PRIVILEGES AND WORK PRODUCT – HOW TO GET INFORMATION AND HOW TO PROTECT IT

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HOW TO OFFER AND EXCLUDE EVIDENCE
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I. SCOPE OF ARTICLE

The Texas Rules of Evidence provide that "no person has a privilege to refuse to disclose any matter, refuse to produce any object or writing, or prevent another from being a witness or disclosing any matter or producing any object or writing except as otherwise provided by constitutional provision, statute, the Texas Rules of Evidence, or by other rules prescribed pursuant to statutory authority." TEX. R. EVID. 501. However, a number of notable exceptions do exist. These exceptions to the rule are intended to promote effective legal services, which, in turn, promote the broader societal interest of the effective administration of justice. *Huie v. DeShazo,* 922 S.W.2d 920, 922 (Tex. 1996).

Unfortunately, as the Texas Supreme Court noted in 1987, the goals of the discovery process are often frustrated by the adversarial approach to discovery. *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987). "The 'rules of the game' encourage parties to hinder opponents by forcing them to utilize repetitive and expensive methods to find out the facts." *Id*. Thus, the truth "is often kept submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause the facts to rise." *Id*. The result is an unconscionable increase in the costs of litigation, an unreasonable delay in pretrial matters, and unnecessarily protracted litigation. *Fina Oil and Chemical Co. v. Salinas*, 750 S.W.2d 32, 34 (Tex. App.—Corpus Christi 1988, no writ).

This paper will evaluate the balance between these competing approaches in the area of privileges and work product, including both the proper assertion of the more common privileges and, conversely, the methods available to determine the appropriateness and the scope of the privilege asserted, including:

- The attorney-client privilege;
- party communications;
- consulting experts;
- witness statements; and
- the privilege against self-incrimination.

Specifically, this paper will address both: (1) the rights of a party to obtain discovery under Texas Rule of Civil Procedure 192.3 regarding potentially privileged matters; and (2) the rights of a party to withhold or refuse to disclose information and/or documents under a claim of privilege.

II. ATTORNEY-CLIENT PRIVILEGE

A. When Does it Apply?

The attorney-client privilege seeks to allow unrestrained communication and contact between an attorney and client for all matters in which the attorney's professional advice or services are sought by alleviating the client's concerns that these confidential communications might be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding. *In re Toyota Motor Corp.*, 94 S.W.3d 819, 822 (Tex. App. San Antonio—2002, reh'g overruled)

(citing *Huie v. DeShazo,* 922 S.W.2d 920, 922 (Tex.1996)). This protection promotes effective legal services, which leads to the promotion of a "broader societal interest of the effective administration of justice." *Id.*

The attorney-client privilege in Rule 503 of the Texas Rules of Evidence covers, among other things, communications between: (1) the client (or the client's representative) and the lawyer (or the lawyer's representative); (2) between the lawyer and the lawyer's representative; and (3) between representatives of the client or between the client and a representative of the client. TEX. R. EVID. 503(b)(1). Rule 503 defines a "client" as a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer. TEX. R. EVID. 503(a)(1). It further defines a "representative of the client" as either:

(1) "a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client," or

(2) "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."

Id. at 503(a)(2)(A), (B). A person who falls in either of these two definitions qualifies as a "representative of the client" and, consequently, within the protection of the attorney-client privilege.

The first definition of "representative of the client" represents what is known as the "control group" of a corporation or other business entity. Typically, this means only the upper echelon of corporate management, namely those persons in a position to control or to take a substantial part in a decision about any action that the entity may take on the advice of the attorney. *See National Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993) ("[t]he control group test reflects the distinction between the corporate entity and the individual employee and is based on the premise that only an employee who controls the actions of the corporation can personify the corporation"). There is no presumption that a person has the authority to obtain or act on legal advice; the authority must be proved by the party claiming the privilege. *Cigna Corp v. Spears*, 838 S.W.2d 561, 565-68 (Tex. App.—San Antonio 1992, orig. proceeding).

