St. Mary's Law Journal

Volume 18 | Number 1 Article 4

1-1-1986

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I. INTRODUCTION

In 1981, and again in 1984, the Texas Supreme Court substantially revised the Rules of Civil Procedure affecting discovery and sanctions. Under the many decisions construing and applying these amendments, the message is clear: Discovery is to be liberally granted, and the courts have no patience for those who abuse or impede the discovery process. The purpose of this article is to address common areas of discovery—both general and specific, to provide a legal basis for such discovery, and to give an overview of the developing law concerning privileges and sanctions for discovery abuse.

II. PURPOSE AND SCOPE OF DISCOVERY

Under the Texas Rules of Civil Procedure, broad discovery is al-

lowed.[1] "[T]he ultimate purpose of discovery is to seek the truth so that disputes may be decided by what the facts reveal, not by what facts are concealed."[2] The aim is to give parties the fullest knowledge of relevant facts and issues.[3] This truth-seeking function of litigation is best served by ruling in favor of discovery when the question is close and should be the controlling factor when seeking, giving, and ruling on discovery.

Discovery is not limited to information that will be admissible at trial. Anything is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence.[4] This broad grant of discovery, however, is not unlimited. For instance, discovery may be limited by the legitimate interest of the opposing party to avoid overly broad requests, harassment, or disclosure of privileged information.[5] Additionally, there is no abuse of discretion in denying production of irrelevant documents.[6] But, in determining matters of discoverability, trial courts must not take an unduly restrictive view of what is and what is not relevant.[7] Rule 215, dealing with the imposition of sanctions, allows penalties for seeking discovery that is frivolous, oppressive, or harassing, as well as for unreasonably resisting legitimate discovery.[8]

III. DISCOVERY PROCEDURES

The scope of discovery and sanctions for discovery abuse are logically intertwined. To understand the sanctions process in Texas civil

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1. *See* Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984).

2. *Id.*

3. *See, e.g.*, West v. Solito, 563 S.W.2d 240, 243-44 (Tex. 1978); Pearson Corp. v. Wichita Falls Boys Club Alumni Ass'n, Inc., 633 S.W.2d 684, 686-87 (Tex. App.—Fort Worth 1982, no writ); Martinez v. Rutledge, 592 S.W.2d 398, 399 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

4. *See* TEX. R. CIV. P. 166b(2); *see also* Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984); Allen v. Humphreys, 559 S.W.2d 798, 803 (Tex. 1977).

5. *See* Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984); *see also* General Motors Corp. v. Lawrence, 651 S.W.2d 732, 733-34 (Tex. 1983) (writ of mandamus conditionally granted where trial court allowed overly broad discovery).

6. *See* Lawther v. Super X Drugs of Tex., Inc., 671 S.W.2d 591, 594 (Tex. App.—Houston [1st Dist.] 1984, no writ).

7. *See* Jampole v. Touchy, 673 S.W.2d 569, 573-74 (Tex. 1984).

8. *See* TEX. R. CIV. P. 215(3) (sanctions authorized under paragraph 2b which are appealable only after final judgment include disallowance of further discovery, orders that matter in discovery be taken as established, refusal of designated claims or defenses, dismissal of case with or without prejudice, and imposition of discovery costs on party or attorney involved).

procedure, one must first consider Rules 166b, 167, 168, and 169, which set the scope and procedure of discovery.

A. *Rule 166b - Scope of Discovery*

Rule 166b is now the general rule relating to the forms and scope of discovery, protective orders, exemptions from discovery, and supplementing responses. The provisions setting the breadth of discovery and limit of exemptions cross over all discovery lines, whether the information sought is in the form of documents, answers to interrogatories, requests for admissions, or deposition testimony.[9]

It is not a ground for objection that information sought will be inadmissible at trial, so long as it appears reasonably calculated to lead to the discovery of admissible evidence.[10] It is not a ground for objection that an interrogatory, pursuant to Rule 168, involves an opinion or contention that relates to fact or the application of law to fact.[11] It is not a ground for objection that a request for admission, pursuant to Rule 169, relates to statements or opinions of fact, or the application of law to fact, or mixed questions of law and fact, or that the documents referred to in a request for admission may not be admissible at trial.[12] Finally, it is not a ground for objection that a request for admission presents a genuine issue for trial.[13]

A party must supplement any discovery response to include information that has been acquired after the original response if the new information shows the prior response was incorrect or incomplete when made, or is now misleading.[14] Any required supplementation must be made not less than thirty days prior to trial, except on leave of the court.[15] Failure to supplement a response results in *automatic* exclusion of that evidence. The burden of showing good cause for allowing the proof is then on the party offering the evidence. It is *not* incumbent on the party opposing use of the non-disclosed evidence to plead surprise or to show good cause for excluding such evidence.[16]

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9. *See id.* 166b(1).

