.[68] The first two issues dealt with attorney-client privilege, while the second two issues related to attorney work product.[69] Most importantly, the court addressed

60. *See* Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 879 (1999) (noting that only seven years after the appearance of the control group test, the subject matter test was created).

61. *See In re* Ampicillin Antitrust Litig., 81 F.R.D. at 387 (favoring the *Harper & Row* test to the control group test); *Sylgab Steel & Wire Corp.*, 62 F.R.D. at 456 (advancing the subject matter test); *Hasso*, 58 F.R.D. at 428 (accepting the subject matter test); *see also* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 75, 76 (3d ed. 1997) (commenting on *Upjohn* and noting that the factors utilized in the Supreme Court's holding are largely considered that of the subject matter test).

62. *See generally* Jacqueline A. Weiss, Note, *Beyond* Upjohn: *Achieving Certainty by Expanding the Scope of the Corporate Attorney-Client Privilege*, 50 FORDHAM L. REV. 1182, 1194 (1982) (reflecting on the *Harper & Row* test and surmising that the test was more acceptable in federal courts).

63. 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided Court*, 400 U.S. 348 (1971).

64. *Sylgab Steel & Wire Corp.*, 62 F.R.D. at 456; *Hasso*, 58 F.R.D. at 428.

65. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 490 (7th Cir. 1970), *aff'd per curiam by an equally divided Court*, 400 U.S. 348 (1971).

66. *Harper & Row Publishers, Inc.*, 423 F.2d at 490.

67. *Id.*

68. *Id.*

69. *Id.*

whether the attorney-client relationship begins at the initial interview between the attorney and the potential client.[70]

In evaluating the threshold issue of whether an attorney's interview with a potential client is covered by the attorney-client privilege, the court examined the merits of the control group test.[71] After noting that several jurisdictions utilized the control group test and that the district court correctly applied that test, the court focused on the question of the adequacy of the control group test.[72] The Seventh Circuit concluded that the control group test was inadequate because some employees outside of the control group also need the protection of the attorney-client privilege.[73]

After abandoning the control group test, calling it "not wholly adequate" and unlawful in this situation, the court established the subject matter test.[74] The Seventh Circuit expressly rejected the control group test in pronouncing its new approach:

> [A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.[75]

Ten years later in *Upjohn*, the United States Supreme Court generally adopted this language and firmly established the subject matter test as the dominant test in federal jurisdictions.[76]

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70. *Id.*

71. *Harper & Row Publishers, Inc.*, 423 F.2d at 491.

72. *Id.*

73. *Id.* (stating "the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group").

74. *Id.*

75. *Id.* at 491-92.

76. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 74-75 (3d ed. 1997) (explaining that the Court in *Upjohn* rejected the control group test and rested its decision "on analysis of the factors commonly considered under the subject matter test"). *See* Thomas D. Anthony, Casenote, *Evidence – Privileges – Control Group Test Unacceptable as Standard for Assertion of Attorney-Client Privilege by Corporations*, 13 ST. MARY'S L.J. 409, 412-14 (1981) (establishing the history and development of the subject matter test). The components of the subject matter test are: (1) the individual making the statement to counsel must be employed by the company; (2) the statements made to the attorney must be advanced at the direction of a corporate superior;

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Prior to *Upjohn*, however, the Eighth Circuit modified the subject matter test created in *Harper & Row Publishers*.[77] In *Diversified Indus., Inc. v. Meredith*,[78] the court faced a writ of mandamus proceeding from a case Diversified Industries defended at the trial level.[79] The plaintiff, Weatherhead Company, sought discovery of a written report and memorandum prepared by attorneys for the defendant.[80] Diversified Industries claimed both attorney-client and work product privileges,[81] but the trial court denied both claims without comment.[82]

The Eighth Circuit held that in order for the attorney-client privilege to apply, communication between the attorney and the employee must occur for the purposes of obtaining legal advice or services.[83] This holding modified the earlier subject matter test developed in *Harper & Row*.[84] Furthermore, the court determined that a communication does not receive protection solely because an attorney made it.[85] Essentially, the modification states that the privilege does not apply to all documents brought to corporate counsel.[86]

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(3) finally, the statement must be within the scope of the individual's duties as an employee. *See id.* at 79.

77. *See* Thomas D. Anthony, Casenote, *Evidence – Privileges – Control Group Test Unacceptable as Standard for Assertion of Attorney-Client Privilege by Corporations*, 13 ST. MARY'S L.J. 409, 413 (1981) (intimating that *Diversified Industries* modified the *Harper & Row* test prior to the Supreme Court's holding in *Upjohn*).

78. 572 F.2d 596 (8th Cir. 1977) (en banc).

79. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 598 (8th Cir. 1977) (en banc) (discussing the precedential implications of the Eighth Circuit's decision to reject certain work-related memoranda in the discovery process).

80. *Id.* at 599.

81. *Id.*

82. *Id.*

83. *Id.* at 602 (establishing "the attorney must have been engaged or consulted by the client for the purpose of obtaining legal services or advice-services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity").

84. *See* Thomas D. Anthony, Casenote, *Evidence – Privileges – Control Group Test Unacceptable as Standard for Assertion of Attorney-Client Privilege by Corporations*, 13 ST. MARY'S L.J. 409, 413 (1981) (evaluating *Diversified Industries* and concluding that the Eighth Circuit's holding modified the subject matter test from its original state); *see also* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 486 (1987) (noting that "[t]he best known variation on the subject matter test appeared in *Diversified Industries, Inc.*").

85. *See Diversified Indus.*, 572 F.2d at 602 (ruling that the communication must be for the purpose of giving or obtaining legal services).

86. *See id.* (limiting the privilege to exist only when the communication is for the purpose of giving or obtaining legal services).

2. Demise of the Control Group Test in Federal Courts

From its inception, the subject matter test largely supplanted the control group test in federal courts.[87] When courts found the control group test too limiting, they simply applied the subject matter test.[88] Further, after its *Diversified Industries* modification in 1978, federal courts began widely adopting the subject matter test. The United States Supreme Court's 1981 decision in *Upjohn Co. v. United States* finally reconciled the two tests.[89]

In an audit on one of its foreign subsidiaries, Upjohn employees inadvertently found evidence of potentially illegal bribes paid to foreign officials to ensure government business.[90] The accountants conducting the audit immediately notified Upjohn's Vice President and General Counsel Gerard Thomas.[91] After contacting the Chairman of the Board and independent counsel, Upjohn performed an internal investigation.[92] Gerard Thomas issued a questionnaire to all of Upjohn's Foreign Area and General Managers.[93] Mr. Thomas labeled this questionnaire as highly confidential and ordered its return immediately upon completion.[94]

Upjohn voluntarily offered a report on the potentially illegal payments to both the Securities and Exchange Commission and the Internal Revenue Service (IRS).[95] The IRS immediately began its own investigation into the tax implications of the payments and subsequently issued a summons to Upjohn requesting all materials

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87. *See* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 485 (1987) (speculating that because the Supreme Court upheld the *Harper & Row* test, without an opinion, courts began to abandon the control group test).

88. *See id.* (applying the subject matter test and commenting that the control group test inhibited communication between attorneys and knowledgeable, low-level employees).

89. Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) (explaining that the control group test is too narrow an interpretation of the work product privilege which includes "not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice").

90. *Id.* at 386.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Upjohn Co.*, 499 U.S. at 387.

95. *Id.* at 386.

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prepared by Mr. Thomas in this investigation.[96] Upjohn refused to produce the documents.[97]

The IRS filed a petition in district court trying to enforce disclosure of the documents.[98] The district court ruled the documents discoverable and Upjohn appealed the decision to the United States Court of Appeals for the Sixth Circuit.[99] Applying the control group test, the Sixth Circuit refused to overturn the district court and deemed the communications neither privileged nor work product.[100]

The Supreme Court, in an opinion written by then Justice Rehnquist, reversed and remanded the decision of the Sixth Circuit.[101] The Court rejected the control group test by stating that "[t]he control group test adopted by the court below . . . frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[102] Further, the Court indicated that the control group test excluded those employees most likely to execute the legal advice of corporate counsel.[103] The resulting exclusion of those employees diminishes the effectiveness of corporate attorneys.[104] Moreover, the Court believed that the control group test prevented the use of corporate counsel to ensure compliance with the law.[105] Finally, the Court noted the test as applied by the lower courts resulted in unpredictability as to what communications deserved protection.[106] Despite its rejection of the control group test, however, *Upjohn* does not explicitly adopt the subject matter test.[107] Rather, the Court adopts a case-

96. *Id.*
97. *Id.* at 387-88.
98. *Id.* at 388.
99. *Upjohn Co.*, 449 U.S. at 388.
100. *Id.* at 389.
101. *Id.* at 396-97.
102. *Id.* at 392.
103. *Id.*
104. *Upjohn Co.*, 449 U.S. at 392.
105. *Id.*
106. *Id.* at 393.
107. *Id.* at 396-97 (stating "[n]eedless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas"); *see* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 74 (3d ed. 1997) (illustrating the holding of *Upjohn* and finding that the Court did not create rules for the privilege as applied to the corporation); *see also*

by-case approach utilizing standards similar to the subject matter test.[108]

Many commentators believe that *Upjohn* created more questions than it answered. For example, some commentators contend that *Upjohn* actually increased the confusion about when a corporation can claim attorney-client privilege.[109] Others argue that *Upjohn* creates a moving target by establishing a case-by-case analysis.[110] Furthermore, some authors express the belief that *Upjohn* refrained from endorsing the subject matter test.[111] Regardless of the scholarly confusion, however, one thing is certain—*Upjohn* clearly rejected the control group test in federal jurisdictions.

C. *The Texas Approach: Reaffirmation of the Control Group Test*

Although the Supreme Court rejected the control group test in the federal arena, several states maintained the test.[112] For example, Illinois reaffirmed the control group test in *Consolidation Coal*

Perry S. Bechtle, *What You Should Know About Corporate Counsel and the Attorney-Client Privilege*, BRIEF, Summer 1994, at 52-53 (reporting that the Court refused to define when a corporation can apply the privilege but clearly rejected the control group test), *at* WL 23-SUM Brief 52; Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 474 (1987) (noticing that the Court did not provide much guidance and left the work to the lower courts); Thomas D. Anthony, Casenote, *Evidence – Privileges – Control Group Test Unacceptable as Standard for Assertion of Attorney-Client Privilege by Corporations*, 13 ST. MARY'S L.J. 409, 418-19 (1981) (criticizing the holding in *Upjohn* and indicating that the decision will result in more inconsistency and uneven application than the *Diversified Indus.* decision upheld by the Court some years earlier).

108. *See Upjohn Co.*, 449 U.S. at 396-97 (explaining that application of the attorney-client privilege requires a review of the subject of the communication on a case-by-case basis to comply with the spirit of Federal Rule of Evidence 501).

109. *See* Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post* Upjohn *Analysis*, 44 WASH. & LEE L. REV. 1181, 1199 (1987) (noting that the courts failed to articulate a bright line test for the attorney-client privilege and as a result, gave rise to a great deal of uncertainty in its application).

110. *See* James Neckmann, *Evidence*—Upjohn v. United States—*Corporate Attorney-Client Privilege*, 7 J. CORP. L. 359, 369 (1982) (discussing that the court's narrow holding will only be applicable in a limited number of cases).

111. *See id.* at 366 (refraining from expressly endorsing the subject matter test).

112. *See, e.g.*, Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993) (orig. proceeding) (noting that the Texas Rule of Civil Evidence 503 clearly adopted the control group test); Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257-58 (Ill. 1982) (expanding the control group by defining it such that top managers and those holding pertinent advisory positions, whose advice and opinion contribute to forming the basis of the ultimate decisions rendered by one with actual authority, fall within the control group).

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Co. v. Bucyrus-Erie Co.[113] Recognizing the recent rejection of the control group test, the Illinois Supreme Court found that the test provided a reasonable balance.[114] Likewise, despite the Supreme Court's rejection in *Upjohn*, Texas continued to follow the control group test.

1. Beginnings of Corporate Protection in Texas

Texas Rule of Civil Evidence 503 initially provided for the attorney-client privilege in Texas.[115] Notably, the Rule defined client in such a way as to include a corporation.[116] Despite the potential breadth of Rule 503, however, Texas courts failed to determine the actual scope of the privilege as applied to corporations for some time. In fact, prior to addressing the scope of the attorney-client privilege, several Texas courts rejected claims of privilege for employees.

In 1988, the Fourth Court of Appeals heard *Sterling Drilling Co. v. Spector*.[117] The underlying suit concerned the death of Armando Medrano in a work site accident.[118] At trial, Medrano's estate requested communications between the Texas Employer's Association attorney and employees of Sterling Drilling Company.[119]

Both the trial court and the Fourth Court of Appeals rejected application of the attorney-client privilege to these communications.[120] The court indicated that no connection existed between the attorney hired by Texas Employer's Insurance Association and Sterling Drilling.[121] Finding no corporate link to counsel, the court denied the attorney-client privilege protection.[122]

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113. 432 N.E.2d 250 (Ill. 1982).

114. *See* Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982) (stating "[t]he control-group test appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decisionmakers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery").

115. TEX. R. CIV. EVID. 503 (1983, repealed 1998).

116. TEX. R. CIV. EVID. 503(a)(1) (1983, repealed 1998).

117. 761 S.W.2d 74 (Tex. App.—San Antonio 1988, orig. proceeding).

118. Sterling Drilling Co. v. Spector, 761 S.W.2d 74, 75 (Tex. App.—San Antonio 1988, orig. proceeding).

119. *Id.* at 75-76.

120. *Id.* at 76 (finding that witnesses' statements and the attorney's letter regarding the statements are not privileged documents).

121. *Id.*

122. *Id.*

In *Boring & Tunneling Co. v. Salazar*,[123] the First Court of Appeals in Houston heard a petition for writ of mandamus addressing the privileged status of documents requested for production.[124] The underlying trial centered on the actions of an employee of Boring & Tunneling while driving one of the company trucks.[125] Plaintiffs in the underlying trial requested documents and communications during discovery.[126] Boring & Tunneling moved for a protective order prohibiting the production of the protected documents.[127] The trial court initially granted the motion but later rescinded the order.[128] Subsequently, the trial judge ordered the production of documents claimed as privileged.[129]

Boring & Tunneling advanced various privileges, including the attorney-client privilege.[130] The appellate court found that the privilege applied to a letter written by the corporate-hired counsel to the insurance adjuster regarding the accident investigation.[131] The court refused, however, to extend the same privilege to cover statements made by the employee/driver to Boring & Tunneling's insurance carrier during an investigation of the accident.[132] Without explicitly addressing the subject matter or control group test, the court classified the employee defendant in this case as a witness with regard to the communications between corporate counsel and the investigating insurance adjuster.[133] As a result, the court held that such information did not fall within the purview of the attorney-client privilege.[134]

While *Boring & Tunneling* fails to utilize the control group test, it does provide an excellent example of how courts in Texas address employees and their relationship with corporate counsel.

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123. 782 S.W.2d 284 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).

124. Boring & Tunneling Co. v. Salazar, 782 S.W.2d 284, 285 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Boring & Tunneling Co.*, 782 S.W.2d at 286.

130. *Id.*

131. *Id.* at 289.

132. *Id.*

133. *Id.*

134. *Boring & Tunneling Co.*, 782 S.W.2d at 286 (noting that, as to the communications between Davis and the adjuster, the communications were not privileged).

