"Privileges"

Steven C. Laird

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Steven C. Laird
LAW OFFICES OF
STEVEN C. LAIRD, P.C.
2400 Scott Avenue
Ft. Worth, Texas 76103
Telephone:(817) 531-3000
Facsimile: (817) 535-3046

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SAILING THROUGH PRIVILEGES

A. GENERAL INFORMATION

Discovery privileges exist in order to promote certain relationships (ex. husband-wife, attorney-client, petitioner-clergy, physician-patient) and to protect discussions/documents made in these relationships from being discoverable in a lawsuit. Because of the high regard placed by the legislature on these privileges, there are only limited circumstances in which you can obtain privileged material from the other side. In fact, there are only three ways to obtain privileged information:

(1) If the privilege is not asserted at the proper time thereby waiving the privilege;

(2) Voluntary waiver of the privilege; or
(3) There is an exception to the privilege that applies in your case.

Most relevant information to a lawsuit is discoverable. However, there are limited privileges recognized by the Texas Rules of Civil Evidence. The general rules of privilege are outlined in this paper along with an overview of pertinent caselaw.

1. **What is discoverable**:

TEX.R.CIV.EVID. Rule 501 (Vernon's Supp. 2001) provides:

Except as otherwise provided by the Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority, no person has a privilege to:
(1) refuse to be a witness;
(2) refuse to disclose any matter;
(3) refuse to produce any object or writing; or
(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

TEX. R. CIV. EVID. Rule 502 (Vernon's Supp. 2001) provides:
A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

2. How to Assert a Privilege in Discovery:
TEX. R. CIV. PROC. Rule 193.3 (Vernon's Supp. 2001)

A party may preserve a privilege from written discovery in accordance with this subdivision.
(a) Withholding Privileged Material or Information. A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that:
(1) information or material responsive to the request has been withheld,
(2) the request to which the information or material relates, and

(3) the privilege or privileges asserted.
(b) Description of Withheld Material or Information. 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. Within 15 days of service of that request, the withholding party must serve a response that:
(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and
(2) asserts a specific privilege for each item or group of items withheld.
(c) Exemption. Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative--
(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and
(2) concerning the litigation in which the discovery is requested.
(d) Privilege Not Waived by Production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if--within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made--the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

3. How to Challenge a Claim of Privilege:

A. Ask for a Hearing
If a party wants to challenge a privilege that has been asserted or seek a ruling on the privilege they have asserted, any party may ask for a hearing at any reasonable time. Vernon's Ann. Texas Rules Civ. Proc., Rule 193.4. The party asserting the privilege must produce evidence to support the claim. *Id.* If the court determines that an in-camera review of the documents is necessary the documents are segregated and produced to the court in a sealed wrapper. *Id.* If the court sustains the objection or claim, the objecting party does not need to produce the documents. If the court overrules the objection or claim, then the objection party must produce the requested material. *Id.*

B. Writ of Mandamus
Mandamus is an extraordinary writ that should only be issued when the trial court clearly abuses its discretion and there is no adequate remedy on appeal. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). *See also*, *Republican Party v. Dietz*, 940 S.W.2d 86 (Tex. 1997) and *In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex, 1998)(orig. proceeding). It is a clear and prejudicial error of law if the trial court

reaches a decision that is arbitrary and unreasonable. *Walker, supra* at 839-40. A trial court's failure to correctly analyze or apply the law is an abuse of discretion and may result in appellate reversal by extraordinary writ. *Id.*

B. THE PRIVILEGES:

1. Attorney Client Privilege

TEX. R. CIV. EVID. Rule 503 (Vernon's Supp. 2001)

(a) **Definitions**. As used in this rule:

(1) A "client" is 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.

(2) A "representative of the client" is:

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

(B) 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.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) 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.

(b) Rules of Privilege

(1) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer

representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) *Special rule of privilege in criminal cases*. In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) Who May claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) **Exceptions.** There is no privilege under this rule:

(1) *Furtherance of crime or fraud*. If 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:

(2) *Claimants through same deceased client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;

(3) *Breach of duty by a lawyer or client*. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) *Document attested by a lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients*. As to a communication 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 any of the clients.

CASELAW**:**

The protection offered by the attorney client privilege is one of the oldest common law privileges recognized. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995).

An attorney may waive the attorney-client privilege, when the attorney has been accused by the client of wrong doing. *Apex Mun. Fund v. N-Group Securities*, 841 F. Supp. 1423 (S.D.Tex. 1993).

The client can waive the privilege by voluntarily disclosing or consenting to disclose significant part of privileged information. *Carmona v. State*, 947 S.W.2d 661 (Tex. App. ---Austin 1997)

In re Tjia, 50 S.W.3d 614, 617 (Tex. App. Amarillo 2001) the court stated that the following factors should guide a court in its determination as to whether a waiver of attorney client privilege has occurred: (1) the party asserting the privilege must seek affirmative relief; (2) the information must be such that if believed by the factfinder, in all probability, it would be outcome determinative of the cause of action, that is, it must go to the very heart of the affirmative relief sought; and (3) disclosure of the confidential communication must be the only means by which the aggrieved party can obtain the evidence.
See also**,** *Republic Ins. Co. v. Davis,* 856 S.W.2d 158 (Tex.1993) (orig. proceeding), which also sets out these factors in determining whether a waiver of the attorney client privilege has taken place.

There are many cases on this topic which are not cited in this paper. Cases having to do with medical negligence are as follows:

In re Fontenot, 13 S.W.3d 111 (Tex. App. – Fort Worth, 2000 n.w.h.) deals with the discoverability of a defendant physician's letter to his attorney in connection with another lawsuit and the claims questionnaire submitted to his insurance carrier as witness statements. The court found that these materials were not discoverable and were privileged attorney-client communications. The physician's liability insurer was a "representative of the client" and communications between the client, the client's attorney and a client's representative are protected communications. *Id.* at 114.

A similar case, *D.N.S., M.D.v. Schattman*, 937 S.W.2d 151 (Tex. App. – Fort Worth, 1997 no writ), discusses whether a physician's report to his carrier sent to the carrier following receipt of a 4590i notice letter is discoverable. The court concluded that the narrative report was privileged under the party communication / attorney-client privileges and was not discoverable. *Id.* at 158.

In re Columbia Valley Regional Medical Center, 41 S.W.3d 797 (Tex. App. – Corpus Christi 2001) uses the attorney client privilege as an analogy to protections offered by constitutional privacy rights and physician-patient privilege. In this case, the court in not releasing non-party medical records with patient identity redacted analogized to that attorney client privilege that "…the trial court does not have the authority to shield portions of documents

from discovery through the redaction of information covered by the attorney client privilege, while allowing production of the remainder of the document. (Citation omitted) Once it is established that a document contains a confidential communication, the privilege extends to the entire document, and not merely to the specific portions related to legal advice, opinions or mental analysis." *Id.* at 801.