10. *See id.* 166b(2)(a).

11. *See id.*

12. *See id.*; *see also* Laycox v. Jaroma, Inc., 709 S.W.2d 2, 4 (Tex. App.—Corpus Christi 1986, no writ).

13. *See* TEX. R. CIV. P. 169(1).

14. *See id.* 166b(5).

15. *See id.*

16. *See* Morrow v. H.E.B., Inc., 29 Tex. Sup. Ct. J. 415, 416 (June 11, 1986) (fact wit-

The party must also show good cause for failure to timely and properly supplement.[17]

A claim that proferred evidence is for anticipated rebuttal should seldom, if ever, be sufficient to show good cause for allowing testimony of an undisclosed or late-disclosed witness.[18] Whether a fact witness has testimony relevant to the proponent's case in chief or rebuttal, the witness is still a person with relevant knowledge and should be timely disclosed in response to a proper inquiry. Likewise, if an expert has potential value in either phase, the proponent must disclose the expert, and thus cannot positively aver that the expert will be used solely for consultation. If a party has done a fair job of discovering the opponent's case, he or she should rarely be able to claim that the potential need for the rebuttal was not, and could not have been, anticipated.

B. *Rule 167 - Requests for Production and Inspection*

Rule 167 provides that a party may serve a request on any other party to: "(a) produce or permit inspection of designated documents or tangible things within the scope of Rule 166b;[19] or (b) permit entry upon designated land or property for the purpose of making inspections, measuring, surveying, photographing, testing, or sampling any of the property."[20] Likewise, mental and physical examinations may be ordered.[21] The request must specify a reasonable time, place, and

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ness); Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243, 246-47 (Tex. 1985) (fact witness); *see also* Clear Lake Water Auth. v. Winograd, 695 S.W.2d 632, 641 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); Brewer v. Isom, 704 S.W.2d 911, 912 (Tex. App.—Dallas 1986, no writ) (fact witness); Missouri-Kansas-Texas Ry. v. Alvarez, 703 S.W.2d 367, 370-71 (Tex. App.—Austin 1986, no writ) (expert witness); First City Bank v. Global Auctioneers, 708 S.W.2d 12, 15 (Tex. App.—Texarkana 1986, no writ) (documents); GATX Tank Erection Corp. v. Tesow Petroleum Corp., 693 S.W.2d 617, 620 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (expert on attorney fees). *But see* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984); E. F. Hutton & Co. v. Youngblood, 708 S.W.2d 865, 870-72 (Tex. App.—Corpus Christi 1986, no writ); Modern Exploration, Inc. v. Maddison, 708 S.W.2d 872, 877-78 (Tex. App.—Corpus Christi 1986, no writ).

17. *See* TEX. R. CIV. P. 166b(5).

18. *See* Missouri-Kansas-Texas Ry. v. Alvarez, 703 S.W.2d 367, 370-71 (Tex. App.—Austin 1986, no writ) (excluding rebuttal testimony). *But see* Garrett Outdoor Co. of Texas v. Kubeczka, 701 S.W.2d 79, 84-85 (Tex. App.—Houston [14th Dist.] 1986, no writ) (rebuttal testimony allowed where opponent knew of witness, material and relevant facts otherwise would have been withheld from jury).

19. TEX. R. CIV. P. 167(1)(a).

20. *Id.* 167(1)(b).