In 1998, a second definition of "representative of the client" was added to Rule 503, known as the "subject matter group." *See* TEX. R. EVID. 503(a)(2)(B). This second definition expands the privilege from the "control group" to include statements by lower level employees if the communication to or from the lawyer is "for the purpose of effectuating" legal representation for the client while acting within the "scope of employment." *Cigna*, 838 S.W.2d at 565 (distinguishing the "control group" test from the "subject matter" test); *see* TEX. R. EVID. 503(a)(2)(B).

Although many of the seminal Texas cases applying Rule 503(a)(2) arise in the context of whether an *employee* qualifies as a representative of a corporate client, neither of the definitions

discussed above contain the express requirement that the representative actually be an *employee* of the client. *See* TEX. R. EVID. 503(a)(2)(A), (B); *see, e.g., National Tank*, 851 S.W.2d at 199 (*employee*-witness statements taken by employer's liability insurer for employer's corporate counsel were not protected from disclosure by attorney-client privilege, as witnesses who made the statements were not representatives of employer-client for purposes of applying privilege); *Cigna*, 838 S.W.2d at 567-68 (attorney-client privilege did not protect documents written by *employees* to attorney or vice versa where employees were not proven to meet definition of representative of corporate-client authorized to obtain or act on legal advice; fact that attorneys at corporation regarded all or some of corporation's employees as clients did not change employees into representatives of the corporate-client); *Osborne v. Johnson*, 954 S.W.2d 180, 183 (Tex. App.—Waco 1997, orig. proceeding) (in order for department chair to qualify as university's representative in investigation of charges against professor for purposes of invoking attorney-client privilege as to communications with university's counsel, he did not have to have ultimate decision-making authority; it was sufficient that he had the authority to hire counsel on behalf of the university or to act on advice rendered by counsel pursuant to an authorized request).

In fact, the Texas Supreme Court has recognized, without deciding, that a person *not employed* by the client may qualify as a "representative of the client." *See National Tank*, 851 S.W.2d at 199 ("[W]e note that liability policies typically vest the insurer with authority to hire counsel and conduct the defense of the insured. In such a case, *certain employees of the insurer* may qualify as *representatives of the insured*.") And this proposition was advanced and upheld by the Fort Worth Court of Appeals opinion of *In re Fontenot,* which found that a physician's liability insurer was a "representative of the client" within the meaning of the "control group" test, as the contract of insurance with the insurer expressly conferred upon the insurer the right and contractual duty to obtain and facilitate legal representation for the insured in the event the insured faced a professional medical liability action. 13 S.W.3d 111, 113 (Tex. App.—Fort Worth 2000, orig. proceeding). The unpublished Houston Fourteenth Court of Appeals opinion of *In re Sea Mar Management Inc.* further supports the proposition that a third-party contractor, as opposed to an *employee*, can qualify as a "representative of the client." *See In re Sea Mar Management, Inc.*, 1999 WL 33219365 at *3 (Tex. App.—Houston [14th Dist.] Jan. 28, 1999, not designated for publication). In *Sea Mar*, at issue was whether the client's investment banker qualified as a "representative of the client" so as to protect a letter written by the client's attorney and disclosed to the investment banker. *Sea Mar*, at *1. The Houston Fourteenth Court of Appeals reasoned that because the investment banker was hired by the client to finalize the transaction at issue and was authorized to receive, and act upon, confidential legal advice rendered by the client's attorneys in connection with that transaction, the investment banker qualified under the "control group test" as a "representative of the client." *Id.* at *3-4.

B. How to Protect Privileged Documents.

If a document contains a confidential communication, the privilege extends to the entire document, as opposed to the specific portions related to legal advice, opinions or mental analysis. *In re Toyota Motor Corp.*, 94 S.W.3d at 822; *see also In re ExxonMobil Corp.*, 97 S.W.3d 353, 361 (Tex. App. Houston [14th Dist.] 2003, orig. proceeding) (the entire document is protected even when only partially covered by the attorney-client privilege). "[F]acts are the lifeblood of legal opinions." *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425, 427

(Tex. App.—Houston [14th Dist.] 1993, orig. proceeding). Thus, "except in the rarest of circumstances, documents falling within the attorney-client privilege simply are not discoverable, even when they are interwoven with factual information." *Id*.