* Please note that the Party Communication/Investigative Privilege is considered part of the attorney work product privilege and attorney-client privilege.

* Please note that the Joint Defense Privilege is a part of the attorney-client privilege. See, *In re Monsanto Company*, 998 S.W.2d 917, 922 (Tex. App. – Waco, 1999 orig. proceeding). *Rio Hondo Implement Co. v. Euresti*, 903 S.W.2d 128, 131 (Tex. App. – Corpus Christi, 1995 orig. proceeding).

2. Attorney Work Product Privilege

TEX. R. CIV. PROC. Rule 192.5 Work Product (Vernon's Ann 2001)

(a) Work Product Defined. Work product comprises:
(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.
(b) Protection of Work Product.
(1) Protection of Core Work Product-Attorney Mental Processes. Core work product--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.
(2) Protection of Other Work Product. Any 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.
(3) Incidental Disclosure of Attorney Mental Processes. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).
(4) Limiting Disclosure of Mental Processes. If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.
(c) Exceptions. Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:
(1) information discoverable under Rule 192.3 concerning experts, trial witnesses,

witness statements, and contentions;
(2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4;
(3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;
(4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and
(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.
(d) Privilege. For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.

CASELAW**:**

The work product privilege protects the mental processes, conclusions, and legal theories of attorneys from discovery. *Washington v. State*, 822 S.W.2d 110 (Tex. App. – Waco 1991) reversed on other grounds 856 S.W.2d 184 (Tex. Crim. App. 1993).

In a recent case, *In re Bank of America*, 45 SW3d. 238 (Tex. App. Houston [1st Dist.] 2001), the court disqualified plaintiff's counsel after Plaintiffs counsel had extensively reviewed attorney work product privileged materials from Bank of America and used them in preparing the Plaintiffs case of fraud against Bank of America. The trial court had given the privileged materials to Plaintiffs counsel following review of the materials in camera even though Bank of America had requested the trial court grant a 10 day stay so that Bank of America could seek mandamus on the documents they believed were privileged. The appellate court agreed with Bank of America that the documents were privileged and that the extensive review by Plaintiff's counsel of the privileged documents prejudiced Bank of America so that the plaintiff's counsel would be disqualified.

"…[O]nce a party anticipates litigation, a very broad privilege attaches to communications among its employees. While "core work product" is not discoverable, the "other work product" is discoverable if the party seeking discovery can establish a substantial need for the materials and its inability to obtain the substantial equivalent of the materials without undue hardship." *In re Monsanto Company*, 998 S.W.2d 917, 930 (Tex. App. – Waco, 1999 orig. proceeding).

There is a 2 prong test set out in *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 203-04 (Tex. 1993) that determines whether the party asserting the work product privilege has good cause to anticipate litigation:

(1) The first prong is objective and the court is required to determine whether a reasonable person, based on the circumstances existing at the time of the investigation, would have anticipated a substantial chance of litigation. *Id.* at 203-04.
(2) The second prong is subjective and the party invoking the privilege must have had a good faith belief that there is a substantial chance that litigation would ensue. *Id.* at 204. The subjective prong requires "that the investigation actually be conducted for the purpose of preparing for litigation." *Id.* "An investigation is

not conducted "in anticipation of litigation" if it is in fact prepared for some other purpose." *Id.* "As with the objective prong, the court must examine the totality of the circumstances to determine whether the subjective prong is satisfied." *Id.*

Purely consulting experts are privileged from discovery as part of the work product privilege. *See* TRCP 195, cmt 1. However, note that a purely consulting expert may become a fact witness if they perform tests on the evidence in a case. *See* TRCP 192.3 [c]

If an investigation was done for another claim/suit arising from the same occurrence, and not done for the very suit in which the privilege is asserted, then the investigation is not protected. *Robinson v. Harkins & Co.*, 711 S.W.2d 619, 621 (Tex. 1986). In *Robinson*, the insurance company's investigation for a worker's compensation claim was not protected. *Id*.

What is absolutely protected?

1. Attorney's thought processes. *Occidental Chem. Corp v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).
2. The attorney's litigation file. *National Un. Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993).
3. Lawyer's notes made during trial. *Goode v. Shoukfeh*, 943 S.W.2d 441, 449 (Tex. 1997).
4. Notes, indexes, correspondence and memo prepared by an attorney. *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987). *Occidental Chem. Corp v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).

* Please note that the Party Communication/Investigative Privilege is considered part of the attorney work product privilege and attorney-client privilege.

3. <u>Physician Patient Privilege</u>

TEX. R. CIV. EVID. Rule 509 (Vernon's Supp. 2001)

(a) <u>Definitions</u>. As used in this rule:

(1) A "patient" means any person who consults or is seen by a physician to receive medical care.

(2) A "physician" means a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) <u>Limited Privilege in Criminal Proceedings</u>. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a

criminal proceeding.
(c) General Rule of Privilege in Civil Proceedings. In a civil proceeding:
(1) Confidential communications between a physician and a patient, relative to or in connection with any professional services rendered by a physician to the patient are privileged and may not be disclosed.
(2) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed.
(3) The provisions of this rule apply even if the patient received the services of a physician prior to the enactment of the Medical Liability and Insurance Improvement Act, Tex.Rev.Civ.Stat. art. 4590i.
(d) Who May Claim the Privilege in a Civil Proceeding. In a civil proceeding:
(1) The privilege of confidentiality may be claimed by the patient or by a representative of the patient acting on the patient's behalf.
(2) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.
(e) Exceptions in a Civil Proceeding. Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:
(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and in any license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;
(2) when the patient or someone authorized to act on the patient's behalf submits a written consent to the release of any privileged information, as provided in paragraph (f);
(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;
(4) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;
(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, Tex.Rev.Civ.Stat. art. 4495b[1], or of a registered nurse under or pursuant to Tex.Rev.Civ.Stat. arts. 4525[2], 4527a,[3] 4527b,[4] and 4527c[5], provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under

[1] Now Occupations Code, title 3, subtitle B-C.
[2] Now Occupations Code, chapter 301.
[3] Now Occupations Code, chapter 301.
[4] Now Occupations Code, chapter 301.
[5] Now Occupations Code, chapter 301.