21. *See* Employers Mut. Casualty Co. v. Street, 707 S.W.2d 277, 278-79 (Tex. App.—

manner for making the inspection or performing the related act, and the party to whom the request is sent has thirty days after receiving the request in which to respond or file objections.[22] The failure to file a response or objection to the request, of course, can result in a motion for sanctions without first having filed a motion to compel.[23]

C. *Rule 168 - Interrogatories*

Interrogatories may be propounded to any party on any matter that can be inquired into under Rule 166b.[24] Questions are limited in number, including subsections, to require no more than thirty answers.[25] No more than two sets of interrogatories may be served by a party on any other party, except when permitted by the court after a hearing and upon a showing of good cause.[26]

The party to whom the interrogatories are directed has not less than thirty days after their receipt to answer, unless upon motion, notice, and for good cause shown, the court enlarges or shortens the time.[27] Objections to interrogatories must be served on the party seeking the interrogatory answer within thirty days after the interrogatories have been received.[28] A failure to respond to an interrogatory within the time alloted will support a motion for sanctions.[29] Incomplete answers may be treated as a failure to answer and will support sanctions, including an order striking pleadings.[30]

D. *Rule 169 - Requests for Admissions*

A party may serve upon any other party a written request for the admission of the truth of any matter discoverable under Rule 166b.[31] Each matter for which an admission is requested must be separately set forth, and the matter is admitted automatically, without the neces-

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Fort Worth 1986, no writ); Teran v. Longoria, 703 S.W.2d 300, 301 (Tex. App.—Corpus Christi 1985, no writ).

22. *See* TEX. R. CIV. P. 167(2).
23. *See id.* 215(2).
24. *See id.* 168(2).
25. *See id.* 168(5).
26. *See id.*
27. *See id.* 168(4).
28. *See id.* 168(6).
29. *See id.* 215(1)(b)(3)(a)-(b).
30. *See* Alexander v. Barlow, 671 S.W.2d 531, 534-35 (Tex. App.—Houston [1st Dist.] 1983, no writ).
31. *See* TEX. R. CIV. P. 169(1).

sity of a court order, unless, within thirty days after service of the request, the party serves a written answer or objection addressed to the matter, signed by the party or the party's attorney.[32] This marks a significant change from the old practice, which required the requesting party to formally move to have the matters deemed admitted. Now, the lax party must move to "undeem" the admissions. If good cause for the delay is not shown, the party may well be deemed out of court.[33]

Rule 169 sets specific procedures with regard to the admission or denial of facts:

(a) If an objection is made, the reason therefor shall be stated.
(b) If the answer does not admit the request, then the answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter.
(c) A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter or request, the party shall specify so much of it as is true and qualify or deny the remainder.
(d) An answering party *may not* give lack of information or lack of knowledge as a reason for failure to admit or deny, *unless* the party makes a reasonable inquiry and the information known or easily obtainable is insufficient to support an admission or denial.
(e) It is no objection that a request presents a genuine issue for trial.[34]

Rule 215 provides that an evasive or incomplete answer is treated as a failure to answer and will deem the matter admitted.[35]

IV. LEGAL BASES FOR PARTICULAR AREAS OF DISCOVERY

A. *Potential Witnesses*

The identity of persons with knowledge of relevant facts is always discoverable, exemptions notwithstanding.[36] Even the identities of persons conducting privileged investigations are discoverable because

32. *See id.*

33. *See* Laycox v. Jaroma, Inc., 709 S.W.2d 2, 3-4 (Tex. App.—Corpus Christi 1986, no writ); Cantu-Johnston Pools, Inc. v. Solis, 705 S.W.2d 299, 300 (Tex. App.—San Antonio 1986, no writ); *cf.* Velchoff v. Campbell, 710 S.W.2d 613, 614 (Tex. App.—Dallas 1986, no writ) (deemed admissions held to be proper summary judgment).

34. TEX. R. CIV. P. 169(1) (procedures discussed in detail).

35. *See id.* 215(1)(c).

36. *See* Giffin v. Smith, 688 S.W.2d 112, 113 (Tex. 1985); Bearden v. Boone, 693 S.W.2d 25, 28 n.3 (Tex. App.—Amarillo 1985, no writ).

they may have, or acquire, non-privileged information.[37] The Rules broadly define a "person [with] knowledge."[38]

B. *Expert Witnesses*

Rule 166b(2)(e) specifically allows discovery of the identity of any expert who may be called as a witness and of the subject matter on which the expert is expected to testify.[39] When a party does not positively aver that the expert in question will be used solely for consultation and will not be called as a witness at trial, the policy of allowing broad discovery in civil cases is furthered by permitting discovery of that expert's reports, factual observations, and opinions.[40] Whatever the status or intended use of the expert, his or her mental impressions and opinions will be discoverable if they are not shown to have been "either acquired or developed in anticipation of litigation."[41]

C. *Other Complaints*

Evidence of other claims and lawsuits or similar incidents involving a party should be discoverable. Information of this type is relevant to show the party's knowledge, intent, state of mind, conduct, or a common scheme and design.[42] For example, in a suit against an insurer

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37. *See* Santa Rosa Medical Center v. Spears, 709 S.W.2d 720, 724 (Tex. App.—San Antonio 1986, no writ).