Evaluating *Boring & Tunneling* in concert with *Sterling Drilling* reveals that historically Texas did not provide a large amount of protection for communications with corporate counsel.[135] Corporations hiring counsel through an intermediary, such as an insurance carrier, do not receive absolute protection for all subsequent communications.[136] Additionally, courts may classify statements made by a corporation's employees, not in the control group, as witness statements unprotected by the attorney-client privilege.[137] Undoubtedly, following *Boring & Tunneling* and *Sterling Drilling*, courts rested unsurely regarding what kinds of communications a corporate counsel could keep privileged. As a result, in order to resolve this confusion and determine the scope of the attorney-client privilege, courts centered on the definition of "representative of the client."[138]

Texas had no published cases defining a representative of a corporate client until the Fourth Court of Appeals decision in *Cigna Corp. v. Spears*.[139] In that case, Tom McCorkle, an independent insurance agent, brought a lawsuit against Cigna Corporation for breach of contract.[140] At trial, McCorkle made a discovery request for certain documents.[141] Cigna produced some of the requested

135. *See id.* at 287-88 (holding that an insured and the insurer's investigators seeking attorney-client privileged protection from discovery requires that the investigation was prepared in anticipation of litigation). Because the party having a cause of action had not yet filed suit, nor manifested any intention of doing so, the insurance company and the insured had no good cause for anticipating litigation. *Id.* at 288. Therefore, investigative reports and conversations conducted without anticipation of litigation, are subject to discovery. *Id.*; *see also* Sterling Drilling Co. v. Spector, 761 S.W.2d 74, 76 (Tex. App.—San Antonio 1988, orig. proceeding) (finding that statements taken by an attorney at the behest of Relator's Worker's Compensation Carrier are not privileged from discovery).

136. *See Boring & Tunneling Co.*, 782 S.W.2d at 286 (stating that the attorney-client privilege does not apply to communications between an adjuster and corporate counsel when the adjuster is not seeking legal advice).

137. *See Sterling Drilling Co.*, 761 S.W.2d at 76 (finding that the attorney-client privilege does not apply to a third party workers' compensation carrier).

138. *See* Cigna Corp. v. Spears, 838 S.W.2d 561, 564 (Tex. App.—San Antonio 1992, orig. proceeding); Tex. Dep't of Mental Health & Mental Retardation v. Davis, 775 S.W.2d 467, 473 (Tex. App.—Austin 1989, orig. proceeding) (analyzing the attorney-client privilege and stating that the representative capacity of an employee is unclear in this case).

139. *Cigna Corp.*, 838 S.W.2d at 564-65 (claiming "[t]here are no published Texas cases interpreting the definition of a representative of the client under rule 503(a)(2)").

140. *Id.* at 563.

141. *Id.*

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documents but claimed attorney-client privilege for several memorandums between in-house counsel and Cigna employees.[142]

The trial court denied Cigna's claim of privilege.[143] The court reasoned that Cigna failed to prove that the employees satisfied the definition of a corporation's representative for the purpose of Texas Rule of Civil Evidence 503(a)(2).[144] On appeal, the court evaluated the scope of representation by examining both the subject matter and control group tests.[145] Without adopting either test, the appellate court analyzed whether Cigna had met its burden of proving the employees were representatives by asking whether the "person was authorized to obtain or to act on legal advice."[146] Ultimately, the Fourth Court of Appeals found Cigna had not met this burden.[147]

Cigna Corp. represents the first time a Texas court addressed the conflict between the control group test and the subject matter test.[148] Despite the court's lengthy discussion, however, the court did not make a clear choice between the two. Nevertheless, one year after *Cigna Corp.*, the Supreme Court of Texas handed down the landmark decision firmly establishing the control group test as the controlling test in Texas.

2. Control Group Test Governs Texas Corporations

Since 1982, Texas has provided for the attorney-client privilege in the form of Rule 503.[149] From its inception, Rule 503 established the control group test as the controlling test in determining

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142. *Id.*

143. *Id.*

144. *Cigna Corp.*, 838 S.W.2d at 563.

145. *Id.* at 565 n.1.

146. *Id.* at 567-68.

147. *Id.*

148. *See* Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 884 (1999) (indicating that *Cigna Corp.* was the first major case addressing the scope of the privilege).

149. *See* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 198 (Tex. 1993) (orig. proceeding) (acknowledging that Texas Rule of Civil Evidence 503 was promulgated in November of 1982); *see also* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 140 (1999) (emphasizing the fact that the Texas Supreme Court ordered the rule codified on November 23, 1982). *See generally* TEX. R. CIV. EVID. 503 (1983, repealed 1998) (defining representative of a client in a limiting fashion).

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the scope of protection afforded corporations.[150] The test, centering on the definition of representative,[151] states that "[a] representative of the client is [one] having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client."[152] *National Tank Co. v. Brotherton* stands as the seminal case interpreting Rule 503.[153]

In *National Tank*, the Texas Supreme Court presided over an original proceeding from an application for writ of mandamus.[154] On August 23, 1990, an explosion at a Wichita Falls manufacturing plant critically injured three people.[155] The day of the explosion, National Tank's general counsel sent an investigator from their legal department.[156] Subsequently, the spouse of one of the victims sued National Tank and requested communications concerning the investigation.[157]

At trial, National Tank claimed the attorney-client privilege and work product doctrine to exclude communications about the investigation.[158] Nevertheless, the trial court overruled National Tank's objections and ordered production of the documents containing these communications.[159] Thereafter, National Tank petitioned the court of appeals for mandamus relief.[160] That court denied relief, and National Tank petitioned the Texas Supreme Court for the protection of two depositions and production of documents associated with the investigation.[161]

The Texas Supreme Court initially granted emergency relief temporarily halting production of the documents and depositions.[162]

150. *See* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 140 (1999) (indicating that the control group test was inherent in the language of the rule); *see also Nat'l Tank Co.*, 851 S.W.2d at 197 (noting that the definition of representative of the client is clearly the control group test).

151. *See Nat'l Tank Co.*, 851 S.W.2d at 197 (proclaiming, "[t]his definition adopts the 'control group' test previously recognized by many federal courts").

152. TEX. R. CIV. EVID. 503(a)(2) (1983, repealed 1998).

153. 851 S.W.2d 193 (Tex. 1993) (orig. proceeding).

154. *Nat'l Tank Co.*, 851 S.W.2d at 207.

155. *Id.* at 195.

156. *Id.*

157. *Id.* at 196.

158. *Id.*

159. *Nat'l Tank Co.*, 851 S.W.2d at 196.

160. *Id.*

161. *Id.*

162. *Id.*

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The court noted that it must determine the scope of both the attorney-client privilege and the work product doctrine. Initially, the court addressed the attorney-client privilege.[163] Focusing on the definition of representative, the court suggested that the definition followed the control group test.[164]

Next, noting the historical relevance of the control group test, the court indicated that those courts applying the test usually do so to "protect only statements made by the upper echelon of corporate management."[165] Additionally, the court referenced the distinction, apparent in the control group test, between the corporate entity and the individual employee.[166] After considering the federal common law rule establishing the subject matter test, the court decided to follow the control group test.[167] Ironically, the court noted that they were "not free to choose one over the other."[168]

After *National Tank*, Texas had a clear standard for applying the attorney-client privilege to corporations.[169] The control group test, as applied in *National Tank*, provides that corporations can claim the privilege only as to communications made by employees who are either in control or able to take a substantial part in the decision making process regarding the corporation's actions following counsel's advice.[170] The control group test generally keeps the corporate identity separate from that of the employee.[171] Further, only those individual employees that personify the corporation enjoy the attorney-client privilege.[172]

163. *Id.*

164. *Nat'l Tank Co.*, 851 S.W.2d at 198.

165. *See id.* at 197.

166. *Id.* at 198.

167. *Id.*

168. *See id.* The court's decision here is ironic because the Texas Supreme Court was the source of the 503 privilege in 1982. *See* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 140 (1999) (addressing the role of the Texas Supreme Court in the creation of Rule 503). The explanation and attitude of the Court is such that an outside legislative source created the rule, therefore requiring deference. *See Nat'l Tank Co.*, 851 S.W.2d at 198.

169. *See* Cullen M. Godfrey, *The Revised Attorney-Client Privilege for Corporations in Texas*, 30 TEX. TECH L. REV. 139, 140 (1999) (intimating that Texas had a distinct privilege and its application effectively mitigated the scope of privilege for corporations).

170. *Nat'l Tank Co.*, 851 S.W.2d at 197.

171. *See id.* (citing City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962) *petition denied sub. nom.*, Gen. Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962)).

172. *See id.*

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The attorney-client privilege has a long and established history. Both at the federal and state level, the rule now encompasses corporate activity. Texas, while officially adopting a narrow scope for several years, has recently broadened the area of protection afforded corporations by recognizing the subject matter test.[173] Another potential area of concern over corporate protection, however, arises under the scope of the attorney work product doctrine.

III. THE WORK PRODUCT EXCEPTION: INCEPTION AND DEVELOPMENT

A. *Origins of the Exception*

Unlike the attorney-client privilege, the work product doctrine developed much more recently in legal history. Dating back to 1947, the work product doctrine has its roots in federal common law.[174] Upon promulgation in 1938, the Federal Rules of Civil Procedure did not provide a reliable privilege for confidential attorney work.[175] During the absence of an established doctrine, however, lower federal courts provided various protections.[176]

1. Establishing a Common Law Protection

Noting the conflict between the need to discover the truth and the need to protect the private thoughts of attorneys, the United States Supreme Court confronted discovery of attorney work materials in *Hickman v. Taylor*.[177] The case involved the sinking of a tugboat while towing a railroad car barge.[178] Five crewmembers

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173. *See* TEX. R. EVID. 503 cmt.

174. Hickman v. Taylor, 329 U.S. 495 (1947); *see Nat'l Tank Co.*, 851 S.W.2d at 200 (tracing the work product doctrine and crediting *Hickman v. Taylor*); *see also* John M. Palmeri & Thomas B. Quinn, *Work Product in Subsequent Litigation: The Tenth Circuit Enters the Fray*, COLO. LAW., July 1998, at 79, 79 (examining the history of work product and stating that *Hickman v. Taylor* was the origin); M. Alice Wells, Note, *Interaction Between 26(b)(3) and 26(b)(4) of the Federal Rules of Civil Procedure: Conflict and Confusion in the Federal Courts*, 9 AM. J. TRIAL ADVOC. 319, 320 (1985) (addressing *Hickman v. Taylor* and implying that the case began the doctrine).

175. *See* Alex W. Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 TEX. L. REV. 781, 786-87 (1992) (reciting the history of the work product doctrine and noting that the initial rules failed to provide for an exception in this area).

176. *See id.* at 787.

177. 329 U.S. 495 (1947).

178. *See Hickman*, 329 U.S. at 498.

died in the accident, yet the cause of the sinking remained unknown.[179] Owners of the tugboat and the barge hired attorneys in anticipation of potential suits from the deceased crewmembers' families.[180] Thereafter, the families sued and, at trial, directed thirty-nine interrogatories at the tug owners.[181] The defendants claimed that the work product doctrine protected some of the documents because these documents represented the work product of their lawyer.[182]

Noting the inapplicability of the attorney-client privilege, the Court squarely addressed the work product protection plead by the owners.[183] The Court framed the issue as

> an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause . . . any hardship or injustice.[184]

Establishing such production as beyond the area of discoverable material, the Court nonetheless contemplated the possible outcomes of allowing discovery of such information.[185]

The Court emphasized attorney privacy as a necessary element in the preparation of a case. While limits to privacy exist, courts must exclude from discovery the working thoughts and strategy of counsel.[186] Fearing the worst, Justice Murphy stated "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten."[187] Further, the Court noted that discovery of such information significantly disserves the interest of the clients.[188]

Despite its powerful rationale, the work product doctrine established by *Hickman* has its limitations. For example, materials prepared in "anticipation of litigation" receive protection unless

179. *Id.*
180. *Id.*
181. *Id.*
182. *See id.* at 499.
183. *Hickman*, 329 U.S. at 508-10.
184. *Id.* at 509.
185. *Id.*
186. *Id.*
187. *Id.* at 511.
188. *Hickman*, 329 U.S. at 511.

proven essential to an opponent's case.[189] Additionally, litigants may discover materials regarding witnesses the party cannot reach or where doing so requires undue hardship.[190] The party attempting to discover such materials has the burden to justify production.[191] However, "an attorney's mental impressions, opinions, and conclusions" receive protection with almost absolute impunity.[192]

2. From Common Law to the Federal Rules of Civil Procedure

In 1970, the Federal Rules of Civil Procedure formally adopted the common law rule created by *Hickman*.[193] Federal Rule of Civil Procedure 26(b)(3) specifically provides for the protection of attorney work product including "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[194] In effect, the federal rule actually expanded the work product doctrine created in *Hickman* to include other representatives of the client.[195] Notwithstanding this minor expansion, the current federal rule substantially mirrors the rule established in *Hickman*.[196]

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189. *Id.* at 508.

190. *Id.* at 511.

191. *See id.* at 512 (emphasizing the burden and claiming "a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order").

192. Alex W. Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 TEX. L. REV. 781, 789 (1992) (citing Hickman v. Taylor, 329 U.S. 495, 512-13 (1947)).

193. FED. R. CIV. P. 26 (b)(3); *see* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 289 (3d ed. 1997) (contending that the propositions in *Hickman* are largely found in Federal Rule of Civil Procedure 26(b)(3)); Alex W. Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 TEX. L. REV. 781, 789 (1992) (noticing that the Federal Rules of Civil Procedure were promulgated, in their current form, in 1970 and that the work product doctrine was adopted from *Hickman*); Daisy Hurst Floyd, *A "Delicate and Difficult Task": Balancing the Competing Interests of Federal Rule of Evidence 612, The Work Product Doctrine, and the Attorney-Client Privilege*, 44 BUFF. L. REV. 101, 108 (1996) (noting that the federal rule was adopted in 1970).

194. FED. R. CIV. P. 26 (b)(3).

195. *See* Alex W. Albright, *The Texas Discovery Privileges: A Fools Game?*, 70 TEX. L. REV. 781, 789 (1992).

196. *See id.* (noting that "[g]enerally . . . the doctrine has remained very similar to that articulated by the Supreme Court"). *Compare* Hickman v. Taylor, 329 U.S. 495, 507-12 (1947) (establishing the work product doctrine in a common law sense), *with* FED. R. CIV. P. 26 (b)(3) (expounding on the common law principles and listing the exact parameters under which work product can be discovered).

While codification of the doctrine follows the language created in *Hickman*, application of Rule 26(b)(3) results in some minor differences in protection.[197] Aside from the above-mentioned expansion to representatives and agents, the rule applies only to pretrial discovery.[198] Also, Rule 26(b)(3) only focuses on discovery of documents and tangible things.[199] Although *Hickman* shares the same principles as the federal rule, the common law provides for a greater range of applicability. When faced with work product questions outside the realm of Rule 26(b)(3), courts often turn to *Hickman* for guidance.[200]

B. *Explaining the Rule*

The work product doctrine provides a greater area of protection than the attorney-client privilege.[201] In spite of its broad applica-

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197. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 292 (3d ed. 1997) (claiming that the principles remain constant between *Hickman* and the Rule; however, noting that the rule had some subtle differences); M. Alice Wells, Note, *Interaction Between 26(b)(3) and 26(b)(4) of the Federal Rules of Civil Procedure: Conflict and Confusion in the Federal Courts*, 9 AM. J. TRIAL ADVOC. 319, 322-23 (1985) (noting the parameters of the federal rule). *But see* Daisy Hurst Floyd, *A "Delicate and Difficult Task": Balancing the Competing Interests of Federal Rule of Evidence 612, The Work Product Doctrine, and the Attorney-Client Privilege*, 44 BUFF. L. REV. 101, 109-10 (1996) (failing to recognize a difference in protection between *Hickman* and the Rule).