subparagraph (e)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (f);
(6) in an involuntary civil commitment proceeding, proceeding for court- ordered treatment, or probable cause hearing under Tex.Health & Safety Code ch. 462; tit. 7, subtit. C; and tit. 7, subtit. D;
(7) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an "institution" as defined in Tex.Health & Safety Code § 242.002.
(f) Consent.
(1) Consent for the release of privileged information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage personal affairs, or an attorney ad litem appointed for the patient, as authorized by Tex.Health & Safety Code tit. 7, subtits. C and D; Tex. Prob. Code ch. V; and Tex.Fam.Code § 107.011; or a personal representative if the patient is deceased, provided that the written consent specifies the following:
(A) the information or medical records to be covered by the release;
(B) the reasons or purposes for the release; and
(C) the person to whom the information is to be released.
(2) The patient, or other person authorized to consent, has the right to withdraw consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.
(3) Any person who received information made privileged by this rule may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

CASELAW:

One of the seminal cases in the area of physician-patient privilege involves a physician challenging providing certain medical and mental health records to the plaintiffs. *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). In *R.K.*, the plaintiffs alleged that the physician's physical or mental condition caused or contributed to the alleged malpractice and that the hospital knew or should have known about his condition. The Supreme Court stated that "…the exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance. Both parts of the test must be met before the exception will apply. Even then, when requested, the trial court must perform an in camera inspection of the documents produced to assure that the proper balancing of interests…occurs before production is ordered." *Id.* at 843. In *R.K.* , the court concluded that the information sought by the plaintiffs was relevant to the condition of R.K. at issue and ordered the trial court to

review the documents and produce the relevant portions of the documents and redact or exempt the irrelevant portions of the documents. *Id.* at 844.

Medical records and communications requested from treating physicians should be relevant to the underlying suit. *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex. 1988).

In a recent case, I*n re Columbia Valley Regional Medical Center*, 41 S.W.3d 797 (Tex. App. – Corpus Christi 2001) the court found that non-party medical records with patient identity redacted would not have to be produced as they would violate the non-parties right to privacy. It should be noted that the court in their findings stated that there are exceptions to the privilege but the party seeking the records did not argue any of the exceptions. *Id.* at 799.

Parties cannot agree to a confidentiality order that would circumvent the claim of privilege. *In re Xeller*, 6 S.W.3d 618, 626 (Tex. App. – Houston [14th Dist.] 1999 n.w.h.). In *Xeller*, the physician and evaluation business sought a writ of mandamus as to whether medical reports and workers' compensation medical evaluation forms of thousands of non-party claimants were privileged. The court held that they were privileged from discovery.

Bristol-Myers Squibb Co. v. Hancock, 921 S.W.2d 917 (Tex. App. – Houston [14th Dist.] 1996, n.w.h.) seeks a physician's patient records in a suit brought by the physician against a breast implant manufacturer for economic losses and injury to professional reputation and mental anguish for not revealing serious health risks associated with the breast implants. In the case, the implant manufacturer requested the identity of the physician's breast implant patients and the disclosure of their medical records. The trial court and appellate court held that the discovery requests should be denied at that time. They concluded that "a decision to require disclosure of such information can properly be made *in this case* only after a trial has been conducted and, if necessary the issue brought up on appeal. *Id.* at 923.

Dentists do not have the protection of the physician-patient privilege according to *Buchanan v. Mayfield*, 925 S.W.2d 135 (Tex. App. – Waco, 1996 orig. proceeding). In Buchanan, the plaintiff sought the identity of a patient who had shared a spit cup with the plaintiff. The defendant dentist asserted that this information was confidential pursuant to the physician-patient privilege. The Waco appellate court disagreed, holding that Buchanan's inquiry into the identity of the unknown patient was reasonably calculated to lead to the discovery of admissible evidence and should have been allowed and that the dentist could not claim the privilege under rule 509 since he was not a physician. *Id*. at 138-41.

Chiropractors have been found to have protection of the physician-patient privilege. *In re Dolezal*, 970 S.W.2d 650 (Tex. App. – Corpus Christi, 1998 n.w.h.). In a personal injury suit involving a motor vehicle accident, the defendant sought the identity of patients seen by the chiropractor referred by the plaintiff's attorney's law firm and billing records of patients to attorneys/patients involving lawsuits or claims. The court extended the physician-patient privilege to the chiropractor stating, "We are aware that as a chiropractor, Dolezal is not technically, a physician. He is, however, a doctor of chiropractic. For purposes of

maintaining the confidentiality of a patient's records, we cannot conceive of any rational basis upon which to distinguish between a doctor or medicine or osteopathy and a doctor of chiropractic." *Id*. at 652 FN3.

4. <u>Confidentiality of Mental Health Information in Civil Cases</u>

TEX. R. CIV. EVID. Rule 510 (Vernon's Supp. 2001)

(a)**Definitions.** As used in this rule:

(1)"Professional" means any person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) reasonably believed by the patient to be included in any of the preceding categories.

(2) "Patient" means any person who:

(A) consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A representative of the patient is:

(A) any person bearing the written consent of the patient;

(B) a parent if the patient is a minor;

(C) a guardian if the patient has been adjudicated incompetent to manage the patient's personal affairs; or

(D) the patient's personal representative if the patient is deceased.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the diagnosis, examination, evaluation, or treatment, or those reasonably necessary for the transmission of the communication, or those who are participating in the diagnosis, examination, evaluation, or treatment under the direction of the professional, including members of the patient's family.

(b) General Rule of Privilege.

(1) Communication between a patient and a professional is confidential and shall not be disclosed in civil cases.

(2) Records of the identity, diagnosis, evaluation, or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed in civil cases.

(3) Any person who received information from confidential communications or records as defined herein, other than a representative of the patient acting on the patient's behalf, shall not disclose in civil cases the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(4) The provisions of this rule apply even if the patient received the services of a professional prior to the enactment of TEX. REV. CIV.

STAT. art 5561h (Vernon Supp. 1984) (now codified as TEX. HEALTH & SAFETY CODE Sections 611.001-611.008).

(c) **Who May Claim the Privilege.**

(1) The privilege of confidentiality may be claimed by the patient of by a representative of the patient acting on the patient's behalf.

(2) The professional may claim the privilege of confidentiality but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(d) **Exceptions.** Exceptions to the privilege in court or administrative proceedings exist:

(1) when the proceedings are brought by the patient against a professional, including but not limited to malpractice proceedings, and in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;

(2) when the patient waives the right in writing to the privilege of confidentiality of any information or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;

(3) when the purpose of the proceeding is to substantiate and collect on a claim for mental or emotional health services rendered to the patient;

(4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court ordered examination relating to the patient's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;

(5) as to communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

(6) in any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution as defined in TEX. HEALTH AND SAFETY CODE Section 242.002.