38. *See* TEX. R. CIV. P. 166b(2)(d) ("A person has knowledge of relevant facts when he or she has or may have knowledge of any discoverable matter. . . . [P]ersonal knowledge is not required"); *see also* Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243, 246 (Tex. 1985).

39. *See* Lindsey v. O'Neill, 689 S.W.2d 400, 402 (Tex. 1985); Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979).

40. *See* Barker v. Dunham, 551 S.W.2d 41, 44 (Tex. 1977).

41. *See* Lindsey v. O'Neill, 689 S.W.2d 400, 402 (Tex. 1985).

42. *See* Jampole v. Touchy, 673 S.W.2d 569, 573-74 (Tex. 1984) (in products liability case, documents revealing manufacturer's knowledge of other possible designs held discoverable as relevant to show manufacturer's alleged conscious indifference); General Motors Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983) (court limited discovery to automobiles manufactured after 1949, because year models requested, back to 1908 on all vehicles, deemed irrelevant); Armco, Inc. v. Southern Rock, Inc., 778 F.2d 1134, 1139-40 (5th Cir. 1985) (evidence of other claims and lawsuits against plaintiff held relevant to plaintiff's claim of delay damages); *see also* TEX. R. EVID. 404(b) (evidence of other acts or wrongs may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident); *id.* 405(b) (proof may be made of specific instances of conduct where character or trait of person is essential element in claim or defense); *id.* 406 (evidence of person's habit or organization's routine practice is relevant to prove conduct of person or group was in conformity with habit or practice on particular occasion).

for unfair settlement practices, evidence of other claim denials is discoverable to show bad faith.[43] Similarly, other incidents involving a claimant may be discovered to show a conscious pattern and a lack of mistake or accident.[44] Furthermore, evidence of problems or tests on similar products may be relevant to determine feasibility in a products liability case.[45]

D. *Financial Information*

Discovery of a party's financial condition and financial records is proper when the party's financial status is in issue. This rule has been applied in many cases and contexts to allow discovery of the following types of information: (a) bank records, invoices, receipts, business records, and tax returns;[46] (b) books and records, customer and supplier lists, and pricing and discount information;[47] (c) information relating to the financial condition of a bank;[48] (d) cancelled checks, check stubs, and financial statements;[49] (e) financial statements, credit applications, receipts, and other financial records of a business;[50] (f) documents relating to overhead expenses and labor costs;[51] (g) invoices relating to materials and equipment furnished by a contractor;[52] (h) depositions inquiring into business affairs and records of the defendant company;[53] and (i) names and addresses of shareholders

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43. *See* Aztec Life Ins. Co. v. Dellana, 667 S.W.2d 911, 915-16 (Tex. App.—Austin 1984, no writ).

44. *See* Payne v. Hartford Fire Ins. Co., 409 S.W.2d 591, 594 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.).

45. *See* Jampole v. Touchy, 673 S.W.2d 569, 573-75 (Tex. 1984).

46. *See* Wielgosz v. Millard, 679 S.W.2d 163, 167 (Tex. App.—Houston [14th Dist.] 1984, no writ).

47. *See* Professional Microfilming, Inc. v. Houston, 661 S.W.2d 767, 769-70 (Tex. App.—Fort Worth 1983, no writ) (corporate information).

48. *See* King v. Ballard, 643 S.W.2d 457, 463 (Tex. App.—Eastland 1982), *aff'd in part and rev'd in part*, 652 S.W.2d 767 (Tex. 1983).

49. *See* Bottinelli v. Robinson, 594 S.W.2d 112, 115 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

50. *See* Lueg v. Tewell, 572 S.W.2d 97, 102 (Tex. Civ. App.—Corpus Christi 1978, no writ).

51. *See* Clarostat Mfg., Inc. v. Alcor Aviation, Inc., 544 S.W.2d 788, 790-91 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.).