A party may therefore withhold any privileged material or information from discovery. TEX. R. CIV. P. 193.3(A). In response, a party may request a hearing on an objection or claim of privilege. TEX. R. CIV. P. 193.4(a). Evidence is presumed discoverable under Texas law; thus, the party claiming a privilege bears the burden of establishing the privilege. *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218, 223 (Tex. 2004). If a party asserting a privilege makes a prima facie showing of privilege and tenders documents to the trial court, the trial court is required to conduct an in camera inspection of those documents before deciding to compel production. *Id*. The trial court abuses its discretion in refusing to conduct an in camera inspection when such review is critical to the evaluation of a privilege claim. *Id*. "The prima facie standard requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Id*. (internal quotations omitted).

C. How to Get Privileged Documents.

Although the attorney-client privilege extends to an entire communication, a person cannot cloak a material fact with the privilege merely by communicating it to an attorney. *Huie v. DeShazo,* 922 S.W.2d 920, 923 (Tex. 1996). Further, although Rule 503 adopts an expansive view of who qualifies as a "representative of the client," the privilege will apply only if the communication was made or received for the purpose of facilitating the rendition of legal services to the client and was confidential. *Id.* at 503(b)(1). The attorney-client privilege also does not apply if the attorney is acting in a capacity other than that of an attorney. *In re Texas Farmers Ins. Exchange*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, (orig. proceeding), *mand. denied* 12 S.W.3d 807 (Tex. 2000).

After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. TEX. R. CIV. P. 193.3(b). Within fifteen (15) days of service of that request, the withholding party must serve a response that: (1) describes the information or materials withheld to enable the requesting party to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld. *Id*.

The attorney-client privilege may also be waived. *Fina Oil and Chemical Co. v. Salinas*, 750 S.W.2d 32, 34 (Tex. App.—Corpus Christi 1988, no writ). For example, if the privilege is used as a sword rather than a shield, the privilege may be waived. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993). A court must employ a three-pronged test to determine whether a waiver occurred: (1) the party asserting the privilege must seek affirmative relief; (2) the privileged information, if believed by the fact finder, must be outcome determinative; and (3) disclosure must be the only means by which the aggrieved party may obtain the evidence. *Id*. If

any requirement is absent, the trial court must uphold the privilege.[1] Mere relevance is insufficient, as is a mere contradiction in position. *Id*.

However, under the snap-back provision, a party who produces material or information without intending to waive a claim of privilege does not waive that claim if, within ten days of discovering such production was made, the producing party amends the response, identifying the material or information produced and stating the privilege asserted. TEX. R. CIV. P. 193.3(b). Then, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege. *Id*.

Finally, courts have held the attorney-client privilege does not apply to situations in which an attorney represents a business and litigation later ensues *between the partners in that business*.[2] This same principle applies in litigation in which shareholders seek documents from the corporation relating to causes of action against the corporation and/or its officers and directors and the shareholder can show good cause why the privilege should not be applicable. *See In re Halter*, 1999 WL 667388, *3 (Tex. App.—Dallas Aug. 27, 1999); *Ward v. Succession of Freeman*, 854 F.2d 780, 784–85 (5th Cir. 1988) ("Recognizing that the beneficiaries of a corporate managements' actions are the corporation's shareholders, we found that a sufficient mutuality of interest between management and shareholders in communications with attorneys to bar any assertion by management alone of an absolute privilege against the shareholders."); *Garner v. Wofinbarger*, 430 F.2d 1093, 1101–04 (5th Cir. 1970) ("[M]anagment judgment must stand on its own merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.") While the attorney-client privilege would apply in a dispute between a business and a third party, the privilege does not apply when the dispute is between the owners of the business. This rule is codified in Texas Rule of Evidence 503(d)(5), which specifically states the attorney-client privilege does not apply to "communications relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among the clients." *See also In re Halter*, 1999 WL 667288, at * 3.