CASELAW**:**

Thapar v. Zezulka, 994 S.W.2d. 635 (Tex. 1999) shows how absolute the confidentiality of mental health information is viewed. In this case, the family sued the psychiatrist for failing to warn law enforcement or the family of the patient's threats made to the psychiatrist at the hospital of the patient's desire to kill his stepfather. Less than one month after release from the hospital, the son killed the stepfather. In *Thapar*, the Texas Supreme Court found that a mental health professional did not owe a duty to warn third parties of a patient's threats to injure/kill because "the confidentiality statute governing mental-health professionals is Texas makes it unwise to recognize such common-law duty." *Id.* at 638. The court

reasoned that the legislature had failed to set out an exception to the mental health information privilege to allow for disclosure to third parties threatened by the patient. *Id.* at 639. Further, the court stated that the mental health professional is not required to inform law enforcement of the patient's threats of harm but may disclose to law enforcement personnel in certain circumstances due to one of the exceptions to the mental health privilege. (citing section 4(b), 1979 Tex. Gen. Laws at 514.) *Id.*

In re Jane Doe, 22 S.W.3d 601 (Tex. App. – Austin, 2000 n.w.h.), the court affirmed that communications between a patient and a physician or professional are confidential and should not be disclosed in civil cases. *Id.* at 607. This case involved a female prisoner alleging personal injuries due to a rape by a prison guard. The defendants argued under *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985), that the plaintiff's mental health records were discoverable under the offensive use exception of the mental health records privilege. *Id.* at 610 The offensive use exception would prevent a party from withholding evidence that would materially weaken or defeat the asserting party's claim. *Id.* However, the court held that the communications were privileged.

Groves v. Gabriel, 874 S.W2d. 660 (Tex. 1994) concerns a former mayor of Lewisville who sought damages against the former city manager for invasion of privacy, false light, breach of fiduciary duties, conversion and intentional infliction of emotional distress for incidents that occurred while they were both city officials. The Supreme Court held that because Ms. Groves placed her mental and emotional condition in issue for alleging severe emotional damages, including "post-traumatic stress disorder" she was required to provide an authorization for release of her mental health records. The release should not include medical records unrelated to her emotional condition. *Id.* at 661.

R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994). As a general rule, "information communicated to a doctor or psychotherapist may be relevant to the merits of an action but in order to fall within the litigation exception to the privilege, the condition itself must be of legal consequence to a party's claim or defense." *Id.* at 843.

5. <u>Privilege against Self-Incrimination</u>

The Privilege Against Self – Incrimination, commonly called "pleading the 5th," is a federally protected constitution amendment. U.S.C.A. Const. Amend. V, Tex. Const. art 1, §10. In civil cases, the Fifth Amendment may be asserted by a party when they reasonably believe their answers will be incriminating. *Marshall v. Ryder System*, 928 S.W. 2d 190 (Tex. App. – Houston [14th Dist.] 1996 writ denied). However, the party asserting the Fifth Amendment privilege in a civil suit cannot assert the privilege in a way that renders the civil proceeding unfair. *Texas Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995). When a person asserting a Fifth Amendment privilege seeks to withhold pertinent information, then he is transforming the Fifth Amendment from a shield into a sword. *Id.* at 760-61. In *Marshall,* the court looked at 3 factors for determining whether a party has used the privilege offensively:

1. Whether the party asserting the privilege is seeking affirmative relief;
2. Whether the party is using the privilege to protect outcome determinative information; and
3. Whether the protected information is not otherwise available to the defendant. *Id.* at 195, citing *Denton*, *supra* at 760-61, *Republic Ins. v. Davis*, 856 S.W.2d 158, 161 (Tex. 1993).

Once a party uses the privilege offensively, they must decide whether to maintain the privilege or risk the imposition of sanctions. *Denton*, *supra* at 763.

6. Husband-Wife Privilege

TEX. R. CIV. EVID. Rule 504 (Vernon's Supp. 2001)

1. Privileges

(a) Confidential Communication Privilege.

(1) Definition. A communication is confidential if it is made privately by any person to the person's spouse and it is not intended for disclosure to any other person.

(2) Rule of privilege. A person, whether or not a party, or the guardian or representative of an incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married.

(3) Who may claim the privilege. The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do so is presumed.

(4) Exceptions. There is no confidential communication privilege:

(A) *Furtherance of crime or fraud*. If the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

(B) *Proceeding between spouses in civil cases.* In (A) a proceeding brought by or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by inter vivos transaction.

(C) *Crime against spouse or minor child.* In a proceeding in which the party is accused of conduct which, if proved, is a crime against the person of the spouse, any minor child, or any member of the household of either spouse.

(D) *Commitment or similar proceeding.* In a proceeding to commit either spouse or otherwise to place that person or that person's property, or both, under the control of another because of an alleged mental or physical condition.

(E) *Proceeding to establish competence.* In a proceeding brought by or on behalf of either spouse to establish competence.
(b) Privilege not to Testify in Criminal Case.
(1) Rule of privilege. In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 611(b).
(2) Failure to call as witness. Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.
(3) Who may claim the privilege. The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.
(4) Exceptions. The privilege of a person's spouse not to be called as a witness for the state does not apply:
(A) *Certain criminal proceedings.* In any proceeding in which the person is charged with a crime against the person's spouse, a member of the household of either spouse, or any minor.
(B) *Matters occurring prior to marriage.* As to matters occurring prior to the marriage.

CASELAW:
In *Marshall v. Ryder System*, 928 S.W. 2d 190 (Tex. App. – Houston [14th Dist.] 1996 writ denied), the wife tried to assert the husband-wife privilege at her deposition in order to protect herself from testifying to her husband's activities from 1990-1993. The Marshalls lawsuit alleged the defendants contaminated their property with spilled diesel fuel. Unfortunately for Mr. Marshall, he was observed by the defendants spiking the monitoring wells on his property with diesel fuel. After the Marshalls case was dismissed by the trial court the Marshalls appealed and the appellate court stated that "[t]he marital privilege is limited to confidential communications between spouses. Only in a criminal case is there a broad, general privilege protecting a person from being a witness against his or her spouse." *Id.* at 195.

This privilege survives death of one of the spouses or divorce. *Wiggins v. Tiller*, 230 S.W. 253, 254 (Tex. App. – San Antonio 1921, no writ).

Most cases having to do with this privilege arise in criminal cases and to a lesser extent in family law cases. An overview of these cases is beyond the scope of this paper and will not be discussed here.

7. **Communication to Members of the Clergy**
TEX. R. CIV. EVID. Rule 505 (Vernon's Supp. 2001)

a. (a) Definitions. As used in this rule:
(1) A "member of the clergy" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.
(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
(b) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member's professional character as spiritual adviser.
(c) Who May Claim the Privilege. The privilege may be claimed by the person, by the person's guardian or conservator, or by the personal representative of the person if the person is deceased. The member of the clergy to whom the communication was made is presumed to have authority to claim the privilege but only on behalf of the communicant.
communication was made is presumed to have authority to claim the privilege but only on behalf of the communicant.