52. *See* Blakely v. Howard, 387 S.W.2d 96, 98-99 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

53. *See* Amarillo Abstract & Title Co. v. Unauthorized Practice of Law Comm., 332 S.W.2d 349, 350-51 (Tex. Civ. App.—Amarillo 1959, no writ).

and number of shares owned.[54]

Financial statements may also be relevant to show the amount of profits derived from the defendant's wrongdoing, which may be considered in determining the amount of exemplary damages.[55] Furthermore, evidence tracing the benefits from the wrongful conduct to other persons is relevant in establishing conspiracy.[56] In consumer and business cases, a seller's failure to disclose its precarious financial position may also be relevant, for example, to a buyer's claim for fraud, gross negligence, breach of fiduciary duty, and exemplary damages. Evidence of the seller's financial condition could lead to the discovery of admissible evidence relevant to show the seller's intent or motive to defraud the buyer—such as a critical need for money.

E. *Tax Returns*

Tax returns and similar information are discoverable, when the information is relevant, on the same conditions as other documents.[57] However, courts are solicitous in requiring *in camera* inspections before allowing discovery of tax returns. In fact, the Texas Supreme Court has suggested that financial records in general are more readily discoverable than tax returns.[58]

F. *Basis for Claim or Defense*

Rule 166b(2)(a) allows discovery whenever it relates to a claim or defense of any party. The legal and factual basis for a party's position is thus expressly discoverable. This discovery can come from both lay witnesses and expert witnesses.[59]

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54. *See* Dallas Joint Stock Land Bank v. State, 135 Tex. 25, 28, 137 S.W.2d 993, 995 (1940).

55. *See* Lloyd A. Fry Roofing Co. v. State, 524 S.W.2d 313, 319-20 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

56. *See* Bourland v. State, 528 S.W.2d 350, 354 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

57. *See, e.g.*, Crane v. Tunks, 160 Tex. 182, 191, 328 S.W.2d 434, 440 (1959); Wielgosz v. Millard, 679 S.W.2d 163, 167 (Tex. App.—Houston [14th Dist.] 1984, no writ); Narro Warehouse, Inc. v. Kelly, 530 S.W.2d 146, 150 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

58. *See* Peeples v. Fourth Supreme Judicial Dist., 701 S.W.2d 635, 636-37 (Tex. 1985).

59. *See* Barker v. Dunham, 551 S.W.2d 41, 43-44 (Tex. 1977); Williamson v. O'Neill, 696 S.W.2d 431, 431 (Tex. App.—Houston [14th Dist.] 1985, no writ).

G. *Impeachment*

Information cannot be discovered solely for impeachment, but potential use for impeachment, when combined with other purposes, will not make a discovery request improper.[60]

H. *Internal Communications and Correspondence*

Correspondence, internal memos, minutes of meetings, and other documents relating to discussions of a claim may also be discoverable, unless they are shown to have been created pursuant to a privileged investigation.[61]

I. *Settlement Agreements and Insurance*

Indemnity, insuring and settlement agreements are also expressly discoverable.[62]

J. *Insurer's Investigation of Insured's Claim*

In cases alleging an insurance company's bad faith in denying and handling a claim, all investigations occurring prior to the date the claim was denied are discoverable. The insurer's conduct in investigating and then denying the claim constitutes the operative facts upon which the suit turns.[63] This conduct is to be distinguished from investigations after suit is filed. An *in camera* inspection may be required to determine on which side of the line the documents fall.[64]

V. EXEMPTIONS FROM DISCOVERY

A. *In General*

In *Giffin v. Smith*,[65] the Texas Supreme Court unequivocally placed

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60. *See* Kupor v. Solito, 687 S.W.2d 441, 443 (Tex. App.—Houston [14th Dist.] 1985, no writ).

61. *See* Jordan v. Court of Appeals, 701 S.W.2d 644, 648 (Tex. 1985); *see also* King v. Ballard, 643 S.W.2d 457, 463 (Tex. App.—Eastland 1982), *aff'd in part and rev'd in part*, 652 S.W.2d 767 (Tex. 1983).

62. *See* TEX. R. CIV. P. 166b(2)(f).

63. *See, e.g.*, Texas Employer's Ins. Ass'n v. Fashing, 706 S.W.2d 801, 802 (Tex. App.—El Paso 1986, no writ); State v. Clark, 695 S.W.2d 673, 675-76 (Tex. App.—Austin 1985, no writ); Aztec Life Ins. Co. v. Dellana, 667 S.W.2d 911, 915 (Tex. App.—Austin 1984, no writ).

64. *See* Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 458 (Tex. 1982) (trial judge ordered to make *in camera* inspection of documents to determine application of privilege).