198. *See* Daisy Hurst Floyd, *A "Delicate and Difficult Task": Balancing the Competing Interests of Federal Rule of Evidence 612, The Work Product Doctrine, and the Attorney-Client Privilege*, 44 BUFF. L. REV. 101, 109-10 (1996) (dividing the scope of the work product doctrine into two general spheres); M. Alice Wells, Note, *Interaction Between 26(b)(3) and 26(b)(4) of the Federal Rules of Civil Procedure: Conflict and Confusion in the Federal Courts*, 9 AM. J. TRIAL ADVOC. 319, 323 (1985) (listing the scope of the federal exemption).

199. *See* M. Alice Wells, Note, *Interaction Between 26(b)(3) and 26(b)(4) of the Federal Rules of Civil Procedure: Conflict and Confusion in the Federal Courts*, 9 AM. J. TRIAL ADVOC. 319, 323 (1985) (discussing the bounds of the federal rules of discovery).

200. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 292 (3d ed. 1997) (noting that "*Hickman*'s principles remain the benchmark when a court is faced with work-product questions"); M. Alice Wells, Note, *Interaction Between 26(b)(3) and 26(b)(4) of the Federal Rules of Civil Procedure: Conflict and Confusion in the Federal Courts*, 9 AM. J. TRIAL ADVOC. 319, 319-20 (1985) (establishing the roots of the doctrine and noting that the federal rules codified the ideas found in *Hickman*).

201. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 297 (3d ed. 1997) (citing case law and indicating that the work product protection is broader in scope than the attorney-privilege); *see also In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1232-33 (3d Cir. 1979) (noting that the attorney-client privilege is of a more narrow scope than the work product exemption).

tion, work product does not protect documents or tangible items not created in anticipation of litigation.[202] Further, the privilege, in both Texas and federal jurisdictions, treats opinion and ordinary work product differently.[203] Likewise, parties may discover otherwise protected documents or tangible items upon proof of undue hardship or substantial need.[204]

1. Anticipation of Litigation

The primary aspect of the work product privilege seems clear—an attorney's work product prepared or assembled in anticipation of litigation receives protection as privileged information.[205] The phrase "in anticipation of litigation," however, remains difficult to assess and often depends on the circumstances of a particular case.[206] After numerous attempts, a plurality of the Texas Supreme

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202. *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947) (noting that the privilege applies to work with "an eye toward litigation"); Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 202 (Tex. 1993) (orig. proceeding) (stating that, for Texas, the rule is applied such that there must be an anticipation of litigation); Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 DEF. COUNS. J. 553, 554 (1995) (addressing the work product doctrine and noting the necessity of "anticipation of litigation"), WL 62 DEFCJ 553.

203. *See* FED. R. CIV. P. 26(b)(3) (providing for ordinary work protection and opinion work protection); TEX. R. CIV. P. 192.5 (protecting both ordinary and opinion work product). *But see* TEX. R. CIV. P. 166b (1984, repealed 1999) (failing to provide for protection of ordinary work product).

204. *See* FED. R. CIV. P. 26(b)(3) (allowing discovery of documents produced in anticipation of litigation that are work product if there is substantial need or undue hardship); TEX. R. CIV. P. 192.5 (establishing the undue hardship rule as an exception to work product protection).

205. *See Nat'l Tank Co.*, 851 S.W.2d at 200-02 (noting that the language establishing protection of witness statements and party communications under Rule 166b(3)(c)-(d) specifically included the anticipation of litigation requirement). The rule, which established work product protection, did not include such language. *Id.* at 201-02. The Texas Supreme Court rejected the defendant's argument, ruling that work product, by definition, "applies only to materials prepared in anticipation of litigation." *Id.* at 202. The court noted that Texas adopted the federal concept of work product. *Id.* Furthermore, there is no evidence to suggest that Texas intended for its work product protection to deviate from the federal concept. *See id.*

206. *See, e.g.*, Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 40 (Tex. 1989) (orig. proceeding) (holding that preparation for a hearing before an administrative body did not constitute anticipation of litigation); Robinson v. Harkins & Co., 711 S.W.2d 619, 621 (Tex. 1986) (per curiam) (limiting the party communications exemption to communications that focused only on the lawsuit for which the exemption was asserted); Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986) (orig. proceeding) (applying a "good cause" standard in which the court analyzes whether there was an objective belief that litigation would result); Turbodyne Corp. v. Heard, 720 S.W.2d 802, 804 (Tex. 1986) (orig.

Court adopted the "rule of reason" to determine when work product satisfies the anticipation of litigation requirement.[207]

In *National Tank*, the Texas Supreme Court ruled that anticipation of litigation means more than a mere "abstract possibility or unwarranted fear" of litigation must exist to ignite the work product privilege.[208] In making its determination, the court utilized a two-part test: (1) circumstances indicating to a reasonable person that there is a substantial chance of litigation; and (2) the party opposing discovery must have a good faith belief that there is a substantial chance that litigation will ensue.[209] Various federal district courts, in applying less structured tests, assert that an investigation by a federal agency indicates the likelihood of future litigation, thereby providing sufficient grounds to trigger the attorney work product doctrine.[210] Furthermore, under the federal rules, litigation need not imminently threaten to protect documents prepared by an attorney, assuming that aiding in possible future litigation stands as the primary motivating purpose behind the creation of the document.[211] However, a party must experience more than a mere possibility of litigation before the rules provide protection under the work product doctrine.[212]

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proceeding) (holding that the communications were not exempted despite a meeting of the good cause standard because they were not prepared in anticipation of the case at bar).

207. *Nat'l Tank Co.*, 851 S.W.2d at 204 (describing a culmination of objective and subjective factors in determining when litigation is truly anticipated).

208. *Id.*

209. *See id.* at 203-04 (identifying the two-prong analysis in *Flores*).

210. FED. R. CIV. P. 26(b)(3); *see* Martin v. Monfort, Inc., 150 F.R.D. 172, 173 (D. Colo. 1993); *cited with approval in* Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 513 (D.N.H. 1996) (identifying studies or tests performed subsequent to a party's awareness of potential litigation as immunized work product). For example, a document prepared in anticipation of dealing with the IRS potentially may be denied in anticipation of litigation. *See* Hodges, Grant & Kaufmann v. United States, 768 F.2d 719, 722 (5th Cir. 1985) (holding that a memorandum pertinent to the preparation of tax returns potentially may be protected work product).

211. *See* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 640 (E.D.N.Y. 1997) (explaining that the potential for litigation constantly exists in insurance cases); Exxon Chem. Patents, Inc. v. Lubrizol Corp., 131 F.R.D. 668, 670 (S.D. Tex. 1990) (asserting that "[t]he work product doctrine is not an umbrella that shades all materials prepared by the lawyer"). *But see* TV-3, Inc. v. Royal Ins. Co. of Am., 193 F.R.D. 490, 492 (S.D. Miss. 2000) (requiring compulsory production of communications forming the basis of an expert's opinion).

212. *See* Nicklasch v. JLG Indus., Inc., 193 F.R.D. 570, 572 (S.D. Ind. 1999) (involving incident reports which did not contain any indication that litigation was likely); Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 659-60 (S.D. Ind. 1991) (stressing that the mere

2. Scope of the Doctrine

The work product doctrine does more than protect discovery materials prepared for litigation. Indeed, the federal work product doctrine also applies to materials prepared by a representative of a party, including attorneys, consultants, agents, or investigators.[213] In addition to the work of the attorney's own agents, the privilege protects studies, materials, and reports prepared or compiled by a party's employees at the direction of the attorney for use in anticipation of litigation.[214]

An attorney's work also receives protection if primarily motivated "to assist in the pending or impending litigation."[215] The work product doctrine "is based on public policy, not constitutional grounds,"[216] and is therefore a tool of judicial administration. Borne out of concerns of fairness and convenience, the work product doctrine safeguards the adversarial system but has no intrinsic value outside the litigation arena.[217]

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possibility of litigation is something more than a "substantial" or "specific threat" as opposed to a "remote prospect," "inchoate possibility," or "likely chance"); Varo, Inc. v. Litton Systems, Inc., 129 F.R.D. 139, 142 (N.D. Tex. 1989) (concluding that a privileged document list alone fails to establish that the requested documents fall within the narrow scope of the work product doctrine).

213. *See* United States v. Nobles, 422 U.S. 225, 238-39 (1975) (acknowledging that the work product doctrine is an "intensely practical [privilege], grounded in the realities of litigation in our adversary system" and for this reason applies all the representatives of a party); *see also* Wiley v. Williams, 769 S.W.2d 715, 717 (Tex. App.—Austin 1989, orig. proceeding [leave denied]) (cautioning that "[t]he work product [doctrine] is not . . . an umbrella for materials assembled in the ordinary course of business").

214. *See, e.g.*, Sprague v. Dir., Office of Worker's Comp. Programs, 688 F.2d 862, 869-70 (1st Cir. 1982) (opining that an opinion letter prepared by an expert at counsel's request in anticipation of imminent litigation is protected by the work product doctrine); Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 514 (D.N.H. 1996) (commenting that "studies conducted by a party at the direction of its attorney in anticipation of litigation fall within the scope of the work product doctrine"); McEwen v. Digitran Sys., Inc., 155 F.R.D. 678, 683 (D. Utah 1994) (holding that materials produced by an accountant in anticipation of litigation and under the direction of an attorney are protected).

215. *See In re* Minebea Co., 143 F.R.D. 494, 499 (S.D.N.Y. 1992) (citing Santiago v. Miles, 121 F.R.D. 636, 646 (W.D.N.Y. 1988)); *In re* Atl. Fin. Mgmt. Sec. Litig., 121 F.R.D. 141, 144 (D. Mass. 1988) (centralizing the work product issue by determining the document's "primary motivating purpose").

216. *In re* Grand Jury Proceedings, 601 F.2d 162, 169 n.2 (5th Cir. 1979) (citing United States v. Nobles, 422 U.S. 225, 236-37 (1975)).

217. *See* Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 201 (M.D.N.C. 1988); *see also* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 287 (3d ed. 1997) (noting that work product is limited to the trial preparation).

As in the common law, work product under the federal rules and *Hickman* supports only a qualified immunity. An opposing party seeking discovery may circumvent the work product doctrine by a "stronger showing of good cause."[218] In addition, an attorney may waive the use of work product.[219] Finally, a party may discover attorney work product through a showing of undue hardship.[220] The type of hardship required to discover work product depends on the nature of the product.[221]

Essentially, courts must address two types of work product: factual work product and mental impressions, also known as opinion work product or core work product.[222] Opinion work product "includes materials reflecting an attorney's legal strategy, intended lines of proof, and evaluation of the strengths and weaknesses of his case."[223] Moreover, opinion work product also encompasses materials containing mental impressions, conclusions, opinions, or

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218. *See* McCullough Tool Co. v. Pan Geo Atlas Corp., 40 F.R.D. 490, 493 (S.D. Tex. 1966) (citing Hickman v. Taylor, 329 U.S. 495, 504 (1947)).

219. United States v. Nobles, 422 U.S. 225, 239 (1975) (stating that the work product doctrine does not provide an absolute exemption and that the doctrine can be waived); *see* Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 773 (Tex. App.—El Paso 1985, orig. proceeding) (determining that a waiver occurred where documents were disclosed and voluntarily delivered).

220. FED. R. CIV. P. 26(b)(3) (stating that work product is discoverable upon a showing of substantial need of the documents in the party's case when the party is unable to obtain the documents without undue hardship).

221. *See, e.g.*, FTC v. Grolier, Inc., 462 U.S. 19, 31-32 n.2 (1983) (indicating that the Court will consider both the alternative means available to obtain the particular work product protected documents and the need to continue protecting them from discovery); *In re* San Juan DuPont Plaza Hotel Fire Litig., 859 F.2d 1007, 1016 (1st Cir. 1988) (considering, with regard to opinion work product, whether the information will become common knowledge by the time of litigation, the time and effort conserved, and whether any meaningful intrusion occurs).

222. *See* Resolution Trust Corp. v. Heiserman, 151 F.R.D. 367, 373-74 (D. Colo. 1993) (explaining that factual work product is afforded less protection under the discovery rules than opinion work product); *see, e.g.*, Republican Party of N.C. v. Martin, 136 F.R.D. 421, 429 (E.D.N.C. 1991) (quoting *In re* Doe, 662 F. 2d 1073, 1076 n.2 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982)); Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 201 (Tex. 1993) (summarizing the distinction between core work product and ordinary work product).

223. *Martin*, 136 F.R.D. at 429.

legal theories of an attorney.[224] Ordinary work product includes all residue from core work product.[225]

In addition to the two types of work product, courts must also determine how the information affects the producing attorney. Because the work product doctrine provides multi-level protection,[226] information most closely related to an attorney's litigation strategy has the highest degree of immunity.[227] By contrast, information having a more tenuous relationship to litigation strategy may become available to the opposition under the hardship exception.[228]

3. Caveats and Limitations

The federal rules allow discovery of protected materials where a party shows substantial need or hardship.[229] However, the hardship rules do not apply where other means would produce the re-

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224. *See* Alex Wilson Albright, *New Discovery Rules: The Supreme Court Advisory Committee's Proposal*, 15 REV. LITIG. 275, 299-300 (1996) (contending that in its current state, opinion work product in all its forms is protected in all situations in federal court); Alex Wilson Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 TEX. L. REV. 781, 828-29 (1992) (noting the coverage of opinion work product and the fact that it is nearly undiscoverable as applied in Texas case law); Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 DEF. COUNS. J. 553, 554 (1995) (indicating that work product includes both ordinary and opinion work and that opinion work product is inclusive of the thoughts of counsel).

225. Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 512 (D.N.H. 1996) (citing to *In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1014 (1st Cir. 1988)).

226. *See* Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L.J. 997, 1046 (1999) (noting that Texas Rule of Civil Procedure 192.5 provides for two categories of work product—core work product and other work product).

227. *See* TEX. R. CIV. P. 192.5(b)(1) (codifying the core work product privilege and the scope of its protection); *In re* Ford Motor Co., 988 S.W.2d 714, 719 (Tex. 1998) (recognizing the absolute protection of documents prepared by attorneys in anticipation of litigation); Humphreys v. Caldwell, 888 S.W.2d 469, 471 (Tex. 1994) (per curiam) (orig. proceeding) (following *Nat'l Tank* and protecting the legal theories of counsel); Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 200-01 (Tex. 1993) (protecting an attorney's mental impressions and legal theories).

228. TEX. R. CIV. P. 192.5(b)(2) (establishing the protection for other work product and noting that this work is available upon a showing of hardship).

229. FED. R. CIV. P. 26(b)(3) (expounding that discovery of these tangible items will occur "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means").

quested information.[230] As to what constitutes discoverable work product under a hardship, some federal courts hold opinion work almost absolutely immune from discovery under the rules.[231] Other federal courts hold that a party may discover core work product, but only in rare and extraordinary circumstances.[232] The Fifth Circuit has yet to clearly adopt either approach.[233] Generally, the Fifth Circuit considers discovery battles unworthy of appeal or mandamus review.[234] In any event, courts afford core work product greater protection under the federal rules than ordinary work product.[235]

In contrast, the Texas Supreme Court has never ruled whether any form of hardship should release ordinary attorney work product, and former Texas Rule of Civil Procedure 166b did not appear on its face to extend hardship to that particular exemption.[236] The Texas Supreme Court has made it abundantly clear, however, that the hardship exception under former Rule 166b never applied to the work product exemption.[237] The Texas Supreme Court sees the

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230. *See* United States v. Lipshy, 492 F. Supp. 35, 47 (N.D. Tex. 1979) (finding that the hardship rule was inapplicable since the IRS could gain the content of their needed subject matter through alternate means).