CASELAW:

In *Kos v. State of Texas*, 15 S.W.3d 633 (Tex. App. – Dallas, 2000 pet. ref'd), a former priest (Rudy Kos) appealed his conviction for sexual assault and indecency with a child arguing that statements he made to a Catholic priest during a private meeting with the priest were privileged. The trial court and appellate court disagreed. The Clergy-Communicant Privilege only applies to communications made to clergy as a spiritual advisor and not to every private communication made by the claimant to a clergy member. *Id.* at 639. In *Kos*, the Director of the Catholic Charities of the Diocese (Father Broderick, who was also a Catholic priest) arranged a meeting with Rudy Kos to discuss what disciplinary intervention would take place concerning the allegations of sexual abuse by Rudy Kos. The meeting between Rudy Kos and the Father Broderick was not part of a Catholic confession, did not discuss sin and was not a meeting in which Rudy Kos sought advice on reconciliation with the church. The communications were not motivated by any religious or spiritual considerations and thereby no clergy privilege attached. *Id.* at 639-640.
A similar result was reached in *Maldonado v. State*, 59 S.W.3d 251 (Tex. App. – Corpus Christi 2001) whereby the court found that confrontation about sexual abuse allegations against a priest were not communications subject to the clergy privilege.

In *Nicholson v. Wittig*, 832 S.W.2d 681 (Tex. App. – Houston [1st Dist.] 1992, no writ), the court found that a hospital chaplain's conversation with a patient's wife were privileged. The hospital had tried to allow testimony of the hospital chaplain concerning the wife's comments of wanting her husband transferred to another hospital for surgery. In this medical malpractice case, the court found that the privilege applies regardless of the nature of the underlying proceeding. *Id* at 685. The court stated [t]he chaplain should not be allowed

to wear two hats and switch roles from hospital employee to spiritual advisor, depending on the nature of the communication." *Id.* at 687.

8. **Trade Secrets**

TEX. R. CIV. EVID. Rule 507 (Vernon's Supp. 2001)

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

CASELAW:

A "trade secret" includes any formula, pattern, device, or compilation of information used in one's business that presents an opportunity to obtain an advantage over competitors who do not know or use it. *Center for Economic Justice v. American Ins. Ass'n*, 39 S.W.3d 337, 347 (Tex. App. –Austin 2001).

In re Continental General Tire, Inc., 979 S.W.2d 609 (Tex. 1998) is a mandamus case. In *In re Continental* a family sued a tire manufacturer for wrongful death damages for alleged negligence in tire manufacturing that allowed for tire separation and a blow-out, which caused a fatal motor vehicle accident. The plaintiffs sought evidence of the skim-stock rubber compound used in manufacturing the tire. The manufacturer claimed the trade secret privilege and the case was filed as a writ of mandamus to the Supreme Court. The Supreme Court did not allow the skim stock formula to be discovered stating that the plaintiffs had not met their burden to show that the compound formula was necessary for a fair adjudication of the case. *Id.* at. 615. Plaintiff's own expert in his deposition stated that the physical properties of a tire cannot be determined from examination of the compound formula and the finished tire must be tested to determine the physical properties of the tire. On oral argument to the Supreme Court the plaintiffs contended that their expert found sulfur on the belt surfaces of the tire and that they needed the tire company's formula to determine whether sulfur is a regular component of the tire or improperly added foreign material introduced during manufacture. The Supreme Court refused to comment on whether this might justify discovery, but since this theory was not presented to the trial court, the Supreme Court would not express an opinion. *Id.* The Texas Supreme Court stated that there is a higher burden for obtaining trade secret information and that a mere showing of relevance to the case is not enough. *Id.*

In re Leviton Manufacturing Co., Inc., 1 S.W.3d 898 (Tex. App. – Waco, 1999 n.w.h.) held that the plaintiff failed to show that continued protection of the requested trade secret information would conceal fraud or otherwise work injustice. *Id.* at 903. "Where a requesting party meets the burden required by *In re Continental* and Rule 507, that the

information is necessary for a fair adjudication of its claim, the trial court should order disclosure of the information, subject to an appropriate protective order. In each circumstance, the trial court must weigh the degree of the requesting party's need for the information with the potential harm of disclosure to the resisting party." *Id.* at 902, citing *In re Continental General Tire, Inc.*, 979 S.W.2d at 613.

9. **Peer Review Privilege**

V.T.C.A., HEALTH & SAFETY CODE §161.032 (d)(e)(f) (Vernon Supp. 2001), **Records and Proceedings Confidential**

b. (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
(b) Notwithstanding Section 551.002, Government Code, the following proceedings may be held in a closed meeting following the procedures prescribed by Subchapter E, Chapter 551, Government Code:
(1) a proceeding of a medical peer review committee, as defined by Section 151.002, Occupations Code, or medical committee; or
(2) a meeting of the governing body of a public hospital, hospital district, hospital authority, or health maintenance organization of a public hospital, hospital authority, hospital district, or state-owned teaching hospital at which the governing body receives records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer.
(c) Records, information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under Chapter 552, Government Code.
(d) The records and proceedings may be used by the committee and the committee members only in the exercise of proper committee functions.
(e) The records, information, and reports received or maintained by a compliance officer retain the protection provided by this section only if the records, information, or reports are received, created, or maintained in the exercise of a proper function of the compliance officer as provided by the Office of Inspector General of the United States Department of Health and Human Services.
(f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

V.T.C.A., TEX. OCCUPATIONS CODE, § 161.002 **Definitions** (Vernon's Supp 2001):

(a) In this subtitle:
(1) "Board" means the Texas State Board of Medical Examiners.
(2) "Continuing threat to the public welfare" means a real and present danger to the health of a physician's patients from the acts or omissions of the physician caused through the physician's lack of competence, impaired status, or failure to care adequately for the physician's patients, as determined by:
(A) the board;
(B) a medical peer review committee in this state;
(C) a physician licensed to practice medicine in this state or otherwise lawfully practicing medicine in this state;
(D) a physician engaged in graduate medical education or training; or
(E) a medical student.
(3) "Disciplinary order" means an action taken under Section 164.001, 164.053, 164.058, or 164.101.
(4) "Doctor of osteopathic medicine" includes a doctor of osteopathy, an osteopath, an osteopathic physician, and an osteopathic surgeon.
(5) "Health care entity" means:
(A) a hospital licensed under Chapter 241 or 577, Health and Safety Code;
(B) an entity, including a health maintenance organization, group medical practice, nursing home, health science center, university medical school, hospital district, hospital authority, or other health care facility, that:
(i) provides or pays for medical care or health care services; and
(ii) follows a formal peer review process to further quality medical care or health care;
(C) a professional society or association of physicians, or a committee of such a society or association, that follows a formal peer review process to further quality medical care or health care; or
(D) an organization established by a professional society or association of physicians, hospitals, or both, that:
(i) collects and verifies the authenticity of documents and other information concerning the qualifications, competence, or performance of licensed health care professionals; and
(ii) acts as a health care facility's agent under the Health Care Quality Improvement Act of 1986 (42 U.S.C. Section 11101 et seq.).
(6) "Legally authorized representative" of a patient means:
(A) a parent or legal guardian if the patient is a minor;
(B) a legal guardian if the patient has been adjudicated incompetent to manage the patient's personal affairs;
(C) an agent of the patient authorized under a durable power of attorney for health care;
(D) an attorney ad litem appointed for the patient;
(E) a guardian ad litem appointed for the patient;
(F) a personal representative or statutory beneficiary if the patient is deceased; or
(G) an attorney retained by the patient or by another person listed by this subdivision.
(7) "Medical peer review" or "professional review action" means the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care provided by those practitioners. The term includes evaluation of the:
(A) merits of a complaint relating to a health care practitioner and a determination or