65. 688 S.W.2d 112 (Tex. 1985).

the burden on the party resisting discovery to produce *evidence* concerning the applicability of the particular privilege or immunity relied upon.[66] The importance of this case became even more apparent after *Peeples v. Fourth Supreme Judicial District*,[67] where the court laid a procedural "road map" to be followed by a party who resists discovery by claiming a privilege or immunity regarding particular documents.[68]

Over time, the judicial philosophy of imposing sanctions for discovery abuse has changed. Historically, many courts of appeals indicated that sanctions were solely or primarily for the purpose of obtaining compliance. However, the scholarly teachings and writings of several Texas Supreme Court justices pointed the way to the future. For example, one justice stated that "sanctions are properly used to insure that the abuser does not profit by his wrong, and that his adversary does not suffer by it."[69] The Texas Supreme Court unanimously adopted the position that sanctions are proper not only to ensure compliance with discovery requests, but also "to deter those who might be tempted to abuse discovery in the absence of a deterrent."[70] As a result, the days of "procrastination and gamesmanship" in the discovery process are over, or should be.[71]

The point to remember is that *everything will be discoverable* unless the party resisting discovery (1) follows the procedural steps required by *Peeples*[72] and (2) produces sufficient *evidence* to establish that the information being sought is exempt from discovery.[73]

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66. *See id.* at 114.

67. 701 S.W.2d 635 (Tex. 1985).

68. *See id.* at 637 (proponent of privilege must specifically plead particular privilege or immunity claimed; hearing on motion then requested; court determines necessity of in camera inspection; if inspection ordered, materials in question must be segregated and produced in court; failure to follow procedure constitutes waiver of ability to complain of court's action).

69. Kilgarlin & Jackson, *Sanctions for Discovery Abuse under New Rule 215*, 15 ST. MARY'S L.J. 767, 774-75 (1984); *see also* Spears, *The Rules of Civil Procedure: 1981 Changes in Pre-Trial Discovery*, 12 ST. MARY'S L.J. 633, 651 (1981); Pope & McConnico, *Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 483 (1980).

70. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985).

71. *See* Dyson v. Olin Corp., 692 S.W.2d 456, 461 (Tex. 1985) (Kilgarlin, J., concurring).

72. *See* Peeples v. Fourth Supreme Judicial Dist., 701 S.W.2d 635, 637 (Tex. 1985).

73. *See id.* at 637 (burden on party asserting privilege to produce evidence showing applicability of claimed privilege); Giffin v. Smith, 688 S.W.2d 112, 114 (Tex. 1985) (party failed to carry burden of showing applicability of attorney-client privilege).

B. *Particular Exemptions*

Rule 166b(3) provides that the following matters are not discoverable:

(a) the work product of an attorney;
(b) the written statements of potential witnesses and parties; except that any person, whether a party or not, shall be entitled to obtain, upon request, a copy of a statement he has previously made concerning the action or its subject matter and which is in the possession, custody, or control of any party;
(c) the identity, mental impressions, and opinions of an expert who has been informally consulted, or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, or any documents or tangible things containing such information, if the expert will not be called as a witness; except that the identity, mental impressions, and opinions of an expert who will not be called to testify, and any documents or tangible things containing such impressions and opinions, are discoverable if the expert's work product forms the basis either in whole or in part of the opinions of an expert who will be called as a witness;
(d) with the exception of discoverable communications prepared by or for experts, any communication passing between agents, representatives, or employees of any party to the action, or communications between any party and his agents, representatives, or employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation, or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen;
(e) any matter protected from disclosure by privilege.[74]

Because these exemptions limit the information available to fact finders, they should be construed narrowly and with regard to the unfairness or harshness of the result if the discovery is not allowed.[75] This manner of construction allows the exemption without unduly frustrating the truth seeking purpose of discovery and, ultimately, of litigation.

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

75. *See* Tucker v. Gayle, 709 S.W.2d 247, 249-50 (Tex. App.—Houston [14th Dist.] 1985, no writ) (when relevant material peculiarly within defendant's control, right to discovery "becomes more important and necessary to our judicial system"). *But see* Terry v. Lawrence, 692 S.W.2d 559, 562 (Tex. App.—Tyler 1985), *rev'd*, 700 S.W.2d 912 (Tex. 1985).