D. Common Traps and Action Steps to Avoid Them.

1. The Attorney-Client Privilege Belongs to the Company.

A common problem in the context of in-house counsel is that management often fails to understand that a company's counsel is not management's personal lawyer. The privilege always belongs to the company, not to any individual employee of the company. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12. The Texas Disciplinary Rules of Professional Conduct provide that:

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[1] The offensive use doctrine is also applicable in an analysis of the Fifth Amendment right against self-incrimination in the context of civil litigation, as discussed more fully below in Section V.

[2] It is important to note that *In re Halter* is an unpublished decision and the Texas Supreme Court has not expressly recognized such an exception. Further, the Dallas court of Appeals appeared to limit its holding to shareholder derivative lawsuits.

> a lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that: (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization; (2) the violation is likely to result in substantial injury to the organization; and (3) the violation is related to a matter within the scope of the lawyer's representation of the organization. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(b).

The ethical rules and applicable case law are clear that in-house counsel must always act in the organization's best interest, not the best interest of management.

To avoid this trap, in-house attorneys should make it clear that they are not the personal lawyer of any director, officer, employee, member, or shareholder and that they must act in the best interest of the organization. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(e). In-house attorneys should advise management or employees to obtain their own counsel when the company discovers that such persons may have done something that is not in the best interest of the company. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12, cmt. 4. The failure to inform a company representative that company counsel must act on behalf of the company, rather than on the representative's behalf, may result in counsel's disqualification. *See, e.g.*, *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969).

Another common trap, stemming from the fact that the privilege belongs to the company, arises in the context of bankruptcy, receivership and shareholder derivative litigation. In a bankruptcy proceeding, the trustee of the company holds the right to assert or waive the attorney-client privilege. *See Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 354 (1985). Similarly, a court-appointed receiver also holds the right to assert or waive the privilege on behalf of the corporation. *U.S. v. Plache*, 913 F.2d 1375, 1381 (9th Cir. 1990). As such, a bankruptcy trustee or a court-appointed receiver may waive the privilege despite the company's wishes to the contrary.

Director and shareholder litigation may also raise issues about who may assert or waive the privilege. If shareholders sue the corporation in their individual capacities rather than suing derivatively, the corporation may assert the attorney-client privilege against the shareholder. *See, e.g., Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981). If a shareholder sues derivatively, the corporation may assert the attorney-client privilege, but shareholders may be entitled to privileged communications if shareholders can show good cause why it should not be invoked. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970) (holding the following are indicia of good cause: "the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which

the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.")

2. Communications in the Presence of Third Parties are Generally not Privileged.

In-house attorneys should also inform representatives of the company that communications made in the presence of third parties will most often not be privileged because they are generally not confidential. *See* Tex. R. Evid 503(a)(5) (stating that a "communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication"). Informing representatives of the company of this rule can prevent costly disclosures in situations where management may be lulled into a false sense of security to reveal information because the company's lawyer is included in the communication.

3. Only Communications Regarding Legal Advice are Privileged.

Each time a representative of the company seeks advice, counsel should question whether the advice sought and provided is predominantly legal in nature. Business strategy, however sensitive and confidential, is not protected by the attorney-client privilege. *See* TEX. R. EVID. 503(b); *Harlandale Independent School Dist. v. Cornyn*, 25 S.W.3d 328, 334 (Tex. App.—Austin 2000, pet. denied) (stating that the relevant inquiry is whether the communication was related to the rendition of legal services). In-house attorneys must make conscious decisions regarding the content of their communications when acting in a business rather than legal capacity. The other participants should also be made aware that the attorney-client privilege will not protect conversations regarding business issues simply because counsel is involved in the conversation.