231. *See* Bd. of Trs. of Leland Standford Jr. Univ. v. Coulter Corp., 118 F.R.D. 532, 534 (S.D. Fla. 1987) (claiming that most federal courts hold that opinion work product is absolutely immune from discovery).

232. *See, e.g.*, Cox v. Adm'r United States Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994) (identifying the crime-fraud exception as a rare instance where the federal courts will find opinion attorney work product discoverable); *In re* Murphy, 560 F.2d 326, 336 n.20 (8th Cir. 1977) (explaining that only in the rarest of circumstance will the court find that opinion work product is discoverable).

233. *See* Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 585 (S.D. Tex. 1996) (leaning, without any express statement, towards the line of cases finding that, in the rarest and extraordinary situation, opinion work product is discoverable).

234. *See* Sealed Appellees v. Sealed Appellants (*In re* Steeg), 112 F.3d 173, 174 (5th Cir. 1997) (dismissing a request for mandamus because the order was not appealable). *But see In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1238 n.1 (5th Cir. 1982) (listing the courts that have heard appeals of discovery orders, but reiterating that discovery orders are generally not appealable).

235. *See* Snowden v. Connaught Laboratories, Inc., 137 F.R.D. 325, 331 (D. Kan. 1991) (explaining the distinctions between opinion and ordinary work product in determining the relevancy of discoverable material); *In re* Murphy, 560 F.2d at 336 n.20 (showing deference to core work product).

236. TEX. R. CIV. P. 166b(3)(e) (1984, repealed 1999).

237. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 202-03 n.11 (Tex. 1993) (orig. proceeding) (declining to decide whether an undue hardship allows discovery of opinion work product but explaining the conflict between party communications and work product exemptions).

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work product exemption as absolute and of continuing duration as to an attorney's thought processes,[238] and therefore subject only to the exceptions in the rules of evidence.[239]

Courts should apply protection under the attorney work product doctrine on a case-by-case basis.[240] Underlying such a determination is the understanding that "an overly broad application of work-product immunity could easily eviscerate the discovery rules and their purpose."[241] With this application, work product protection would not automatically extend to material routinely collected in a given case.[242]

Additionally, the Texas Supreme Court has held that work product prepared and established in one lawsuit maintains work product status as to subsequent litigation.[243] In that regard, the issues and facts of the new litigation need not be connected with the previous litigation in order for attorney work product to retain its character.[244] Furthermore, work product created in a criminal case remains immunized in a subsequent civil case.[245]

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238. *See* Occidental Chem. Corp. v. Banales, 907 S.W.2d 488, 490 (Tex. 1995) (per curiam) (orig. proceeding) (distinguishing between the protection afforded an attorney's thought process and the mechanical compilation of information that reveals an attorney's thought process).

239. TEX. R. EVID. 503(d) (enumerating the exceptions to the attorney-client privilege); *see also Occidental Chem. Corp.*, 907 S.W.2d at 490 (acknowledging that the exceptions to the attorney work product privilege are narrow).

240. Republic of Phil. v. Westinghouse Elec. Corp., 132 F.R.D. 384, 389 (D.N.J. 1990) (reasoning that each case must be evaluated on its own merits because the attorney work product is not absolute and can be waived).

241. Mead Corp. v. Riverwood Natural Res. Corp., 145 F.R.D. 512, 520 (D. Minn. 1992).

242. *See* Tex. Dep't of Mental Health & Mental Retardation v. Davis, 775 S.W.2d 467, 471 (Tex. App.—Austin 1989, orig. proceeding) (explaining that the work product exemption only protects materials that have been prepared by the attorney or an agent of the attorney).

243. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 202 n.10 (Tex. 1993) (orig. proceeding) (warning that although attorney work product materials that have been exempted will retain their exempted status in subsequent litigation, to qualify for the privilege, the materials must have been prepared in anticipation of the original lawsuit).

244. *In re* Int'l Sys. & Controls Corp. Sec. Litig., 91 F.R.D. 552, 557 (S.D. Tex. 1981) (asserting that the issues being litigated in the two cases do not have to be in the same order for the work product exemption to apply and be maintained); Owens-Corning Fiberglas Corp. v. Caldwell, 818 S.W.2d 749, 751 n.4 (Tex. 1991) (orig. proceeding) (indicating that work product from prior litigation continues to maintain its characteristic as protected in subsequent litigation).

245. Wood v. McCown, 784 S.W.2d 126, 129 (Tex. App.—Austin 1990, orig. proceeding) (noting that the parties did not find case law to suggest that the attorney work product

Although the Texas Supreme Court fervently protects the thought processes of an attorney,[246] courts must still subject the exemption to the same exceptions that apply to the attorney-client privilege.[247] For example, courts limit the application of the work product doctrine to such intangible things as a firm's legal strategy to situations where the court finds a "real, rather than speculative, concern that the [lawyer's] thought processes . . . [related] to pending or anticipated litigation would be exposed."[248] Furthermore, offensive use waives immunity as to compiled material revealing the attorney's thought processes, and courts may pierce the work product exception as a sanction.[249] As a recent Texas case shows, however, a court's erroneous ruling on a work product issue can result in harmful and reversible error.[250]

A party seeking to limit discovery by asserting a privilege or immunity has the burden of proving the propriety of the assertion.[251] The party must offer "a specific explanation why the item is privileged from discovery."[252] Stated another way, the attorney asserting work product immunity must demonstrate facts sufficient to

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exemption terminates at the end of a criminal case, rendering such material discoverable for a subsequent civil trial).

246. Occidental Chem. Corp. v. Banales, 907 S.W.2d 488, 490 (Tex. 1995) (per curiam) (orig. proceeding) (recognizing that the thought processes of counsel are protected absolutely as core work product).

247. *See* TEX. R. CIV. P. 192.5(c)(5) (proclaiming that the exemptions found in the attorney-client privilege are applicable to work product); *Occidental Chem. Corp.*, 907 S.W.2d at 490 (claiming "we agree with OxyChem that the work product privilege is absolute, subject only to the narrow exemptions found in the Texas Rules of Civil Procedure").

248. *In re* Minebea Co., 143 F.R.D. 494, 500 (S.D.N.Y. 1992) (quoting Gould, Inc. v. Mitsui Mining & Smelting Co., 825 F. 2d 676, 680 (2d Cir. 1987)).

249. *See Occidental Chem. Corp.*, 907 S.W.2d at 490 (warning that even though the production of information compiled by an attorney is possible, a court should tailor the sanction "to satisfy the legitimate purposes of the discovery process offended").

250. *See* Oyster Creek Fin. Corp. v. Richwood Inv. II, Inc., 957 S.W.2d 640, 648 (Tex. App.—Amarillo 1997, pet. denied) (deeming the trial court committed reversible error by declaring an attorney's handwritten notes pertaining to interest calculations as possible work product).

251. First Sec. Sav. v. Kan. Bankers Surety, 115 F.R.D. 181, 183 (D. Neb. 1987) (noting that placing the burden of proof on the party not asserting the privilege would serve as an insurmountable barrier); Huie v. DeShazo, 922 S.W.2d 920, 926 (Tex. 1996) (stating that the burden of proof regarding a privilege or exemption rests with the party asserting the privilege); Boring & Tunneling Co. v. Salazar, 782 S.W.2d 284, 286 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (indicating that a party seeking the protection of a privilege also hears the burden of proof).

252. Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 646 (N.D. Ill. 1994).

warrant application of the doctrine.[253] Similarly, a party asserting work product immunity concerning document production has the burden to prove such immunity for each document.[254] If successful, the burden then shifts to the opposing side. The party seeking discovery must demonstrate "good cause" for avoiding application of the work product doctrine.[255] The Supreme Court has emphasized, however, that the party seeking discovery bears a heavy burden in attempting to justify production of attorney work product through subpoena or court order.[256]

Although attorneys often evidence a *prima facie* showing of entitlement to immunity under the work product doctrine by affidavit,[257] the documents that the attorney wishes to protect often provide the best or only evidence to sustain the claim of immunity.[258] In such a case, the attorney should segregate the documents and deliver these to the trial court.[259] The court then determines the necessity and extent of any *in camera* inspection of the documents.[260] The trial court's failure to conduct a proper in-

253. *See First Sec. Sav.*, 115 F.R.D. at 182 (stating that the party claiming the privilege has the burden of showing that the items are protected).

254. *See* Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691, 698 (D. Nev. 1994) (asserting that the requisite elements of a particular privilege must be proven by the party advocating immunity for each document).

255. *See First Sec. Sav.*, 115 F.R.D. at 184 n.2 (noting that a showing of "good cause" is only necessary if the party asserting the privilege has first shown sufficient evidence to justify application of the privilege); *see also* Kent Corp. v. Nat'l Labor Relations Bd., 530 F.2d 612, 623-24 (5th Cir. 1976) (recognizing that upon meeting the initial burden, the burden shifts, and the party seeking discovery must then show a substantial need and an inability to obtain that information by other means); *In re* Natta, 410 F.2d 187, 193 (3d Cir. 1969) (contending that the burden shifted and the burden of good cause was on the proponent of the discovery); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 558 (2d Cir. 1967) (denying production where information requested was simply helpful rather than essential to the case).

256. *See* Hickman v. Taylor, 329 U.S. 495, 512 (1947) (professing that an "attorney's course of preparation is . . . essential to an orderly working of our system of legal procedure").

257. *See* GAF Corp. v. Caldwell, 839 S.W.2d 149, 150 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (commenting on the necessity of an affidavit to establish the relevancy of the work product exemption).

258. *See* Arkla, Inc. v. Harris, 846 S.W.2d 623, 631 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding) (stating that if the documents themselves substantiate the asserted privilege then the trial court should conduct an *in camera* review of the evidence).

259. *Id.*

260. *See* Peeples v. Hon. Fourth Supreme Judicial Dist., 701 S.W.2d 635, 637 (Tex. 1985) (orig. proceeding); Marathon Oil Co. v. Moyé, 893 S.W.2d 585, 590 (Tex. App.—Dallas 1994, orig. proceeding).

spection of documents constitutes an abuse of discretion when such a review proves critical to the evaluation of a claim of discovery exemption.[261] In that regard, an appellate court may perform its own *in camera* inspection of the same documents tendered to the trial court in order to determine whether the trial court correctly administered the applicable law of privilege or immunity.[262]

If an attorney asserts the work product exemption in connection with a discovery request, such as interrogatories or requests for admissions, the objecting party must specifically plead the exemption or immunity.[263] Additionally, the objecting party must produce evidence necessary to support the claim of immunity "in the form of affidavits served at least seven days before the hearing or by testimony" at the hearing.[264] Thereafter, the trial court may call for an *in camera* inspection of the tangible materials.[265] If the court sustains the right to immunity, the court reporter re-seals the materials, preserving the information for any potential appeal.[266]

Courts may vitiate the potential use of the work product doctrine because of the unethical or unprofessional conduct of the party or attorney attempting to assert protection.[267] For example, the clandestine taping by an attorney of a telephone conversation does not result in protected work product because the illicit process violates rules of professional conduct.[268] The principles requiring waiver of the work product privilege when an attorney uses

261. State v. Lowry, 802 S.W.2d 669, 673 (Tex. 1991) (bemoaning the failure of the trial judge to conduct an *in camera* inspection).

262. *Marathon Oil Co.*, 893 S.W.2d at 590.

263. *See* Tex. R. Civ. P. 166b(4) (1984, repealed 1999).

264. *See id.*

265. *See* Int'l Surplus Lines Ins. Co. v. Wallace, 843 S.W.2d 773, 775 (Tex. App.—Texarkana 1992, orig. proceeding).

266. *See* Volcanic Gardens Mgmt. Co. v. Paxson, 847 S.W.2d 343, 348 (Tex. App.—El Paso 1993, orig. proceeding) (outlining that reviewing courts must conduct an *in camera* inspection in order to ascertain the substance of the alleged privileged communication).

267. *See* Ward v. Maritz, Inc., 156 F.R.D. 592, 594 (D.N.J. 1994) (providing several examples involving the secret recordings of witness statements which the parties attempted to hide under the work product doctrine); *see also* Moody v. IRS, 654 F.2d 795, 800 (D.C. Cir. 1981) (remanding to the district court to determine whether an *ex parte* meeting between an IRS attorney and the judiciary initiated the work product exemption).

268. *See* Chapman & Cole, Ltd. v. Itel Container Int'l B.V., 865 F.2d 676, 686 (5th Cir. 1989) (declaring that secretly taped conversations did not constitute protectable work product since the act violated professional conduct rules, thus waiving the privilege).

ill-gotten information offensively[269] mirrors the principles underlying waiver of the attorney-client privilege for offensive use.[270]

Protection under the attorney work product doctrine extends only to the communication of facts, but not to the facts themselves.[271] For instance, work product will not protect the mere fact that an investigation took place; however, work product may protect the contents of that investigation.[272] The Texas Supreme Court expressly holds that the work product rule "does not extend to 'facts the attorney may acquire.'"[273] Consequently, it does not contravene the work product rule for an attorney to question an opposing party about the information included in protected documents.[274] As one federal court noted "where an attorney is 'incisive enough to recognize and question' an opposing party on facts contained in protected documents, '[t]he fear that [opposing counsel's] work product would be revealed would thus become groundless.'"[275]

Texas appellate courts differ in their holdings regarding the lack of exemption for the factual content of an attorney's documents.[276]

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269. *See* Occidental Chem. Corp. v. Banales, 907 S.W.2d 488, 490 (Tex. 1995) (orig. proceeding) (per curiam) (expressing that information regarding an attorney's thought process is subject to waiver by offensive use).

270. *See* Marathon Oil Co. v. Moyé, 893 S.W.2d 585, 590 (Tex. App.—Dallas 1994, orig. proceeding) (identifying three factors that indicate offensive use of privilege). The privilege, either concerning work product or attorney-client communications, is waived when "the party asserting the privilege is seeking affirmative relief," the information is potentially "outcome determinative," and the alleged privileged information is "the aggrieved party's only means of access to the evidence." *Id.*

271. *See* Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981) (discussing the attorney-client privilege which "only protects disclosure of communications"); Casson Constr. Co. v. Armco Steel Corp., 91 F.R.D. 376, 385 (D. Kan. 1980) (denying the doctrine would apply to discovery facts learned by a lawyer that were not in support of the exemption).

272. *See* Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) (stating that "work product does not preclude inquiry into the mere fact of an investigation").

273. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 203 n.11 (Tex. 1993) (orig. proceeding) (quoting Owens-Corning Fiberglass Corp. v. Caldwell, 818 S.W.2d 749, 750 n.2 (Tex. 1991)).

274. *See* Jaroslawicz v. Engelhard Corp., 115 F.R.D. 515, 518 (D.N.J. 1987) (indicating that the plaintiff may use adversarial skills to obtain the information contained in protected documents through questioning).

275. Ward v. Maritz, Inc., 156 F.R.D. 592, 599 (D.N.J. 1994) (quoting Sporck v. Peil, 759 F.2d 312, 318 (3d Cir. 1985)).

276. *Compare* Keene Corp. v. Caldwell, 840 S.W.2d 715, 719 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (establishing that factual recitations given to attorneys

In *Keene Corp. v. Caldwell*[277] the Fourteenth Court of Appeals indicated that, generally, a party may not discover the factual recitations in attorney work product.[278] Yet, a prior opinion, this time from the First Court of Appeals, clearly held that the opposing party may discover the portion of an attorney's work product involving a "neutral recital of facts."[279] A closer examination, however, reveals a significant distinguishing characteristic. Specifically, the attorney seeking to protect the documents in the former case argued both attorney-client privilege and the work product exemption, while the attorney in the latter argued only work product.[280]

The Fifth Circuit holds that disclosure of work product to a third party does not waive the exemption.[281] Specifically, the court has stated that waiver occurs "when the attorney requests the witness to disclose the information or when the attorney discloses the information to the court voluntarily or makes no objection when it is offered."[282] Comparatively, Texas courts are split on the issue of waiver in certain aspects.[283]

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that are privileged under attorney-client privilege are not discoverable), *with* Leede Oil & Gas, Inc. v. McCorkle, 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (holding that documents prepared by attorneys which include facts are not necessarily protected).