recommendation regarding the complaint;
(B) accuracy of a diagnosis;
(C) quality of the care provided by a health care practitioner;
(D) report made to a medical peer review committee concerning activities under the committee's review authority;
(E) report made by a medical peer review committee to another committee or to the board as permitted or required by law; and
(F) implementation of the duties of a medical peer review committee by a member, agent, or employee of the committee.
(8) "Medical peer review committee" or "professional review body" means a committee of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services or the competence of physicians, including evaluation of the performance of those functions specified by Section 85.204, Health and Safety Code. The term includes:
(A) an employee or agent of the committee, including an assistant, investigator, intervenor, attorney, and any other person or organization that serves the committee; and
(B) the governing body of a public hospital owned or operated by a governmental entity, the governing body of a hospital authority created under Chapter 262 or 264, Health and Safety Code, and the governing body of a hospital district created under Article IX, Texas Constitution, but only:
(i) in relation to the governing body's evaluation of the competence of a physician or the quality of medical and health care services provided by the public hospital, hospital authority, or hospital district; and
(ii) to the extent that the evaluation under Subparagraph (i) involves discussions or records that specifically or necessarily identify an individual patient or physician.
(9) "Medical records" means all records relating to the history, diagnosis, treatment, or prognosis of a patient.
(10) "Operation" means the application of surgery or the performance of surgical services.
(11) "Person" means an individual, unless the term is expressly made applicable to a partnership, association, or corporation.
(12) "Physician" means a person licensed to practice medicine in this state.
(13) "Practicing medicine" means the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who:
(A) publicly professes to be a physician or surgeon; or
(B) directly or indirectly charges money or other compensation for those services.
(14) "Surgery" includes:
(A) surgical services, procedures, and operations; and
(B) the procedures described in the surgery section of the common procedure coding system as adopted by the Health Care Financing Administration of the United States Department of Health and Human Services.
(b) The terms "physician" and "surgeon" are synonyms. As used in this subtitle, the terms "practitioner" and "practitioner of medicine" include physicians and surgeons.

V.T.C.A., TEX. OCCUPATIONS CODE, § 160.007, **Confidentiality Relating to Medical Peer Review Committee** (Vernon's Supp 2001):

(a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.
(b) If a judge makes a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to the committee is relevant to an anticompetitive action, or to a civil rights proceeding brought under 42 U.S.C. Section 1983, the proceeding, record, or communication is not confidential to the extent it is considered relevant.
(c) A record or proceeding of a medical peer review committee or a written or oral communication made to the committee may be disclosed to:
(1) another medical peer review committee;
(2) an appropriate state or federal agency;
(3) a national accreditation body;
(4) the board; or
(5) the state board of registration or licensing of physicians of another state.
(d) If a medical peer review committee takes action that could result in censure, suspension, restriction, limitation, revocation, or denial of membership or privileges in a health care entity, the affected physician shall be provided a written copy of the recommendation of the medical peer review committee and a copy of the final decision, including a statement of the basis for the decision. Disclosure to the affected physician of confidential peer review committee information relevant to the matter under review does not constitute waiver of the confidentiality requirements established under this subtitle.
(e) Unless disclosure is required or authorized by law, a record or determination of or a communication to a medical peer review committee is not subject to subpoena or discovery and is not admissible as evidence in any civil judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee. The evidentiary privileges created by this subtitle may be invoked by a person or organization in a civil judicial or administrative proceeding unless the person or organization secures a waiver of the privilege executed in writing by the chair, vice chair, or secretary of the affected medical peer review committee.
(f) If, under Sections 160.008(a) and (b), a person participating in peer review, a medical peer review committee, or a health care entity named as a defendant in a civil action filed as a result of participation in peer review may use otherwise confidential information in the defendant's own defense, a plaintiff in the proceeding may disclose a record or determination of or a communication to a medical peer review committee in rebuttal to information supplied by the defendant.
(g) A person seeking access to privileged information must plead and prove waiver of the privilege. A member, employee, or agent of a medical peer review committee who provides access to an otherwise privileged communication or record in cooperation with a law enforcement authority in a criminal investigation is not considered to have waived any privilege established under this subtitle.

V.T.C.A., TEX. OCCUPATIONS CODE, §160.008, **Use of Certain Confidential Information** (Vernon's Supp 2001):

(a) This section applies to a person participating in peer review, a medical peer review committee, or a health care entity named as a defendant in a civil action filed as a result of participation in peer review.
(b) A defendant subject to this section may use otherwise confidential information obtained for legitimate internal business and professional purposes, including use in the defendant's own defense. Use of confidential information under this subsection does not constitute a waiver of the confidential and privileged nature of medical peer review committee proceedings.
(c) A defendant subject to this section may file a counterclaim in a pending action or may prove a cause of action in a subsequent action to recover defense costs, including court costs, attorney's fees, and damages incurred as a result of the civil action, if the plaintiff's original action is determined to be frivolous or brought in bad faith.

V.T.C.A., Health & Safety Code § 161.033. **Immunity for Committee Members** (Vernon's Supp. 2001).

A member of a medical committee is not liable for damages to a person for an action taken or recommendation made within the scope of the functions of the committee if the committee member acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to the committee member.

Other health care professions:
See also, Tex. Occ. Code § 303.001 et seq. for nurses, Tex. Occ. Code §261.001 et seq for dentists, Tex. Occ. Code § 202.401 et seq. for podiatrists, Tex. Occ. Code §204.208 for physician assistants and Tex. Occ. Code §205.304 for acupuncturists.