The distinction between when an attorney is acting in a legal rather than a business capacity can be a difficult line to draw. Therefore, the in-house attorney should always take steps to emphasize the legal nature of the advice being sought and rendered in a communication that mixes business and legal issues.

Cases in which courts evaluated whether a communication was made for the purpose of rendering legal services offer some guidance:

(1) Documents evaluating legal issues should clearly identify counsel as the author or the recipient of the communication. A basic criterion that courts consider is whether the communication was made by or to an attorney. One Texas court has held that a document that did not show the author or recipient on its face was not privileged. *See In re Monsanto Co.*, 998 S.W.2d 917, 933. Therefore, one of the simplest steps to protect a communication is to make it clear that the communication is from or to a lawyer. In addition, the lawyer should make sure that representatives of the company are aware that they should specifically identify the lawyer as the recipient of all communication directed to the lawyer.

(2) When acting in a legal capacity, in house counsel should make that very clear in their communications. Documents prepared regarding legal issues should be marked and identified as discussing legal issues. For example, a document might recite that that it is a memo regarding a "meeting to discuss the legal ramifications of firing an employee," rather than a "meeting to discuss whether to fire an employee."

(3) Steps should be taken within the company to identify counsel as having the primary purpose of spotting and addressing legal issues as they arise. Even counsel's title can make an impression as to the capacity in which the attorney is working. If possible, it is best that their title reflects their position as legal counsel. These steps can assist in establishing that counsel was acting in conformity with a stated legal purpose when making or receiving a communication subject to court review.

(4) Because an otherwise privileged communication loses its protection if it was not intended to be confidential, steps should be taken to ensure that the intent to maintain the confidentiality of a legal document is self-evident. *See Osborne v. Johnson*, 954 S.W.3d 180, 184 (Tex. App.—Waco 1997, mandamus denied).

In assessing whether a document is confidential, the document itself is far more persuasive than counsel's testimony regarding the document. Therefore, the following tips can assist in objectively establishing the intent that a document be confidential.

First, state on the document that it is a privileged attorney-client communication. Courts consider evidence regarding whether parties intended a communication to be confidential in evaluating whether the attorney-client privilege applies. A clear indication on the document that it is intended to be privileged will weigh in favor of a finding that the document was intended to be confidential.

Second, limit electronic and physical access to the document. The more easily accessible, the less likely a court will find that the document was intended to be confidential. This is a corollary of the rule that communications that are disclosed to third parties who are not representatives of the client are not considered "confidential communications" and therefore are not protected by the attorney-client privilege. *See In re Monsanto Co.*, 998 S.W.2d 917, 931 (Tex. App.—Waco 1999, no pet.) (holding that what might have been a privileged communication lost its privilege when it was sent to third parties who were not shown to be representatives of the client). However, if all of the recipients of a communication are employees who are involved in a decision with legal ramifications, a court is more likely to be persuaded that the parties intended that the communication be confidential. *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218 (Tex. 2004) (holding that trial court did not abuse its discretion in holding that documents were privileged where the author and recipients of the documents were members of the legal team). To the extent possible, the fact that the document has limited access should be apparent on its face. Physical copies of the documents should be stored in a secure

place intended for legal documents only; electronic copies of legal documents should be maintained only in secured areas of a company's intra-network.

E. Permissive and Mandatory Disclosures

An attorney should work to ensure the client is aware of circumstances in which the attorney is permitted or required by law to report confidential communications. These obligations arise under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Evidence and SEC regulations.

1. The Texas Disciplinary Rules.

The Texas Disciplinary Rules *require* that a lawyer representing an organization take reasonable remedial actions whenever the lawyer learns or knows that: "(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization; (2) the violation is likely to result in substantial injury to the organization; and (3) the violation is related to a matter within the scope of the lawyer's representation of the organization." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 (b). In other words, counsel is required to report privileged information "up the ladder" when they know that a representative of the company has committed an act that may result in substantial injury to the organization.