277. 840 S.W.2d 715 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

278. *See Keene Corp.*, 840 S.W.2d at 719 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (identifying a floodgate argument that would involve client reluctance to reveal factual information assuming the attorney work product did not encompass the protection of an attorney's factual recitations).

279. *McCorkle*, 789 S.W.2d at 687 (asserting that an attorney's recital of facts neutral to both parties, which do not contain the attorney's thoughts, mental processes or arguments, fall within the ambit of discoverable work product). The court reasons that the neutral recitation of facts do not indicate the attorney's reaction to the testimony. *See id.*

280. *Compare Keene Corp.*, 840 S.W.2d at 718 (concluding that the relator made a *prima facie* showing of attorney-client and work product privileges), *with McCorkle*, 789 S.W.2d at 687 (involving the question of whether the work product privilege protected an attorney's factual recitation).

281. *See* Shields v. Sturm, Ruger & Co., 864 F.2d 379, 382 (5th Cir. 1989) (denoting that "the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege").

282. *Id.* at 382 (identifying an attorney's affirmative acts that constitute waiver of the attorney work product exemption).

283. *See, e.g.*, *In re* George 28 S.W.3d 511, 513 (Tex. 2000) (orig. proceeding) (finding that waiver did not occur where disqualification of law firms created a potential work product problem); *In re* Monsanto, 998 S.W.2d 917, 925-26 (Tex. App.—Waco 1999, orig. proceeding) (determining that voluntary disclosure of privileged information did not occur here, therefore waiver did not occur).

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Although the work product doctrine protects the process by which attorneys select and compile the documents necessary to formulate a case,[284] the opposing party may discover and obtain those documents "through the adversarial process by asking questions in the appropriate areas."[285] If a party may discover a portion of a document through other means, however, this fact does not necessarily overcome the privilege protecting the remainder of the document.[286]

C. *A Unique Texas Approach to Work Product*

Few Texas cases exist on the attorney work product doctrine compared to the extensive volume of law reported from the many federal district and circuit courts. However, the Texas Supreme Court looks favorably to federal precedent when deciding attorney work product questions.[287] The court has stated that there is nothing indicating that "the Texas concept of 'work product' was intended to be different from that of the federal courts."[288] In addition, Texas appellate courts freely cite federal law as precedent for work product issues, as well as the law of other states.[289]

1. Party Communications Under Former Rule 166b(3)(d)

One area where Texas does diverge from the federal rule concerns the party communications exemption. In *Terry v. Law-*

284. Peterson v. Douglas County Bank & Trust Co., 967 F.2d 1186, 1189 (8th Cir. 1992) (reversing an order that required production of documents that were selected and compiled in anticipation of litigation).

285. Leonen v. Johns-Manville, 135 F.R.D. 94, 96 (D.N.J. 1990).

286. Gen. Motors Corp. v. Gayle, 924 S.W.2d 222, 229 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding [leave denied]) (citing Keene Corp. v. Caldwell, 840 S.W.2d 715, 720 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding)).

287. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 202 (Tex. 1993) (orig. proceeding) (declaring that the Texas Supreme Court considered both federal case law and the case law of other states when deciding the attorney work product issue).

288. *Id.* (stating that Texas has adopted the federal work product doctrine).

289. *See, e.g.*, Leede Oil & Gas, Inc. v. McCorkle, 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (relying on Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) for the proposition that an attorney's work product is protected under the lawyer-client privilege); Tex. Dep't of Mental Health & Mental Retardation v. Davis, 775 S.W.2d 467, 471 (Tex. App.–Austin 1989, orig. proceeding [leave denied]) (citing Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 42 (Tex. 1989)); *see also* Nat'l Farmers' Union Prop. & Cas. v. Dist. Court, 718 P.2d 1044, 1047 (Colo. 1986) (en banc) (relying on federal decisions to answer the attorney-client privilege as it applies to state court in Colorado).

rence,[290] the Texas Supreme Court shed some light on the origin and purpose of the party communications exemption.[291] The court analyzed Rule 166b and combined "all scope of discovery concepts into one rule."[292] Previously, Rule 167 covered discovery of tangible items,[293] while Rule 186a addressed deposition procedures.[294]

When Texas changed the discovery rules again in 1984, however, Rule 166b became the focal point of all discovery exceptions.[295] One commentator noted that new Rule 166b required protection for party "communications made 'in anticipation of the prosecution or defense of the claims made a part of the pending litigation.'"[296] The commentary further explains that the 1984 change in the party communications rule, which deleted the word "written," makes photographs undiscoverable.[297] Such a conclusion expands the exemption to other intangible things under the rule, beyond written materials. For example, a literal reading of the early rule could easily lead to the conclusion that the revised rule encompasses things such as the thoughts of the party's representatives concerning pending or impending litigation that the employee subsequently communicated to fellow employees or between such employees and attorneys.

Prior to the new Texas Rule of Civil Procedure 192.5, considerable uncertainty existed regarding the independence or distinction of party communications immunity from the attorney work prod-

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290. 700 S.W.2d 912, 913 (Tex. 1985).

291. *See* Terry v. Lawrence, 700 S.W.2d 912, 913 (Tex. 1985) (clarifying that the party communications rule included "all forms of discovery, not just the discovery of tangible items").

292. *Id.*

293. TEX. R. CIV. P. 167 (1976, amended 1981); *see* Methodist Home v. Marshall, 830 S.W.2d 220, 228 (Tex. App.—Dallas 1992, orig. proceeding) (discussing prior case law applying former rule 167 and the scope of its language); *see also* Overstreet v. Home Indem. Co., 747 S.W.2d 822, 825 (Tex. App.—Dallas 1987, writ denied) (describing application of former Rule 167).

294. TEX. R. CIV. P. 186a (1959, repealed 1984); *see Ex parte* Hanlon, 406 S.W.2d 204, 207-08 (Tex. 1966) (applying 186a and noting that the rule explicitly addressed work product in Texas); Menton v. Lattimore, 667 S.W.2d 335, 339-40 (Tex. App.–Fort Worth 1984, orig. proceeding) (bemoaning the potential injustices exacted by the old rule of civil procedure governing work product).

295. TEX. R. CIV. P. 166b (1984, repealed 1999).

296. William W. Kilgarlin et al., *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 893 (1988) (quoting former TEX. R. CIV. P. 166b(3)).

297. *See id.* at n.94 (addressing the change in the former work product doctrine).

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uct doctrine. Courts and commentators attribute part of the confusion to reported cases such as the 1985 opinion from the Amarillo Court of Appeals that defined work product to contain substantially the same elements as those appearing in former Rule 166b(3)(d), which described the party communications exemption.[298] Furthermore, federal decisions which merged the two exemptions may have also caused confusion.[299]

Several Texas cases held that the work product exemption extended to reports, memoranda, and summaries of interviews or notes, prepared for an attorney's use by other persons.[300] To some extent, this resulted in duplicating the function of the party communications exemption. For example, a 1991 decision from the Fourteenth Court of Appeals involved claims of party communications immunity as well as attorney-client privilege and work product immunity.[301] However, the court never reached the party communications issue because the two other discovery exemptions proved dispositive.[302]

While the party communications exemption often yielded to other privileges in the discovery shuffle, the Supreme Court of

298. *See* Bearden v. Boone, 693 S.W.2d 25, 28 (Tex. App.—Amarillo 1985, orig. proceeding). Describing the attorney work product exemption as:

> any communication passing between agents or representatives or the employees of any party to the action or communications between any party and his agents, representatives or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen.

Id. (citing Tex. R. Civ. P. 166b(3)(d)).

299. *See* Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 509-14 (D.N.H. 1996) (describing the legal elements required for exemptions for attorney-client communication and attorney work product).

300. GAF Corp. v. Caldwell, 839 S.W.2d 149, 151 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (concluding that documents generated by non-attorneys are included in the work product exemption); *see In re* Monsato Co., 998 S.W.2d 917, 930 (Tex. App.—Waco 1999, orig. proceeding) (including under work product, materials prepared by representatives other than attorneys); Toyota Motor Sales U.S.A., Inc. v. Heard, 774 S.W.2d 316, 317-18 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding) (recognizing that the attorney work product privilege applies to materials prepared by an attorney's agent).

301. *See* Riggs v. Sentry Ins., 821 S.W.2d 701, 709 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (challenging the applicability of discovery immunities by the appellant).

302. *See id.* at 711 (deciding it was not necessary to determine if party communications are exempt from discovery).

Texas clearly acknowledged the existence of the party communications exemption in *National Tank Co. v. Brotherton*.[303] Despite this recognition, the court offered little explanation of the exemption's operating characteristics in *National Tank* or in any other published decision. Although the supreme court provided a forum in *National Tank* to articulate the details and separate function of the party communications exemption, the only matter under review applicable to the party communications exemption concerned the need to define "in anticipation of the prosecution or defense of the claims made a part of the pending litigation."[304] The court provided a definition of the party communications exemption when it stated that the rule "protects communications between agents, representatives or employees of a party when made in anticipation of litigation."[305]

The Supreme Court of Texas recently had another opportunity to consider the scope of the party communications exemption under former Rule 166(3)(d), but instead opted to deny leave to file a motion for writ of mandamus.[306] However, Justice Owen, joined by Justice Hecht, filed a lengthy dissenting opinion, addressing the interplay between party communications and the attorney-client privilege.[307] The major thrust of the dissenting opinion was the determination of whether and when litigation is anticipated by the party claiming immunity or privilege, along with the persons in a corporate structure who are entitled to protection of the attorney-client privilege.[308] Moreover, the dissent supports the proposition that party communications must concern the specific types of litigation in question and that the exemption does not apply to an

303. 851 S.W.2d 193, 203-05 (Tex. 1993) (expressing that former Texas Rule of Civil Procedure 166b(3)(d) protects communications between parties when the communication is made in anticipation of litigation).

304. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 203 (Tex. 1993).

305. *Id.*

306. Valero Transmission, L.P. v. Dowd, 960 S.W.2d 642, 642 (Tex. 1997).

307. *See id.* at 647 (noting that although the attorney-client privilege does not apply to a particular inter-office memo, the party communication privilege should apply where more than one potential claim arises out of common facts).

308. *Id.* at 642.

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investigation of the potential claim of a remote party to the instant litigation.[309]

In *Aetna Casualty & Surety Co. v. Blackmon*,[310] a 1991 mandamus proceeding in the Corpus Christi Court of Appeals, the court considered the interplay between former Rule 166b(2)(e), concerning experts and reports of experts, and former Rule 166b(3), concerning party communications.[311] In that case, Aetna designated an employee as an expert.[312] The employee claimed the party communications exemption for certain documents in his possession. The appellate court found that Aetna and the employee waived the exemption as to those documents the employee relied on for his expert testimony, but not as to other documents which the employee did not rely on as an expert.[313]

Six years later in *D.N.S., M.D. v. Schattman*,[314] the Fort Worth Court of Appeals considered the holding in *Aetna* when ruling on the nature of an expert's report prepared under the auspices of former Rule 166b(3).[315] In that case, the defendant's expert prepared and sent a report to his malpractice insurer at the insurer's request.[316] The court found that the party created the report in anticipation of the defense of pending litigation and that no evidence suggested that the party prepared the report in anticipation of testifying as his own expert.[317] Although the court recognized that under Rule 166b(3) a party may discover communications prepared by experts, the report of this party, even though also an ex-

309. *Id.* at 648-49 (arguing that interoffice memoranda related to specific litigation between the named parties should be privileged while memoranda resulting from an investigation of a potential third-party defendant claim should not be privileged).

310. 810 S.W.2d 438 (Tex. App.—Corpus Christi 1991, orig. proceeding).

311. *See* Aetna Cas. & Sur. Co. v. Blackmon, 810 S.W.2d 438, 440 (Tex. App.—Corpus Christi 1991, orig. proceeding) (noting a possible conflict between the two sections).

312. *Id.* at 439.

313. *See id.* at 440-41 (noting that because the employer failed to segregate the documents into the two relevant categories, mandamus was denied).

314. 937 S.W.2d 151 (Tex. App.—Fort Worth 1997, orig. proceeding).

315. *See* D.N.S. v. Schattman, 937 S.W.2d 151, 156 (Tex. App.—Fort Worth 1997, orig. proceeding) (discussing the holding in the *Aetna* case, which found that designating an employee an expert under former rule 166b(2)(e) could result in a waiver of privileges under former rule 166b(3)).

316. *Id.* at 157.

317. *Id.*

pert, constituted a party communication, thus, the exception applied.[318]

Few reported cases provide examples of party communications in the corporate realm. In *Green v. Lerner*,[319] however, the First Court of Appeals addressed the definition of party communication and its applicability.[320] The case involved a memorandum from an employee-engineer to the company's in-house counsel for the purpose of preparing a defense.[321] The court held that opposing counsel could not discover the memo pursuant to both the work product and party communications privileges.[322] Alternatively, in *Child World v. Solito*,[323] the court recognized the party communications exemption by protecting an insurance company's internal report concerning the settlement demand of a claimant who suggested litigation.[324] The 1989 Texas Supreme Court case *Flores v. Fourth Court of Appeals*,[325] however, demonstrates that internal reports prepared in the usual and customary course of business do not qualify as party communications.[326] Also, documents or records merely secured from a party by a lawyer in anticipation of litigation do not necessarily remove those materials from discovery.[327]

Amid all the confusion, one Texas court did its best to provide practitioners with guidance. In *Jackson v. Downey*,[328] the court dis-

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318. *Id.* at 157-58.

319. 786 S.W.2d 486 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding).

320. Green v. Lerner, 786 S.W.2d 486, 491 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (asserting that the party communication exemption protects information pertinent to the preparation of litigation).

321. *See id.* (applying the party communication exemption to a memo prepared by an engineer regarding a leak of hydrofluoric acid).

322. *See id.* at 490-92 (illustrating that a variety of information would be protected under the work product and party communications' privileges).

323. 780 S.W.2d 954 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding).

324. *See id.* at 955-56.

325. 777 S.W.2d 38 (Tex. 1989) (orig. proceeding).

326. *See* Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41 (Tex. 1989) (orig. proceeding) (commenting that the lack of objective criteria supporting the imminence of litigation, coupled with the document's routine preparation commands the implication of discoverable material).

327. *See In re* LTV Sec. Litig., 89 F.R.D. 595, 612 (N.D. Tex. 1981) (holding that documents secured from a party by a lawyer must be "'assembled' by or for a party or his representative into a meaningful product" in order to be sheltered from disclosure by the work product doctrine).

328. 817 S.W.2d 858 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]).

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cussed a three-prong test for applying the party communications exemption as defined in Texas Rule of Civil Procedure 166b(3)(d).[329] The three elements of the test, all of which a party must satisfy, were: (1) communications by agents, representatives or employees of a party; (2) made subsequent to the event(s) that form the basis of the lawsuit; and (3) in connection with the particular lawsuit.[330] Regrettably, subsequent Texas case law does not develop or add to any part of the three-prong test. The lack of defining case law, however, allows courts to consider the plain meaning of the rule's language or, alternatively, the drafters' intentions as evidenced by the rule's application in Texas and in other jurisdictions with similar rules.