CASELAW:

SUPREME COURT TRILOGY DECIDED July 12, 1996 BY TEXAS SUPREME COURT ON PEER REVIEW PRIVILEGE :

A. *Memorial Hosp.-The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996). This case involves a physician (Dr. Bruce Leipzig) who had been the subject of a CBS 48 Hours television program on "Bad Medicine." *Id.* at 2. CBS served subpoenas on various hospitals in Texas where Dr. Liepzig had practiced asking for the hospitals to "produce all documents in their administrative and credentialing files concerning Leipzig, including "nonprivileged" documents regarding Leipzig's application for staff privileges." *Id.* at 2-3. The hospitals filed motions for protective orders claiming that their files were privileged from discovery under sections 161.031 and 161.032 of the Texas Health and Safety Code and Sections 5.06 (g) and (j) of the Medical Practice Act, Texas Revised Civil Statute article 4495b and had supporting affidavits from their medical staff coordinators along with tendering several categories of documents to the trial court for an in camera inspection. *Id.* at 3. The court held that the initial credentialing documents are confidential and exempt from discovery. *Id.* The Court reasoned that peer review information needed to be privileged to exact "critical analysis of the competence and performance of physicians and other health-care providers by their peers will result in improved standards of medical care; and second,

that an atmosphere of confidentiality is required for candid, uninhibited communication of such critical analysis within the medical profession." *Id.* Further, the Court held that a hospital committee that is considering a physician's initial application for staff privileges is a "medical peer review committee" *Id.* at 4-5 and these documents are not records made in the regular course of business. Id. at 11-12.

B. In another case decided by the Texas Supreme Court involving Dr. Leipzig, *Brownwood Regional Hosp. v. Eleventh Court of Appeals*, 927 S.W.2d 24 (Tex. 1996) the family brought a medical malpractice suit against Dr. Leipzig and a negligent credentialing case against the hospital. The Court held that the credentialing documents were protected from discovery but that the hospital by-laws were discoverable. The court stated that the plaintiffs "are free to pursue information regarding Leipzig and his qualifications from any other available source. For example, information regarding the Arkansas Medical Board's investigation of Leipzig is a matter of public record." *Id.* at 27.

C. *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12 (Tex. 1996) also involves the peer review privilege. In this case, Dr. Herbert Kasnetz sued the hospital and Dr. Tom Dickey for intentionally and maliciously supplying false information about Dr. Kasnetz so that he could not obtain staff privileges at other hospitals. The Supreme Court held that the initial credentialing documents, communications to the medical peer review committee and documents pertaining to subsequent peer review are privileged and cannot be discovered even when the plaintiff alleges malice unless there has been a waiver of the privilege. *Id.* at 15-16. Additionally, the court stated that there are several alternatives "by which confidential information may be disclosed to an affected physician." *Id.* at 18. The court gave alternative source examples of "… a medical peer review committee may have obtained and reviewed a copy of a letter from a physician, but that document is not thereby clothed with a privilege if its author or recipient share it with individuals or entities that do not come under the umbrella of article 4495b. Or, a medical review committee may review documents that are within the public domain." *Id*. Patient medical records are not shielded from discovery just because a medical peer review committee reviews them. *Id.* "[I]nformation that is available from a source other than the [peer review] committee does not become privileged simply by being acquired by the review committee." *Id*. A party must seek the documents and communications through non-privileged sources in order to obtain non-privileged information. *Id.* Deposition questions concerning communications to a peer review committee are objectionable as those questions are seeking privileged information protected by the peer review privilege. *Id*. Section 5.06 or article 4495b protects individuals communicating information to a peer review committee, even if they are not acting within the scope of their authority as a member of a credentialing committee. *Id.* at 19. In this case, Dr. Kasnetz was allowed to obtain a copy of any communications between himself and the hospital committees and a written copy of any recommendations or final decisions of the hospital's peer review committee that could result in censure, suspension, restriction, limitation, revocation, or denial of membership or privileges pursuant to section 5.06(i) of article 4495(b). *Id*. at 21. In addition, third parties are not entitled to discover the revealed information from the physician as the confidential nature of the communication remains. *Id*.

B. OTHER CASES INVOLVING PEER REVIEW:

In re Pack, 996 S.W.2d 4 (Tex. App. – Fort Worth, 1999 no writ). Texas Department of Human Services' (TDHS) licensing inspection reports, deficiency sheets, summaries, and plans of correction are public record and the peer review privilege does not apply. *Id*. at 7. In addition, TDHS surveyors may be deposed concerning their investigations. *Id*. The court followed the *Irving Healthcare Sys. v. Brooks* case holding that "[t]he mere fact that the Nursing Home's peer-review committee may have reviewed the TDHS documents does not make them privileged." *Id*. Hum. Res. Code Ann. §32.021(k) (Vernon Supp. 1999) states A [TDHS] surveyor or investigator may testify in a civil action as to observations, factual findings, conclusions, or violations of requirements for licensure or for certification for participation in the state Medicaid program that were made in the discharge of official duties for [TDHS]…" *Id*. at 7-8.

Patient whose medical treatment is subject of a peer review committee has no special right of access to the peer review records under the Open Records Act. Op. Atty. Gen. ORD-591, 1991.

In *In re Univ. of Tex. Health Science Center at Tyler*, 33 S.W.3d 822 (Tex. 2000), a patient sued the hospital where he had contracted an infection following open heart surgery. *Id.* at 824. Other patients had also become infected. *Id.* The Supreme Court held that infection control committee records that were created by or at the request of the Infection Control Committee were privileged under the peer review privilege. *Id.* at 825. The hospital filed objections and also provided answers to interrogatories in which the hospital volunteered information about the Infection Control Committee's recommendations they had made following the infections of Plaintiff and other open-heart patients. The plaintiff argued that this information was then waived by the defendant. The Supreme Court stated, "…the voluntary production of information about the Infection Control Committee's recommendations in response to a discovery request does not waive the privilege that protects the documents received, maintained, or developed by the committee from discovery in this suit asserting health-care liability claims." *Id.* at 827.

In re Methodist Hosp., 982 S.W.2d 112 (Tex. App. – Houston [1st Dist.] 1998 no pet.), the appellate court allowed certain documents related to the infectious disease reports to be discoverable. In *Methodist Hosp.*, the trial court and the appellate court found that some of the documents (infection surveillance reports) were kept in the regular course of business and thus were discoverable. *Id*. at 115-116. These infection surveillance reports were kept in administrative files apart from the infection control committee's deliberations. *Id*.

In a slip and fall premises liability case against a hospital, the Fort Worth Court of Appeals addressed the issue of peer review privilege for all accident reports and documents/notes of investigation undertaken concerning the slip and fall accident. *In re Osteopathic Medical Center of Texas*, 16 S.W.3d 881 (Tex. App.—Fort Worth, 2000 n.w.h.). "The essence of the medical peer review privilege is that documents made by or for a medical committee or medical peer review committee are confidential and privileged from discovery unless they are made in the regular course of business or the privilege has been waived." *Id.* at 883-884.