1. Work Product of an Attorney

The attorney work product doctrine was recognized by the United States Supreme Court in *Hickman v. Taylor*.[76] The plaintiff sought to obtain notes taken by the defendants' attorney when he interviewed potential witnesses to an accident. The Supreme Court held these matters were not discoverable because "not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[77] The Court did qualify the work product exemption, however, by recognizing that "where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had."[78]

The work product doctrine generally protects against disclosure of specific documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories, prepared and assembled in actual anticipation of ligitation.[79] In this respect, the work product doctrine overlaps the investigative exemption. Work product also overlaps the attorney-client privilege and protects confidential communications. Unlike the latter, however, it is not perpetual.[80]

The exemption "is not an umbrella for materials assembled in the ordinary course of business."[81] The work product doctrine also does not allow an attorney to keep from a corporation recorded statements made by its employees.[82]

2. Statements of a Witness or Party

As a general rule, statements of a witness or party are not discoverable, because a litigant is able to depose or otherwise question the person himself.[83] This exemption does not prevent a person from get-

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76. 329 U.S. 495 (1947).

77. *Id.* at 510.

78. *Id.* at 511.

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

80. *See* Bearden v. Boone, 693 S.W.2d 25, 28 (Tex. App.—Amarillo 1985, no writ); *see also* DeWitt & Rearick, Inc. v. Ferguson, 699 S.W.2d 692, 694 (Tex. App.—El Paso 1985, no writ).

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

82. *See id.*

83. *See* Cupples Prods. Co. v. Marshall, 690 S.W.2d 623, 624-25 (Tex. App.—Dallas 1985, no writ) (discovery request denied that sought production of statements and reports

ting a copy of his or her own statement, and a corporation may likewise get copies of statements made by its agents and employees.[84] Statements by an insured to the insurer, or to attorneys hired by the insurer to defend the insured, may fall within this exception and may also be protected by the attorney-client privilege or investigative exemption.[85] This exemption, however, would not allow the insurer to withhold the insured's own statements from the insured.

3. Identity and Impressions of Experts

Evidence to be used by or obtained from an expert witness can, in certain situations, be excluded from the discovery process. The three elements of the expert witness exemption are: (a) the expert information must be obtained in anticipation of litigation; (b) the party retaining the expert cannot intend to call the expert as a witness at trial; and (c) the expert's work and opinions cannot form the basis, in whole or in part, of another expert's trial testimony.[86]

The burden is on the party opposing discovery of the expert's views to prove the information was developed in anticipation of litigation; otherwise, the exception does not apply.[87] A party retaining an expert may be compelled to designate whether the expert will testify, so that the party seeking discovery can determine whether the privilege applies.[88] If the party retaining the expert fails to positively state that an expert's testimony or impressions will not be used at trial, discovery should be permitted, or the court may preclude the use at trial of any testimony by that expert.[89]

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reflecting information acquired from witnesses to accident); W. W. Rodgers & Sons Produce Co. v. Johnson, 673 S.W.2d 291, 294-95 (Tex. App.—Dallas 1984, no writ) (not discoverable when information used solely for impeachment of person who's credibility is not in issue).

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

85. *See* Menton v. Lattimore, 667 S.W.2d 335, 339-41 (Tex. App.—Fort Worth 1984, no writ); Hiebert v. Weiss, 622 S.W.2d 150, 151-52 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.).

86. *See* TEX. R. CIV. P. 166b(3)(c).

87. *See* Turbodyne v. Heard, 29 Tex. Sup. Ct. J. 521, 522 (party failed to show experts' documents prepared in anticipation of litigation); Lindsey v. O'Neill, 689 S.W.2d 400, 402 (Tex. 1985) (before holding entire category of expert opinion evidence exempt from discovery, proof must be made that such evidence acquired or developed in anticipation of litigation).

88. *See* TEX. R. CIV. P. 166b(2)(e)(3); *see also* Werner v. Miller, 579 S.W.2d 455, 456 (Tex. 1979).

89. *See* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443-44 (Tex. 1984); Barker v. Dunham, 551 S.W.2d 41, 44 (Tex. 1977).