2. Various Communication Examples

Texas has addressed the party communications exemption in a plethora of situations. In the corporate context, there are more situations where the exemption may occur than there is caselaw interpreting this unique rule. To provide a deeper understanding of the party communication exemption, the remainder of this section examines where the rule arises.

a. Agents, Representatives or Employees of a Party

One of the areas debated under the party communications exemption concerns communications with agents, representatives, or employees. In *Lone Star Dodge, Inc. v. Marshall*,[331] the Dallas Court of Appeals provided insight regarding who falls within the definition of "agents, representatives or employees" of a party.[332] In *Marshall*, written documents containing notes from conversations between officers of a party and the party's insurance company constituted privileged information as "written communi-

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329. *Id.*; *see also* Jackson v. Downey, 817 S.W.2d 858, 859 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]) (noting that party communications that predate the occurrence on which the suit is based are not exempted from discovery).

330. *See* Allen v. Humphreys, 559 S.W.2d 798, 802 (Tex. 1977) (identifying Rule 167 as the 1977 equivalent to the party communication exemption).

331. 736 S.W.2d 184 (Tex. App.—Dallas 1987, orig. proceeding).

332. *See* Lone Star Dodge, Inc. v. Marshall, 736 S.W.2d 184, 188 (Tex. App.—Dallas 1987, orig. proceeding) (involving such potential agents as an insurance carrier, an investigator, and a consulting expert).

cations between its agents, representatives, or employees," therefore satisfying the first prong of the *Jackson* test.[333]

Similarly, a federal court in Illinois held conversations between an insured and her insurance company fell within Illinois's equivalent to the party communications privilege. The court stated that the privilege applied:

> [E]ven where such communication is made to a layman, and not an attorney, and even where no lawyer is actually retained to defend the insured, because the insured may properly assume that the communication is made to the insurer as an *agent* for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.[334]

Finally, while applying the work product privilege, the court stated that "[e]mployees of a party are agents of the party, and work product prepared by them are[sic]privileged, even if not prepared in response to an attorney."[335] Therefore, using the plain meaning of the terms "agents, representatives, or employees," combined with examples found in cases from Texas and other jurisdictions, courts clearly should interpret the first prong in a broad manner to at least include employees, at all levels, and persons obligated to investigate a party's liability for certain events.

b. Communication Made Subsequent to Occurrence(s) on Which Lawsuit Based

Another major area of concern during the independent existence of the party communications exemption concerned communications made after the incident which gave rise to the lawsuit. The literal meaning of the second prong, "made subsequent to the occurrence," probably explains the lack of case law analyzing this phrase.[336] Cases addressing this aspect of the party communica-

333. *Id.* (citing Allen v. Humphreys, 559 S.W.2d 798, 802 (Tex. 1977)).

334. Lower v. Rucker, 576 N.E.2d 422, 423 (Ill. 1991) (emphasis added).

335. Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 649 (N.D. Ill. 1994) (refuting the plaintiff's contention that communication among employees of an agent is not privileged unless the communication is "in response to an attorney").

336. TEX. R. CIV. P. 166b(3)(d) (1984, repealed 1999).

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tions exemption merely examine the date of the communication and the date of the incident to determine which came first.[337]

In *Texas Employers' Insurance Ass'n v. Fashing*,[338] the court wrestled with this issue. The facts involved two events: an on the job injury leading to a worker's compensation claim and the subsequent firing of the injured employee.[339] The employee claimed wrongful discharge.[340] The insurance company claimed the party communications doctrine protected against requiring the company to produce documents created after the injury.[341] The court, however, found that the company created the documents in question before the wrongful termination lawsuit and, therefore, the documents did not fall within the party communication exemption.[342] When Texas statutorily adopted the party communication exemption, it dropped this requirement.[343]

c. In Connection with Subsequent Lawsuit

A final area of concern addressed in the party communications exemption focused on communications made in connection with subsequent litigation. The last prong, "in connection with . . . the particular lawsuit," has received more judicial attention than the first two prongs. The third prong attempts to encompass communications that occur before a party files a lawsuit.[344] In fact, cases discussing the party communication exemption all make the point that communications made in anticipation of litigation meet the

337. *See Lone Star Dodge, Inc.*, 736 S.W.2d at 188 (explaining that because most of the documents were created after the date of the incident, they satisfied the second prong of *Allen*).

338. 706 S.W.2d 801 (Tex. App.—El Paso 1986, orig. proceeding).

339. Tex. Employers' Ins. Ass'n v. Fashing, 706 S.W.2d 801, 801 (Tex. App.—El Paso 1986, orig. proceeding).

340. *Id.*

341. *Id.*

342. *Id.* at 802.

343. *See* TEX. R. CIV. P. 192.5(a)(2); *In re* Monsanto Co., 998 S.W.2d 917, 929 (Tex. App.—Waco 1999, orig. proceeding) (noting that "[the work product privilege] by combining privileges and eliminating the 'subsequent to the occurrence' and 'particular pending suit' requirements" has expanded).

344. *See* Lone Star Dodge, Inc. v. Marshall, 736 S.W.2d 184, 188 (Tex. App.—Dallas 1987, orig. proceeding) (interpreting the point after which a party may claim the party communication exemption).

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third-prong of the party communications privilege.[345] Obviously, a party satisfies the third prong when making a communication subsequent to the filing of a lawsuit. When a party makes a communication subsequent to the occurrence but prior to the actual filing of the lawsuit, however, the question becomes whether the party made the communication in anticipation of litigation. In that regard, the test in *National Tank* should suffice.[346]

The party communications exemption has had a litigious and embattled past. This multidimensional exemption arguably expanded the boundaries of the work product doctrine into the realm of the attorney-client privilege. The recent establishment of Texas Rule of Civil Procedure 192.5, however, absorbed the fractured work product and party communications exemptions.[347]

D. *Former Employees*

Former employees enjoy considerable protection under both the work product and party communications exemptions for information learned before termination. Under current Texas law, a lawyer's *ex parte* contact with the opposing party's former employees does not violate any published rules, including any Texas rules of professional conduct, unless the contacting attorney is aware that the ex-employee had access to substantial job-related information subject to attorney-client protection, or the interviewing attorney actively searches for privileged information possessed by the corporation.[348]

345. *See, e.g.*, Allen v. Humphreys, 559 S.W.2d 798, 803 (Tex. 1977) (orig. proceeding) (holding discoverable tests and surveys the defendant admitted were not prepared in anticipation of litigation and, therefore, did not meet the third-prong of the test); Jackson v. Downey, 817 S.W.2d 858, 860 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding [leave denied]) (addressing whether documents created before suit was filed may be deemed created in anticipation of litigation); *Lone Star Dodge, Inc.*, 736 S.W.2d at 188 (determining that the anticipation of litigation exemption can originate before suit is filed).

346. *See* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 204 (Tex. 1993) (applying a reasonableness standard in determining whether a party believes litigation is imminent).

347. *See* Tex. R. Civ. P. 192.5 cmt. 8 (stating that "[w]ork product replaces the 'attorney work product' and 'party communication' discovery exemptions from former Rule 166b").

348. *See generally* Humphreys v. Caldwell, 881 S.W.2d 940, 945-46 (Tex. App.—Corpus Christi 1994, orig. proceeding) (analyzing both the federal and state law and finding that State Farm Insurance did not invoke work product exception here).

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From a practical standpoint, these rules may prove very difficult to police, given the fact that the ex-employee voluntarily consents to the interview and may dump information detrimental to the corporation, inadvertently or not. In addition, the interview likely will not include opposing counsel to observe and object. Of course, parties can more readily enforce the rules in a deposition if what the employee or other corporate agents communicated to a corporate attorney in confidence falls under the attorney-client privilege, the attorney work product exemption and/or, in Texas, the party communications exemption. Furthermore, citing to *Upjohn Co. v. United States*, federal courts have interpreted the attorney-client privilege "as preventing disclosure of privileged information [gained] by former employees."[349]

1. Protection Extends to Communications with Former Employees

The first contemporary review of an attorney's contact with former employees occurred in a 1981 California federal case.[350] The Ninth Circuit explained, in a footnote, why it extended the attorney-client privilege to deposition questions concerning orientation sessions attended by former employees.[351] In making its decision, the court considered the United States Supreme Court's holding in *Upjohn*. Although *Upjohn* only addressed potential violations transmitted by Upjohn's current employees, the Ninth Circuit used the rationale to include ex-employees as well.[352] The Ninth Circuit found that the employees made some of the communications in question to counsel in order to secure legal advice for the company.[353] The court further concluded that these conversations remained privileged after the employees no longer worked for the company.[354] The court emphasized in a footnote that "[t]he orien-

349. *In re* Coordinated Pretrial Proceedings In Petroleum Prod. Antitrust Litig., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981).

350. *Id.* at 1361.

351. *Id.* at 1361 n.7.

352. *Id.* (deeming that the corporate attorney's representation of former employees did not constitute grounds for disqualification).

353. *See id.* (stating that conversations would provide information to aid in corporate council's advice while handling pending lawsuits).

354. *In re* Coordinated Pretrial Proceedings In Petroleum Prod. Antitrust Litig., 658 F.2d at 1361 n.7 (holding that communications made by former employees were protected in this instance).

tation sessions undoubtedly provided information which will be used by corporate counsel in advising the companies [on] how to handle the pending lawsuit."[355] Moreover, the privilege belongs to the company, as the client, and the company's attorney has an obligation to invoke the privilege for the client.[356] The court then adopted the rationale of *Upjohn* in the context of former employees:

> Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.[357]

In *Admiral Insurance Co. v. United States District Court for District of Arizona*,[358] the Ninth Circuit reinforced the rationale of *Upjohn* by extending it to former corporate employees.[359] The court reaffirmed the principle that the attorney-client privilege allows a free flow of information by corporate employees to the corporation's attorneys and that the protection provided by the privilege outweighs the unavoidable disadvantage attributable to the resultant secrecy.[360] Corporate employees in *Admiral Insurance* gave statements to corporate attorneys enabling the corporation to receive legal advice regarding its potential for liability under a lawsuit.[361] The fact that the corporation intended to terminate one of those employees after his interview with the attorneys did not destroy the attorney-client privilege.[362] Further, the con-

355. *Id.* at n.7.

356. *See* United States v. King, 536 F. Supp. 253, 259 (C.D. Calif. 1982) (citing Fisher v. United States, 425 U.S. 391, 402 n.8 (1976)).

357. Upjohn Co. v. United States, 449 U.S. 383, 391 (1981).

358. 881 F.2d 1486 (9th Cir. 1989).

359. Admiral Ins. Co. v. United States Dist. Court for Dist. of Ariz., 881 F.2d 1486, 1493 (9th Cir. 1989) (adhering to *Upjohn*'s extension of the attorney-client privilege to protect relevant information acquired from a former corporate employee).

360. *Id.* at 1495 (commenting that the cost to preserve the attorney-client privilege can be high but is necessary).

361. *Id.* at 1490.

362. *Id.* at 1493 (denoting a former employee as a "de facto third-party witness"). Nor did the fact that the employee was actually an employee of a subsidiary company affect the privilege so long as the employee was testifying about matters within the scope of his employment which were "critical to the [legal] representation of the parent company." *Id.* at n.6; *see also* Weil Ceramics & Glass, Inc. v. Work, 110 F.R.D. 500, 503 (E.D.N.Y.

tents of the interview remained privileged, and opposing counsel could not access the information by treating the terminated employee as a "de facto third-party witness."[363]

2. Factual Inquiry Not Precluded

Most cases involving an attorney contacting a former employee also address the Model Rules of Professional Conduct of the American Bar Association (the "Model Rules"). While Texas does not precisely follow the Model Rules, Texas has patterned its own Texas Disciplinary Rules of Professional Conduct after the Model Rules.[364] In fact, Texas Rule 4.02(a) "Communication With One Represented By Counsel" substantially mirrors Model Rule 4.2, and the Texas commentary tracks that of its ABA counterpart.[365] However, the Texas rules go one step further by stating:

> Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue.[366]

This comment in the Texas rules allows inquiry into the "matter at issue," which must include the facts. If so, the rule does not allow inquiry into privileged communications or attorney thought processes, or party communications concerning investigation of the facts.

For example, in *Command Transportation Inc. v. Y.S. Line (U.S.A.) Corp.*, the court allowed communications between a corporation's counsel and its former employee where the company utilized the information to formulate a defense and prevent similar

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1986) (explaining that the subsidiaries and the parent corporation are considered collectively in correlation to which employees are deemed corporate representatives).

363. *Admiral Ins. Co.*, 881 F.2d at 1493 (rejecting the plaintiff's contention that a former corporate employee should be viewed as a "de facto third-party witness").

364. *See generally* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01, *et. seq. reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) (establishing the rules applicable in Texas).

365. *Compare* TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a) (implementing the substance of ABA Model Rule of Professional Conduct 4.2), *with* MODEL RULES OF PROF'L CONDUCT 4.2 (1999) (stating the conduct required when communicating with a person represented by counsel).

366. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02 cmt. 4.

problems in the future.[367] In that case, Massachusetts showed a willingness to follow federal law on evidentiary matters and, although the federal court applied substantive law of the forum state, the court followed the federal rules on attorney-client privilege.[368] This is particularly true because the former employee was the most knowledgeable person about the actions. The communications were confidential, and the interests or loyalties of the former employee did not diverge from those of the employer.[369] Similarly, the Texas Supreme Court indicated a willingness to recognize employee communications as attorney-client privilege or work product exemption if done in anticipation of litigation.[370]

The narrow question of whether the attorney-client privilege covered contemporary and confidential communications between a former employee and the corporation's attorney arose out of a discovery dispute in *Connolly Data Systems v. Victor Technologies, Inc.*[371] The relevant question became whether the parties must consider a former employee as an authorized representative of the corporation through whom the corporation has now communicated.[372] Under California law, the attorney-client privilege does not protect from disclosure communication between an attorney and a person not considered a corporation's authorized representative.[373] In that case, however, the attorney work product privilege did apply under the federal rules.[374] The work product doctrine, not limited in application to "documents and tangible things," may

367. Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94, 97 (D. Mass. 1987).

368. *See id.* (applying federal law on attorney-client privilege because Massachusetts's law on attorney-client privilege in the corporate context offered no guidance).

369. *See id.* (providing the court's view that applying the attorney-client privilege would foster communications between the former employee and counsel).

370. *See* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 202 (Tex. 1993) (concluding that work product privilege is recognized in Texas if done in anticipation of litigation).

371. 114 F.R.D. 89, 93 (S.D. Cal. 1987) (investigating if conversations between a former employee of a corporation and its attorney are privileged as attorney-client communications).

372. *See* Connolly Data Sys. v. Victor Tech., Inc., 114 F.R.D. 89, 93 (S.D. Cal. 1987) (discussing whether a former employee of a corporation qualifies as an authorized representative in discussion with the corporation's attorney).

373. *See id.* at 95 (concluding that the communication was not privileged because the former employee was not the person authorized to communicate with the attorney).

374. *See id.* at 96 (stating that questions asked by the attorney could reveal confidential theory or strategy).