In this case, reports or portions of the reports were completed by persons who were not hospital employees or medical staff. The court held that there is no statutory requirement that the documents be prepared by the hospital employees or medical staff. *Id.* at 885. Although the plaintiffs argued that the peer review privilege should only apply in medical malpractice or health care liability cases, the court concluded that the peer review privilege could be applicable in a premises liability case. *Id.* at 885. The court allowed for the Security Services Incident Report to be produced to the plaintiff as it was not prepared by or for the hospital's peer review committee for purposes of investigating the occurrences, nor was it related to any health care/medical services provided to the patient. The court did not allow the Patient Quality Event Tracking Report to be produced to the plaintiff as this document was shown on its face during in camera inspection and by affidavit evidence to have been made exclusively for the hospital's medical peer review committee.

In re WHMC d/b/a Columbia West Houston Medical Center, 996 S.W. 2d 409 (Tex. App. – Houston [14th Dist.] 1999 n.w.h.) involves a family that sued for the wrongful death of their child involving a delay in treatment in the emergency room. The family sought discovery of documents involving a "performance improvement project to reduce the amount of time patients spent in the emergency room." The appellate court held that these documents were privileged. *Id*. at 413. The hospital supplied a detailed affidavit tracking the statutory language of the Health & Safety Code and the Texas Medical Practice Act. In addition, the hospital supplied in camera documents to support the privilege. *Id*. The court stated, "[a] detailed affidavit that tracks the statutory language and is descriptive enough to be persuasive, but not so descriptive as to disclose the privileged information, is sufficient to raise and prove privilege." *Id*. The court summarized that "The hospital committee privilege does not apply to documents gratuitously submitted to a committee or that were created without committee impetus and purpose. (citation omitted) Thus, the fact that a document was considered by a committee does not automatically transform that document into a committee record or proceeding. See *Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 36 (Tex. 1977). Rather, information is protected by the hospital committee privilege if sought out by or brought to the attention of the committee for purposes of an investigation, review, or other deliberative proceeding. (citation omitted) The hospital committee privilege also does not apply to "records made or maintained in the regular course of business by a hospital." Tex. Health & Safety Code, §161.032 (c). Such records include those "kept in connection with the treatment of individual patients as well as the business and administrative files and papers apart from committee deliberations." *Id*. at 412.

Routine business records of a health care entity such as a patient's medical records, do not become privileged and are not shielded from discovery simply because a medical peer review committee has considered or reviewed the medical records. *In re Ching*, 32 S.W.3d 306, 313 (Tex. App. – Amarillo, 2000 n.w.h.). This case involves a pediatric heart surgeon whose privileges were suspended at two Lubbock hospitals who alleges violations of the Texas Antitrust Act by the hospitals. The appellate court ordered an in-camera review by the trial court of the requested materials.

Roe v. Walls Regional Hospital, 21 S.W.3d 647 (Tex. App. – Waco, 2000 n.w.h.). A physician sued the hospital concerning his privileges. The court did not allow the physician

to obtain a copy of the medical peer review committee's confidential records and proceedings, stating "[t]he records and proceedings of a medical peer review committee are confidential and the communications made to a medical peer review committee are privileged, absent waiver of that privilege or a judge's preliminary finding that such records or proceedings are relevant to an anticompetitive action of a civil rights proceeding." *Id.* at 653.

In re Lavernia Nursing Facility, Inc., 12 S.W.3d 566 (Tex. App. – San Antonio, 1999 orig. proceeding), the nursing home lost its claim of privilege concerning the production of negative employee records as they did not follow proper procedure (i.e. they did not produce the records for an in camera inspection by the trial court) and the nursing home also concealed the existence of the records after telling the plaintiff's counsel and court that all of the personnel records had been produced. *Id*. at 571. When deposition testimony later revealed that there were negative personnel records, the nursing home then asserted that they kept these negative records in a separately named file for the Quality Assurance Committee apart from the personnel records and therefore the records were not part of the personnel file. *Id*. at 569. The court held that all of the personnel records, including the negative employee records should be produced.

Wheeler v. Methodist Hosp., 2000 WL 1877658 (Tex. App. – Houston [1st Dist.] 2000 n.w.h. – HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS AND UNTIL RELEASED IS SUBJECT TO REVISION OR WITHDRAWAL) involved a physician who sued the hospital for defamation regarding the hospital's report to the National Practitioner Data Bank.

The court gave an exhaustive list at pages 13-17 of what discovery was barred due to the privilege.

The court held that the following were allowed in discovery as falling outside the privilege and were discoverable:

1. Discovery directed to a non-medical peer review committee source such as routine business records, medical records (*Id*. at 12).
2. Recommendations or final decisions of the committee that could result in censure, suspension, restriction, limitation, revocation, or denial of membership or privileges in a health care entity (*Id*.).
3. Communications between the doctor and the committee. (*Id*.)
4. Documents that the hospital or committee had waived by sharing with individuals not under the umbrella of article 4495b. (*Id*.).

10. **Blood Donor Privilege**

TEX. HEALTH & SAFETY CODE §162.010(e) (Vernon's Supp. 2001)

(e) The court may not disclose to any other person the name of a donor or any other information that could result in the disclosure of a donor's identity, including an address, social security number, designated recipient, or replacement donation information. However, on the motion of any party, the court shall order the taking of the donor's deposition at a specified time and in a manner that maintains the donor's anonymity.

See, *Tarrant County Hosp. Dist. v. Curry*, 907 S.W.2d 445, 445-46 (Tex. 1995).

11. **Law Enforcement Privilege**

Basic information concerning an arrested person, arrest or crime is not privileged. TEX. GOVT. CODE. §552.108(c) (Vernon's Supp. 2001).

TEX. GOVT. CODE. §552.108 (Vernon's Supp. 2001)
(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
(1) release of the information would interfere with the detection, investigation, or prosecution of crime;
(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or
(3)it is information that:
(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
(B) reflects the mental impressions or legal reasoning of an attorney representing the state.
(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:
(1) release of the internal record or notation would interfere with law enforcement or prosecution;
(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
(3) the internal record or notation:
(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
(B) reflects the mental impressions or legal reasoning of an attorney representing the state.
(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

See, *Hobson v. Moore*, 734 S.W.2d 340, 341 (Tex. 1987) and *Texas Attorney's General's Office v. Adams*, 793 S.W.2d 771, 776 (Tex. App. – Fort Worth, 1990).

12. **Journalists and Confidential Information**

There is conflicting authority concerning journalists and whether their information is privileged. *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 678 (Tex. App. – San Antonio, 1991, orig. proceeding) says there is a privilege. However, *Dolcefino v. Ray*, 902

S.W.2d 163, 164-65 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) says there is no qualified privilege.