The Texas Disciplinary Rules also require that a lawyer reveal confidential information regarding certain future conduct. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 (e). The Rule provides that "when a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act."

The Texas Disciplinary Rules provide that disclosure of confidential information is *permissive* where the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law, when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act, and to the extent revelation of the information reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act for which the client has utilized the attorney's services. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 (C)(4)(5) and (8).

2. The Texas Rules of Evidence.

Similar to the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Evidence unequivocally state that there is no attorney-client privilege when "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." TEX. R. EVID. 503(d).

3. SEC Regulations.

SEC regulations also create certain reporting requirements for those appearing before the Securities and Exchange Commission. Under these regulations, an attorney appearing before the Commission on behalf of an issuer must report evidence of a material violation of SEC regulations to the company's chief legal officer. 17 C.F. R. § 205.3(b)(2). The chief legal officer must then conduct an investigation. 17 C.F. R. § 205.3(b)(3). If the reporting attorney does not believe the chief legal officer has provided the appropriate response within a reasonable time, the attorney must report the evidence to the audit committee of the company's board of directors, another committee of the board comprised of directors who are not employees and are not "interested persons," or if no such committee exists, the company's board of directors. 17 C.F. R. § 205.3(b)(4).

SEC regulations also provide that an attorney practicing before the SEC may reveal to the SEC, "without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(1) to prevent the issuer from committing a material violation that is likely to cause substantial injury to… the issuer or the investors;

(2) to prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury…

(3) to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used." 17 C.F.R. § 205.3(d).

F. Work Product Defined.

Under Texas Rule of Civil Procedure 192.5, work product is comprised of materials prepared, mental impressions developed, or communications made in anticipation of litigation. TEX. R. CIV. P. 192.5(a). Core work product, defined as an attorney's work product containing mental impressions, opinions, conclusions, or legal theories, is not discoverable. *Id*. at 192.5(b). 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. *Id*.

A document is not privileged simply because it was created by an attorney or is contained in an attorney's file. *In re Maher*, 143 S.W.3d 907, 912 (Tex. App.—Fort Worth 2004, orig. proceeding) (citing *Nat'l Union Fire Ins. Co. v. Valdez,* 863 S.W.2d 458, 460 (Tex.1993)). Instead, the test to determine whether work product is created in anticipation of litigation includes both an objective and a subjective element. *Id*. "To determine when a party reasonably anticipates or foresees litigation, the trial court must look to the totality of the circumstances and decide whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation." *In re Toyota Motor Corp.*, 94 S.W.3d 819

(Tex. App.—San Antonio 2002, reh'g overruled) (quoting *In re Monsanto Co.,* 998 S.W.2d 917, 924 (Tex. App.—Waco 1999, orig. proceeding)).

Specifically, litigation is anticipated when: (1) a reasonable person would conclude from the totality of the circumstances that a substantial chance of litigation exists; and (2) the party resisting discovery believed in good faith that a substantial chance that litigation would ensue existed and conducted an investigation for the purpose of preparing for such litigation. *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993) (construing prior rule). Thus, for the privilege to apply, preparation for litigation must be the primary motivating purpose for the creation of the document because a document is not prepared in anticipation of litigation if it is prepared for some other purpose. *In re Maher*, 143 S.W.3d at 912. Ultimately, "[a]lthough there is no set statistical probability by which to define the term substantial chance of litigation, it simply means that it is more than a mere abstract possibility or unwarranted fear." *Oyster Creek Financial Corp. v. Richwood Investments, II, Inc.*, 957 S.W.2d 640, 646 (Tex. App.—Amarillo 1997, pet. denied) (construing prior rule) (quoting *National Tank Co. v. Brotherton*, 851 S.W.2d at 204).

III. CONSULTING EXPERTS

A. How to Protect It.

Although a party may discover specified information regarding a testifying expert or a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert, the identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. TEX. R. CIV. P. 192.3(e).