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shield deposition questions that might produce answers tending to divulge an attorney's mental impressions, opinions and theories concerning the lawsuit.[375] Therefore, parties may not properly ask those types of questions. Parties may ask, however, questions limited to the former employee's knowledge about the facts of the lawsuit, or questions asking what the employee said to the attorney about those facts.[376] The court's order as to questions in the continued deposition, consisted of these guidelines:

1. [the opposition] may inquire into the former employee's knowledge of matters relevant to the litigation;
2. [the opposition] may not ask questions that tend to elicit questions posed to [the former employee by the former employer's attorney, nor as to those particular] facts to which the [employer's attorney] appeared to attach significance, or to any other matter that reveals [that] attorney's mental impressions, theories, conclusions or opinions concerning the case.[377]

Federal courts take unusual measures to ensure that a former employee divulge only facts. For example, in one case the court required the employee to read the court's opinion before answering questions, and ordered the attorneys asking the questions to advise the employee at the beginning of each session that he need not disclose any prior communications between himself and the lawyers for his former employer.[378] In another case, the court honored a plaintiff's representations that he would not seek confidential information from defendant's former employee and would warn the former employee not to reveal such information.[379] In yet another instance, where the federal government contacted former employees *ex parte*, the court required the government to keep a

375. *See id.* (clarifying that the questions posed to the corporate employee by attorney was protected as attorney work product).

376. *See id.* (distinguishing privileged communication that is part of an attorney's work product from unprotected questions seeking facts or statements).

377. *See id.* (establishing guidelines for the deposition that determined which questions are prohibited).

378. *See* PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118, 123 (W.D. Pa. 1990) (instructing deponents on which type of questions can be answered); *see also* Porter v. Arco Metals Co., 642 F. Supp. 1116, 1117 (D. Mont. 1986) (discussing reasons why privilege extends to communication and not facts).

379. *See* Aiken v. Bus. & Indus. Health Group, Inc., 885 F. Supp. 1474, 1480 (D. Kan. 1995) (commenting that plaintiff's attorney vowed to the court that it would not seek privileged information from former employees).

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list of such persons and the date of contact, as well as to preserve all statements, notes, or answers to questionnaires obtained from such contacts.[380] Subject to attorney work product limitations, the court then gave the defendant access to these materials.[381]

In another government case, the court would not require advance notification of *ex parte* communications with former corporate employees, but ruled that any statements by such former employees would not constitute corporate party admissions.[382] Correspondingly, another court disqualified an attorney who obtained confidential information from the former employer of his client's opposition.[383] The court based its decision on a preliminary draft of Section 162 of the Third Restatement of the Law Governing Lawyers, which imposes a no-contact rule when applied to "a person whom the lawyer knows to have been extensively exposed to relevant trade secrets, confidential client information, or similar confidential information of another party interested in the matter."[384]

Florida courts have also grappled with the question of *ex parte* contact with former corporate employees.[385] The Supreme Court of Florida resolved matters in 1997 by refusing to identify a former employee as a "person" as contemplated by Rule 4.2 of the Ameri-

380. *See* United States v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1295 (E.D. Mo. 1997) (directing government attorneys to submit detailed records of any information obtained from former employees and authorizing McDonnell Douglas attorneys to review those records, unless privileged by work product).

381. *See id.*

382. *See* United States v. Beiersdorf-Jobst, Inc., 980 F. Supp. 257, 262 (N.D. Ohio 1997) (allowing *ex parte* communications with former employees and holding that such statements were not party admissions).

383. *See* Camden v. Maryland, 910 F. Supp. 1115, 1124 (D. Md. 1996) (ordering that plaintiff's counsel be disqualified).

384. *See id.* at 1121 (discussing the proposed section). Comment [d] to the proposed rule states: "Only some persons exposed to a principal's confidential information will have been exposed to the extent stated." *Id.* at 1122.

385. *See* H.B.A. Mgmt., Inc. v. Estate of Schwartz, 693 So. 2d 541, 544-45 (Fla. 1997) (affirming that the rules of professional conduct prohibiting *ex parte* communications in businesses is concerned only with current employees); Keesal v. First Healthcare Corp., 684 So. 2d 214, 214 (Fla. Dist. Ct. App. 1996) (seeking review of a court order that prohibits counsel from participating in *ex parte* communications with former employees); Reynoso v. Greynolds Park Manor, Inc., 659 So. 2d 1156, 1157 (Fla. Dist. Ct. App. 1995) (concluding that the professional rules of conduct do not prohibit *ex parte* contact with former employees); Barfuss v. Diversicare Corp. of Am., 656 So. 2d 486, 488-89 (Fla. Dist. Ct. App. 1995) (stating that communications with these former employees is essential to form the basis for this complaint based on their actions or inaction).

can Bar Association Model Rules of Professional Conduct.[386] The court reasoned that an employee's departure terminates his agency and can no longer form the basis for *respondeat superior* to create liability for an employer or to construct admissions on behalf of the employer.[387]

Sometimes attorneys hire their corporate client's former employees as litigation consultants, thus attempting to create privilege.[388] A 1990 federal case tried under Illinois law dealt with such a situation in which a corporation's attorneys hired the former vice president of finance.[389] When the defendant asked the former employee/consultant certain deposition questions, the corporation's counsel objected and instructed the witness not to answer based on the attorney-client privilege and the work product exception.[390] Illinois uses the control group test, just as Texas did until recently. At the time the privileged information reached the witness, the witness served in his consultant role and not that of an employee of the corporation.[391] The attorney-client privilege, as applied in Illinois, did not extend to communications with former employees of a corporation when the corporation utilized the former employee as a litigation consultant.[392] The work product doctrine, however, did apply to certain deposition questions.[393] As a result, the court deemed improper any such questions that would produce answers expressly revealing the witness's or the lawyer's mental impressions, conclusions, opinions, or legal theories concerning the litigation.[394]

State courts generally respect and follow federal decisions on the question of communications with present and former corporate

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386. *H.B.A. Mgmt.*, 693 So. 2d at 546.

387. *Id.* (concluding that the purpose of Rule 4.2 is "no longer served by restricting contacts with former employees").

388. *See* Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., 129 F.R.D. 515, 518 (N.D. Ill. 1990) (finding the attorney-client privilege did not extend to a former vice president thereafter hired as a litigation consultant).

389. *Id.* at 516.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Barrett Indus. Trucks*, 129 F.R.D. at 518.

394. *Id.* (citing Hydramar, Inc. v. Gen. Dynamics Corp., 119 F.R.D. 367, 372 (E.D. Pa. 1988)).

employees.[395] Evidence of this appears in *Martin v. Workers Compensation Appeals Board*,[396] a 1997 California case involving a matter purely of state interest.[397] The court inquired whether employee witness statements made in the process of evaluating a case for litigation were made in the ordinary course of business.[398] The court concluded, after examining federal law on the subject, that the party seeking to protect the information made no showing that the employee statements in question related to the scope of employment during the period of employment.[399] Therefore, the court deemed the employees independent witnesses whose statements fell outside the attorney-client privilege owned by the corporation.[400]

IV. Reforms in Texas and the Result of the Revisions to Both Rules of Evidence and Procedure

The State of Texas recently made several reforms to both the rules of civil procedure and evidence. In 1998 the state merged the rules of civil evidence and criminal evidence into one set of rules.[401] Further, Rule 503, the attorney-client privilege, adopted the subject matter test over the control group test,[402] thereby overruling the Texas Supreme Court's holding in *National Tank*.[403] Likewise, in 1999, the rules of civil procedure saw a change in the area of work product protection.[404] Specifically, the state reclassified work

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395. *Id.*

396. 59 Cal. App. 4th 333, 69 CAL. RPTR. 2d 138 (1997).

397. Martin v. Workers' Comp. Appeals Bd., 59 Cal. App. 4th 333, 69 CAL. RPTR. 2d 138 (1997).

398. *See id.* at 142.

399. *See id.* at 145 (recognizing that the statements, as analyzed by the two tests used by federal courts, were not related to the scope of employee duties).

400. *See id.*

401. Craig W. Saunders, Comment, *Texas Rule of Evidence 503: Defining "Scope of Employment" for Corporations*, 30 ST. MARY'S L.J. 863, 886-87 (1999).

402. *See* Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L.J. 997, 1044 (1999) (analyzing Rule 503 and noting that the subject matter test is now the test applied when evaluating corporate use of the privilege).

403. TEX. R. EVID. 503 cmt.

404. *See* TEX. R. CIV. P. 192.5 cmt. 8 (stating that work product is defined for the first time, replacing "party communication" and "attorney work product" from former Rule 166b).

product from an exemption to a privilege.[405] Additionally, the new rules statutorily define work product[406] and provide a higher degree of protection for core work product in comparison to ordinary or other work product.[407]

A. *Attorney-Client Privilege in Its New State*

1. The New Rule

Texas Rule of Evidence 503, in its new version, became effective on March 1, 1998.[408] Most significantly, the rule abolished the control group test in favor of the more widely used subject matter test.[409] The new rule now broadly defines "representative of the client" as "any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."[410] The rule now offers a greater degree of protection for corporations in Texas.

The Texas Supreme Court contemplated the use of the subject matter test in *National Tank*.[411] Despite the adoption of the control group test, the court addressed the range of protection provided by the subject matter test in its discussion of *Harper & Row Publishers*. Quoting the Seventh Circuit, the Texas Supreme Court stated that an employee's communications equate to that of the corporation as long as: "[T]he employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by

405. TEX. R. CIV. P. 192.5(d); *see* TEX. R. CIV. P. 193 cmt. 3 (stating that "[t]his rule governs the presentation of all privileges including work product").

406. TEX. R. CIV. P. 192.5(a)(1-2) (establishing a two part definition of work product covering both materials prepared in anticipation of litigation and communications made in anticipation of litigation). This definition clearly adopts the party communications exemption found in former Rule 166b. *See id.*

407. *Compare* TEX. R. CIV. P. 192.5(b)(1) (establishing that "the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories—is not discoverable"), *with* TEX. R. CIV. P. 192.5(b)(2) (providing that "[a]ny other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means").

408. TEX. R. EVID. 503.

409. *Id.* at cmt. (adopting the subject matter test).

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

411. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 198 (Tex. 1993) (orig. proceeding).

the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."[412] *National Tank's* discussion of *Harper & Row Publishers* provides guidance for future Texas courts applying the subject matter test.

2. Recent Case Law

As previously explained, after March 1, 1998, the attorney-client privilege provided for a greater amount of protection for corporations. Although there is little case law applying the new privilege, two recent cases provide examples of how courts will apply the subject matter test in Texas. The two cases, from the Texas Appellate Courts of Waco and Houston, provide the most definitive applications of the new privilege as applied to corporations.

Most recently, the First Court of Appeals addressed an original proceeding for writ of mandamus in *In re NationsBank*.[413] In that case, the court analyzed whether the attorney-client privilege and the work product doctrine applied to documents produced by NationsBank's corporate counsel. The court held in an unpublished opinion that the trial court abused its discretion as to the admittance of some documents, while it did not abuse its discretion in the admittance of others.[414]

The result of a complex business dealing, Nitla sued claiming NationsBank was liable for the fraudulent conduct of third parties.[415] Nitla additionally claimed that NationsBank participated in fraudulent conduct and benefited from such conduct by receiving the fruits and profits of the transaction.[416] NationsBank claimed the attorney-client privilege for more than thirty documents sought by

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412. *Id.* (quoting Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971)); *accord In re* Monsanto Co., 998 S.W.2d 917, 922-23 (Tex. App.—Waco 1999, orig. proceeding).

413. No. 01-99-00278-CV, 2000 WL 799807 (Tex. App.—Houston [1st Dist.] 2000, orig. proceeding) (unpublished panel opinion).

414. *In re* NationsBank, No. 01-99-00278-CV, 2000 WL 799807, at *5 (Tex. App.—Houston [1st Dist.] 2000, orig. proceeding) (unpublished panel opinion).

415. *See id.* at *2.

416. *Id.* (stating, "Nitla contends that NationsBank is liable for the other defendants' fraudulent conduct because it aided and abetted such fraudulent conduct, benefited [sic] from such fraudulent conduct, participated in the fraudulent conduct, and received the fruits and profits of such fraudulent conduct").

Nitla.[417] In support of the privilege, NationsBank filed four separate affidavits by corporate counsel. Nitla countered NationsBank's offerings, asserting the crime/fraud exception to the attorney-client privilege.[418]

The court extensively discussed the new Texas definition of representative prior to making its holding.[419] After noting the rule change, the court applied the subject matter test as prescribed by the new rule.[420] The court believed that a representative of the corporation made the communications and, therefore, offered protection to a large number of the documents.[421] The court then turned to the issue of the crime/fraud exception to determine which documents would remain protected.[422]

NationsBank clearly applied the subject matter test in determining that the scope of the attorney-client privilege applied to a large number of communications.[423] Despite its unpublished status, the case serves as an excellent example of the subject matter test in action. Another key holding in the application of the subject matter test in Texas derives from a 1999 Waco Appellate Court decision.

In re Monsanto Company[424] stands as the definitive published opinion applying the subject matter test after the rule change in March of 1998. Monsanto Company developed gene-enhanced cottonseeds and marketed the seeds as insect resistant.[425] The seeds did not prove resistant to insects, and several farmers sued Monsanto under multiple causes of action.[426] The plaintiffs requested several documents at trial, but Monsanto claimed privilege

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417. *Id.* at *5 (proclaiming "NationsBank asserted only the attorney-client privilege with respect to the following documents: NB/Priv 001-003, 014-040, 053-058, 098-099, 118, 122-127, 136-139, 174-176, 178-183, 190-197, 200-218, 222-229, 231-272, 296, 301-305, 307-310, 335-337, and 338-339").

418. *Id.* at *5-6 (asserting TEX. R. EVID. 503(d)(1)).

419. *In re* NationsBank, 2000 WL 799807 at *5.

420. *Id.*

421. *Id.* at *5 n.11 (applying the new rule of evidence and indicating that the rule did fit despite claims that the communications were made prior to the creation of the rule).

422. *Id.* at *5-6.

423. *Id.* at *6.

424. 998 S.W.2d 917 (Tex. App.—Waco 1999, orig. proceeding).

425. *In re* Monsanto Co., 998 S.W.2d 917, 920 (Tex. App.—Waco 1999, orig. proceeding).

426. *See id.*

for a large number of these documents.[427] The trial court denied the defendant's claim of privilege on almost 400 documents.[428] The court discussed the attorney-client privilege and assessed that the subject matter test applied when an entity, such as Monsanto Company, asserted the privilege.[429] Additionally, the court noted plaintiff's assertion of the crime/fraud exception and conceded that if the exception applied then the privilege failed.[430] In this instance the privilege applied to the documents, and the court noted the great breadth of the privilege.[431] Arguing that it applied "common sense to the contents of the documents," the court extended the attorney-client privilege to a number of the documents while applying the work product privilege to others.[432]

Both *NationsBank* and *Monsanto* recognize the expanded scope of the attorney-client privilege since the March 1998 change to the rules of evidence. Recognizing that the threshold requirement for corporations to claim the privilege depends upon the subject matter of litigation rather than the ability of the party to exercise control over the situation, both courts correctly apply the rule. Regrettably, few other cases have directly applied the new subject matter test. In addition, as an unpublished opinion, *NationsBank* does not provide usable precedent in a Texas court.[433] This means that Texas lawyers and courts can only rely on *Monsanto* to provide immediate guidance on the Texas application of the subject matter test. Arguably, however, Texas lawyers can still rely on *National Tank* to argue the scope of the subject matter test.[434] Texas attorneys and courts may also turn to federal law for further guidance

427. *See id.*
428. *See id.*
429. *See id.*
430. *In re* Monsanto Co., 998 S.W.2d at 922.
431. *Id.* at 923-25.
432. *Id.* at 929-30.
433. *See* Tex. R. App. P. 47.7 (prohibiting unpublished appellate court decisions from being used as authority in court).
434. *See* Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 198 (Tex. 1993) (orig. proceeding) (citing *Harper & Row Publishers, Inc.* and noting that range of protection corporations have under the attorney-client privilege based on the subject matter test); *In re* Monsanto Co., 998 S.W.2d at 922-23 (relying on *Nat'l Tank's* use of *Harper & Row Publisher's* definition of the subject matter test). *But see In re* NationsBank, No. 01-99-00278-CV, 2000 WL 799807, at *5 n.11 (Tex. App.—Houston [1st Dist.] June 19, 2000, orig. proceeding) (unpublished panel opinion) (relying solely on the new rule of evidence to provide for the subject matter test as explicitly stated in the comments).

because federal courts have applied the subject matter test, in one form or another, since 1971.[435]

B. *Attorney Work Product Privilege from Revised Rules of Civil Procedure*

1. The New Rule

As of January 1, 1999, Texas employed a new work product privilege. The new rule defines work product for the first time and provides relevant exemptions.[436] Additionally, the new rule of civil procedure combines and replaces the attorney work product and party communications exemptions found previously in Rule 166b.[437] The new rule jealously protects core work product by absolutely prohibiting discovery of the "mental impressions, opinions, conclusions, or legal theories" of counsel.[438] Moreover, the new rule provides a great deal of protection for core work product and diminishes the ambiguity found in former Rule 166b.