As with the work-product privilege, the consulting-expert privilege provides "a sphere of protection and privacy" in which parties and their attorneys can develop their case. *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997). Thus, parties may consult with experts to test their litigation theories. *Id*. If such tests prove beneficial, that expert may be designated as a witness for trial; conversely, the identity of an expert and his or her conclusions that fail to support the party's case need not be revealed. *Id*. "The policy behind the consulting expert privilege is to encourage parties to seek expert advice in evaluating their case and to prevent a party from receiving undue benefit from an adversary's efforts and diligence." *Id*. (quoting *Tom L. Scott, Inc. v. McIlhany,* 798 S.W.2d 556, 559 (Tex. 1990).

For purposes of the rule, a testifying expert is defined as "an expert who may be called to testify as an expert witness at trial," while a consulting expert is "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7(c).

B. How to Get It.

Although an employee may be specially employed as a consulting-only expert, all employees do not necessarily qualify as "consulting-only" experts. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 555 (Tex. 1990). For example, "an employee who was employed in an area

that becomes the subject of litigation can never qualify as a consulting-only expert because the employment was not in anticipation of litigation." *Id*. Thus, the factual knowledge and opinions acquired by an individual who is an expert and an active participant in the events material to the lawsuit are discoverable. *Id*. at 554. This information is not shielded from discovery by merely changing the designation of a person with knowledge of relevant facts to a "consulting-only expert." *Id*. "If employees obtain factual information relevant to a case simply by virtue of their employment as employees, rather than as consulting experts, that information is discoverable." *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139, 150 (Tex. App.—Fort Worth 2002, reh'g overruled). "Indeed, while the identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are *not* discoverable, the facts known first-hand to the consulting expert *are* discoverable." *Id*.

IV. WITNESS STATEMENTS

A. How to Protect It.

For purposes of the rule, a witness statement is: (1) a written statement signed or otherwise adopted or approved in writing by the person making it; or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement or any substantially verbatim transcription of such a recording. TEX. R. CIV. P. 192.3(h). However, notes taken during a conversation or interview with a witness are not a witness statement. *Id*. Additionally, a witness statement is not discoverable if it is contained within a document which is privileged. *In re ExxonMobil Corp.*, 97 S.W.3d 353, 361 (Tex. App. Houston [14th Dist.]—2003, orig. proceeding).

B. How to Get It.

Under Texas Rule of Civil Procedure 192.3(h), a party is entitled to obtain discovery of the statement of any person with knowledge of relevant facts regardless as to when the statement was made. TEX. R. CIV. P. 192.3(h). Further, such statements are excluded from the work product privilege even if made or prepared in anticipation of litigation or for trial. TEX. R. CIV. P. 192.5(c)(1). Notes taken during a conversation or interview with a witness, however, do not constitute not a witness statement. TEX. R. CIV. P. 192.3(h).

V. SELF-INCRIMINATION

A. How to Protect It.

A party may invoke his Fifth Amendment privilege against self-incrimination in a civil proceeding if he reasonably fears his answers might incriminate him. *In re Verbois*, 10 S.W.3d 825, 828 (Tex. App.—Waco 2000, no pet.) (citing *United States v. Balsys*, 524 U.S. 666 (1998); *Texas Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex.1995)). Generally speaking, an individual cannot be required to incriminate himself or herself through the demand of his or her books and records, "provided that the danger of incrimination is real and appreciable and not of an imaginary, remote, and unsubstantial character." *Blair v. Texas Employment Comm'n*, 492 S.W.2d 924, 925 (Tex. Civ. App.—Amarillo 1973, no writ).

B. How to Get It.

However, a corporation has no claim of privilege against self-incrimination, whether in the context of a corporation compelled to produce records or a testifying corporate officer. *Super X Drugs of Texas, Inc. v. State*, 505 S.W.2d 333, 337 (Tex. Civ. App. Houston [14th Dist.] 1974, no writ). "This is true whether the corporation is being compelled to produce records and papers or whether an officer of the corporation is testifying directly." *Id*. (citing *George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968). Thus, a corporation may not claim a privilege against self-incrimination in an effort to escape discovery efforts. *Id*.