In addition, Rule 192.5 provides for a greater depth of protection than former Rule 166b. For example, Rule 166b relied on Rule 503(d) to provide protection for information decreed as both work product and attorney-client privilege.[439] Rule 192.5, however, limits work product unambiguously to: (1) material prepared, or (2) mental impressions,[440] or (3) a communication.[441] In addition, all of these limits must occur in anticipation of litigation.[442] Where

435. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971) (creating the modern subject matter test as applied in federal and Texas courts).

436. *See* TEX. R. CIV. P. 192.5 cmt. 8 (stating that "[w]ork product is defined for the first time, and its exceptions stated").

437. *See id.* (noting "[w]ork product replaces the 'attorney work product' and 'party communication' discovery exemptions from former Rule 166b").

438. *See* TEX. R. CIV. P. 192.5(b)(1) (clarifying protection by stating "the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories — is not discoverable"). The rule further reinforces this idea by limiting the disclosure of mental processes directly. *See* TEX. R. CIV. P. 192.5(b)(4) (decreeing that a court must "protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable").

439. TEX. R. CIV. P. 166b(3)(d) (1984, repealed 1999) (establishing the party communication exemption).

440. TEX. R. CIV. P. 192.5(a)(1).

441. TEX. R. CIV. P. 192.5(a)(2).

442. TEX. R. CIV. P. 192.5(a)(1-2).

Rule 166b relied on case law to resolve its ambiguity, Rule 192.5 adopts the wisdom of Texas common law and provides for a clear standard for courts to follow.

2. Recent Case Law

Rule 192.5 clearly reflects that Texas has made progress in honing the protections afforded attorneys from overly intrusive discovery. Two important cases, one at the supreme court and the other at the intermediate level, interpret the new rule and provide guidance for future application. Undoubtedly, as the law develops, courts will utilize the breadth of Rule 192.5 to fairly protect an attorney's work product.

In July 2000, the Texas Supreme Court addressed the new work product rule. In a complex case, the court asked how the new work product rule affected a successor counsel's claim of privilege.[443] *In re George*[444] involved the disqualification of two law firms and the protection of their work product. After the Court disqualified two prior law firms, new counsel wished to receive the work product of the two prior law firms representing this client. The trial court allowed production of the files to new counsel.

For the first time the court addressed whether disqualification of counsel created a rebuttable presumption that the work was privileged and, therefore, excluded from production.[445] Chief Justice Phillips, in his majority opinion, addressed the doctrine behind the current work product privilege and how the privilege related to disqualification. Chief Justice Phillips initially stated that "[t]he purposes underlying the initial disqualification will often require a partial or total restriction on the successor counsel's access to the disqualified counsel's work product."[446] In order to uphold the purposes behind the disqualification order, the court found a restriction on work product necessary.[447] Further, because the work product contained confidential information, the court excluded the attorney's work from discovery.[448] The court concluded by holding

443. *In re* George, 28 S.W.3d 511, 512 (Tex. 2000) (orig. proceeding).
444. 28 S.W.3d 511 (Tex. 2000) (orig. proceeding).
445. *In re* George, 28 S.W.3d at 518.
446. *Id.* at 515.
447. *Id.* (indicating "that a restriction on work product is necessary to further the purposes behind this Court's disqualification order").
448. *See id.* at 518.

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that a rebuttable presumption that the work product contains confidential information most effectively protects work product.[449] The adoption of a rebuttable presumption in this context established a new rule of law in the State of Texas.

The Fourth Court of Appeals in San Antonio heard a petition for writ of mandamus in October of 2000. *In re Weeks Marine, Inc.*,[450] involved a relator's attempts to obtain various reports, photographs, and videotapes through discovery. The underlying case centered on permanent injuries sustained by a crewmember on a vessel owned by Weeks Marine. The plaintiff's discovery request included the above-mentioned reports, photographs, and videotapes.[451] Respondent, now relator, Weeks Marine claimed privilege for this information, but the trial court disagreed.[452] Weeks Marine filed an abuse of discretion review with the San Antonio Court of Appeals.[453]

The appellate court initially examined new Rule 192.5.[454] The court indicated that the definition of work product demanded that the privilege apply in this case.[455] In its per curiam opinion, the court noted that the documents clearly indicated that Weeks Marine gathered the information in anticipation of litigation and met the definition of work product. Because the surveillance report included the requested photographs, the court extended the privilege to the photographs as well. Finally, the court found that Weeks Marine made the videotapes as additional surveillance of the plaintiff entering and exiting a vehicle. As a result, the court deemed the videotapes made in anticipation of defending against this suit and, thus, were privileged under the new rule.

The holdings in both *In re George* and *In re Weeks Marine* indicate how Texas courts will hold in the future. Rule 192.5 largely answers the concerns created by former Rule 166b. Aside from the newly created rebuttable presumption rule applied by *In re George*, the rule provides for a clear and concise privilege that

449. *Id.*

450. 31 S.W.3d 389 (Tex. App.–San Antonio 2000, orig. proceeding) (per curiam).

451. *In re* Weeks Marine, Inc., 31 S.W.3d at 390 (Tex. App.—San Antonio 2000, orig. proceeding) (per curiam).

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.* at 391.

courts will generally have little problems applying. Rather than relying on common law to determine the scope of discovery protection, Texas courts have a strong procedural rule to guide the way.

V. Conclusion

The work product and attorney-client privileges have long histories in both federal and Texas jurisdictions. Dating back to Rome, the attorney-client privilege has developed into a rule generally protecting confidential communications between clients and attorneys in both the public and corporate world. The more recent work product privilege has moved quickly from federal common law to the statutory protection that it provides today. In Texas, the attorney-client privilege has progressed in the corporate field from applying only to communications made by those parties in control, to those employees' communications involved in the subject matter of their duties. Likewise, work product in Texas has also progressed. From a simple exemption that applied only to core work product to a privilege that covers core and ordinary work product, with some limitations, the scope of the work product privilege is now clear.

A. *The Resulting Overlap in Protection*

The resulting clarity in discovery rules in Texas is not without its problems. Some could argue that while the rules appear clear and distinct in a vacuum, any overlapping can create confusion. Evidence of overlap appears most significant when a court finds that one privilege does not apply to a given situation but the other privilege does.

In *Landry v. Burge*,[456] the defendants pled both the attorney-client and work product privilege under the new rules. When addressing work product, the intermediate appellate court held that the law firm did not make communications about the names of clients in anticipation of litigation and, therefore, the work product privilege did not apply.[457] The court then addressed the attorney-client privilege and indicated that client identity did not generally

456. No. 05-99-01217-CV, 2000 WL 1456471 (Tex. App.—Dallas 2000).

457. *See* Landry v. Burge, No. 05-99-01217-CV, 2000 WL 1456471, at *5 (Tex. App.—Dallas 2000) (not designated for publication) (stating "[a] client's identity is not material prepared or a mental impression developed in anticipation of litigation. Even if client

qualify as the kind of communication protected by the privilege.[458] The resulting lack of overlapping protection demonstrates a clear application of the law.

The Court of Appeals for Waco provides one of the best examples of analysis as both new privileges where dual privilege pleading proved fruitful. *In re Monsanto Co.*, as extensively discussed earlier, analyzes both new privileges. In that case the court protected some documents through the work product privilege and other documents received protection after applying the attorney-client privilege.[459]

In applying the attorney-client privilege, the court emphasized the contrast between the control group test and the subject matter test by stating that "[t]he expanded 'subject matter' test deems an employee's communication privileged if it is made at the direction of his superiors and its subject matter is the performance of the employee's duties."[460] Subsequently, the court protected the majority of e-mails and memorandums at issue under the attorney-client privilege because they constituted confidential communications between relevant parties.[461]

After addressing the attorney-client privilege, the court immediately shifted to the work product privilege. The court found that a large number of the documents were protected by either the work product privilege or the attorney-client privilege.[462] Several memos, e-mails and legal drafts were considered work product because of their content.[463] However, not all of the documents were protected. Because the claiming party did not prove that a representative of the client provided the remaining two documents or that the documents contained confidential communications, the court held the two remaining documents discoverable.[464]

identity could be considered a communication, there is no evidence . . . that the communication was made in anticipation of litigation").

458. *Id.* at *5-6 (citing to *In re* Grand Jury Subpoena, 926 F.2d 1423, 1431 (5th Cir. 1991)).

459. *See In re* Monsanto Co., 998 S.W.2d 917, 934 (Tex. App.–Waco 1999, orig. proceeding).

460. *Id.* at 931.

461. *Id.* (holding "the majority of the documents designated in the PR-RS log are entitled to the attorney-client privilege").

462. *Id.* at 932.

463. *Id.* at 931.

464. *In re* Monsanto Co., 998 S.W.2d at 931.

In analyzing both *Laundry* and *Monsanto*, an obvious rule of thumb emerges. When attempting to assert privilege in the face of broad discovery requests, attorneys should argue both attorney-client and work product privileges. While neither of these cases resulted in all of the evidence receiving protection, the odds clearly favor a party asserting both privileges.

B. *Courts and Attorneys Now Have More Clear Guidance for Discovery*

Texas attorneys representing corporations have a greater chance of protecting both work product and confidential communications now that the rules have changed. Companies can now protect confidential communications occuring between employees and counsel as long as a superior directs the employee and the employee acts within the scope of employment.[465] Likewise, as long as in-house counsel acts in anticipation of litigation, the work product doctrine creates a privilege for mental impressions.[466] Other work product proves discoverable only upon a showing of substantial need or undue hardship.[467] The adoption of these rules follows both federal guidance and Texas common law. The following scenario demonstrates the new range of protections.

1. Old Scenario, New Rule

Assume a customer, injured by an exploding pressure valve while visiting manufacturing facilities, sues a Texas corporation. In a subsequent meeting of employees, called by outside counsel and hosted by in-house counsel, how does the new discovery privilege work? Assume the president/CEO, secretary, the sales manager, the factory manager, a product machine operator/assembler, a quality control inspector, and the janitor attend the meeting. The objective purpose of the meeting is to educate the lawyers, find out what went wrong, determine if this has ever happened before, and generate any document(s) that will assist with the defense of the lawsuit.

Communications between either of the two lawyers and the president/CEO, and probably the two department managers receive

465. TEX. R. EVID. 503(a)(2)(B); *In re* Monsanto Co., 998 S.W.2d at 929.
466. TEX. R. CIV. P. 192.5(b)(1).
467. TEX. R. CIV. P. 192.5(b)(2).

protection under the attorney-client privilege. However, what if opposing counsel deposes the secretary, inspector, machine operator, and janitor and asks about the conversations between the lawyers and those at the meeting? Who can claim the attorney-client privilege? The law of the attorney-client privilege under *National Tank* did not protect such deponents.[468] However, these individuals clearly represent employees of a party involved in the investigation relating to a particular and existing lawsuit. As such, the new Rule 503, effective March 1, 1998, prevents discovery of their information.[469]

The federal rules concerning attorney work product have long held that a party may not depose an opponent's employee about the content of conversations between the attorney and other persons.[470] This type of invalid questioning, in effect, seeks statements made by the party's counsel that may disclose the attorney's thoughts about the strong and weak points of the case.[471] If the Texas Supreme Court's assertion that no differences exist between work product under the federal rules and under the Texas rules is correct, courts must deem improper all deposition questions asked of any person who attended the meeting if those questions seek the

468. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 198-99 (Tex. 1993) (denoting that the qualifying employee did not have the requisite authority to communicate on behalf of their corporation).

469. TEX. R. EVID. 503(b)(1)(c) (discussing the application of the attorney-client privilege to non-client third parties).

470. FED. R. CIV. P. 26(b)(3); *see, e.g.*, Hydramar, Inc. v. Gen. Dynamics Corp., 119 F.R.D. 367, 371-72 (E.D. Pa. 1988) (intimating that depositions may not reveal the mental impressions of counsel in anticipation of litigation); Ford v. Philips Electronics Instrument Co., 82 F.R.D. 359, 359-61 (E.D. Pa. 1979) (addressing a motion to limit the scope of examination of a witness at oral deposition to not reveal material information about the internal thoughts of counsel); Ceco Steel Products Corp. v. H. K. Porter Co., 31 F.R.D. 142, 144 (N.D. Ill. 1962) (manifesting an intent to presume that an attorney's communications generated protectable work product when those communications involved uncertainty as to what transpired).

471. *See, e.g.*, Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (holding that it was error to compel disclosure of opinion work product even if it was disclosed to a testifying expert); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 386-87 n.3 (N.D. Cal. 1991) (noting a split of authority on exceptions allowing for the discovery of core work product and the preference to protect the strategic thoughts of attorneys amongst the majority of authorities; however, this court did not provide protection in this instance); Hamel v. Gen. Motors Corp., 128 F.R.D. 281, 283 (D. Kan. 1989) (protecting factual work product); *Hydramar, Inc.*, 119 F.R.D. at 371-72 (following prior precedent and protecting core work product of attorneys).

content of the exchange between the attorney and any persons at the meeting.

Despite the breadth of the federal rules and Texas's new counterpart, courts and attorneys alike must understand the fine distinction between strategy meetings and investigatory meetings. The fact that an investigatory meeting took place appears not to achieve privileged status. In addition, opposing counsel may likely discover the broad subject matter of investigation. The investigatory meeting, however, often serves the defense as a foundation for asserting the work product privilege. The interchange between the attorneys and anyone at a meeting called for the purpose of investigating an accident and formulating a defense strategy clearly fall under the attorney work product privilege. Therefore, such deposition questions of the janitor as, "Do you recall whether there was any discussion of documents?" may yield a "yes" or "no" answer, but little else. Courts must protect parties against questions about such things as the length of the investigatory sessions, the frequency of the meetings, who attended, and how the attorney directed the proceedings.

If the above scenario described a different meeting called by the president/C.E.O., without any attorneys present, Texas case law might support use of work product protection. A literal reading of the rule and the application of federal and Texas case law should allow the work product privilege to operate. In this instance, the agents of the corporation could produce strategic and tactical plans in anticipation of litigation. The investigatory meeting must be guided in anticipation of litigation before it enters the threshold of work product. The privilege applies to the contents of investigatory discussions at such a meeting, even if a party has yet to file the lawsuit at the time of the meeting. Under the old rules, Texas corporations had a greater risk of losing the work product or attorney-client shield. The above scenarios could have entirely different results if the old rules and interpretations applied. Now that the fog has cleared, Texas corporations may act within clear guidelines to protect their privileged communications.

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