Further, the "privilege against self-incrimination does not permit a party or witness in a civil proceeding to wholly refuse to submit to a deposition or take the witness stand." *In re Verbois*, 10 S.W.3d 825, 828 (Tex. App.— Waco 2000, no pet.) (citing *Ex parte Butler,* 522 S.W.2d 196, 197 (Tex.1975) (orig. proceeding); *In re Speer,* 965 S.W.2d 41, 45 (Tex. App.— Fort Worth 1998, orig. proceeding)). Blanket assertions of the federal or state privilege against self-incrimination are also impermissible." *Id*. (citing *Speer*, 965 S.W.2d at 46; *Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App.—San Antonio 1995, orig. proceeding); *Burton v. West*, 749 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding); *Sinclair v. Savings & Loan Comm'r*, 696 S.W.2d 142, 147 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (op. on reh'g); and *Meyer v. Tunks*, 360 S.W.2d 518, 523 (Tex.1962) (orig. proceeding)). Thus, the privilege must be asserted on a question-by-question basis. *Id*. (citing *Sinclair*, 696 S.W.2d at 147; *Speer*, 965 S.W.2d at 46; *Gebhardt*, 891 S.W.2d at 330; and *Burton*, 749 S.W.2d at 508).

A question-by-question assertion is necessary for two reasons. First, juries in civil cases are allowed to make negative inferences based upon the assertion of the privilege. *Speer*, 965 S.W.2d at 46 (citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976)). Thus, it is important to understand which specific question is subject to a possible negative inference. Second, a civil witness does not get to decide when and how he is entitled to exercise the privilege. *Id*. Instead, "[e]ach assertion of the privilege rests on its own circumstances and blanket assertions of the privilege are not allowed." *Id*.

For example, once the privilege is asserted in response to a specific question, a judge is entitled to determine whether a refusal to answer is based upon good faith and is justifiable under all of the circumstances. *Warford v. Beard*, 653 S.W.2d 908, 911 (Tex. App.—Amarillo 1983, no writ). "Thus, each question for which the privilege is claimed must be studied and the court must forecast whether an answer to the question could tend to incriminate the witness in a crime." Additionally, a trial court can prohibit a plaintiff from introducing evidence on the subject to which he or she asserted a Fifth Amendment privilege, and the court's act of judicial discretion does not constitute a penalty. *Texas Dept. of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995). Rather, such a rule ensures that civil proceedings remain fair. *Id*.

This "offensive use" doctrine provides that even when a party has a valid basis to avoid discovery, that party must decide whether to maintain the privilege or risk suffering a sanction if and when ordered by the trial court. *Id*. at 761. The Texas Supreme Court, in *Republic Insurance v. Davis*, developed a three-element test to determine whether an offensive use of an evidentiary privilege is occurring: (1) a party must be seeking affirmative relief; (2) the party is

using a privilege to protect outcome determinative information; and (3) the protected information is not otherwise available to the defendant. 856 S.W.2d 158, 161 (Tex. 1993)

Once a court determines an offensive use of the privilege has occurred, the court must determine the most appropriate sanction. *Denton*, 897 S.W.2d at 763. To determine the most appropriate remedy, courts will consider a number of factors, including: (1) the nature of the questions asked and the privilege asserted; (2) the resulting unfairness to a defendant if trial were to proceed without the sought discovery; (3) the statutes of limitation for the crimes the plaintiff fears and whether and the extent to which the delay would prejudice the defendant's ability to prepare a defense; or (4) whether a dismissal is appropriate as the only way to fairly balance the plaintiff's and defendant's rights. *Id*. This list is not dispositive; instead, these factors are intended to guide the court to a remedy which reflects a direct relationship between the offensive conduct and the sanction that is no more severe than necessary to satisfy its legitimate purposes. *Id*.