An expert's position as a regular employee of a party does not change these rules.[90] Further, if a defendant has particular expertise regarding the occurrence in question, he may be required to give his opinion regarding such matters.[91] Finally, under "an especially rigorous showing of good cause," even reports of non-testifying experts may be discoverable.[92]

4. Post-Occurrence Communications Relating to Prosecution, Defense, or Investigation of Claim

One asserting the investigative exemption must establish four necessary elements. First, the documents for which the privilege is claimed must consist only of communications between or among a party and its agents, representatives, or employees. Second, the communications must have been made subsequent to the event upon which the suit is predicated. Third, the communications must have been made in connection with the prosecution, investigation, or defense of the particular suit in which the exemption is claimed or in connection with the investigation of the particular circumstances, occurrence, or transaction out of which the claim arose. Finally, the communications must also be confidential; otherwise, the privilege may be held waived or non-existent.[93] A community of interests may preserve confidentiality, but dissemination to persons with adverse interests destroys any privilege.[94]

In *Allen v. Humphreys*,[95] the Texas Supreme Court held that the post occurrence investigation exemption under the former Rule 167 applied only to written communications arising after suit was filed or after the party had good cause to believe such a suit would be filed.[96]

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90. *See* Barker v. Dunham, 551 S.W.2d 41, 43-44 (Tex. 1977).

91. *See* Williamson v. O'Neill, 696 S.W.2d 431, 431-32 (Tex. App.—Houston [14th Dist.] 1985, no writ).

92. *See Ex parte* Shepperd, 513 S.W.2d 813, 817 (Tex. 1974).

93. *See* TEX. R. CIV. P. 166b(3)(d); *see also* Jordan v. Court of Appeals, 701 S.W.2d 644, 647-48 (Tex. 1985); Allen v. Humphreys, 559 S.W.2d 798, 802 (Tex. 1977); State v. Clark, 695 S.W.2d 673, 675 (Tex. App.—Austin 1985, no writ); Anderson v. Higdon, 695 S.W.2d 320, 326 (Tex. App.—Waco 1985, no writ); Cupples Prods. Co. v. Marshall, 690 S.W.2d 623, 625 (Tex. App.—Dallas 1985, no writ); Valentino v. City of Houston, 674 S.W.2d 813, 819-20 (Tex. App.—Houston [1st Dist.] 1984, no writ).

94. *See* Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. App.—El Paso 1985, no writ).

95. 559 S.W.2d 798 (Tex. 1977).

96. *See id.* at 803.

The exemption was incorporated into Rule 166(b)(d) in 1984. Where the former rule referred to the "claim or the *circumstances* out of which same has arisen," the new rule referred to the "claim or the investigation of the *occurrence* or *transaction* out of which the claim has arisen." Some courts of appeals viewed this as a substantive change expanding the exemption to apply to earlier, more preliminary communications.[97] Other courts, however, continued to adhere to the old construction.[98]

In a trilogy of opinions, the Texas Supreme Court unequivocally reaffirmed the *Allen* requirement and held that Rule 166(3)(d) did not effect a substantive change in the post-occurrence investigation exemption. In *Robinson v. Harkins & Co.*,[99] the court reaffirmed the holding in *Allen* that "the privilege against discovery can be invoked only where the documents sought to be protected were prepared in connection with the defense of the lawsuit in which the discovery is sought."[100] The court further held: "[T]he purpose of the 1984 amendments to the Texas Rules of Civil Procedure was to combine all scope of discovery concepts into a single rule, not to make substantive changes in the existing law. In adopting Tex. R. Civ. P. 166b, this court did not overrule *Allen v. Humphreys*."[101] The court concluded that an investigative report, prepared when no lawsuit was pending, was discoverable.[102]

In *Stringer v. Eleventh Court of Appeals*,[103] the Texas Supreme Court held: "Only information obtained by a party after there is good cause to believe a suit will be filed or after the institution of a lawsuit is privileged."[104] The court then found that an investigator's report made the day after an accident was not privileged. The court rea-

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97. *See* Turbodyne Corp. v. Heard, 698 S.W.2d 703, 706 (Tex. App.—Houston [14th Dist.] 1985, no writ); Cupples Prods. Co. v. Marshall, 690 S.W.2d 623, 625 (Tex. App.—Dallas 1985, no writ).

98. *See* Texas Employer's Ins. Ass'n v. Fashing, 706 S.W.2d 801, 802 (Tex. App.—El Paso 1986, no writ); Tucker v. Gayle, 709 S.W.2d 247, 249 (Tex. App.—Houston [14th Dist.] 1986, no writ); Kupor v. Solito, 687 S.W.2d 441, 443 (Tex. App.—Houston [14th Dist.] 1985, no writ); Zenith Radio Corp. v. Clark, 665 S.W.2d 804, 809 (Tex. App.—Austin 1985, no writ).

99. 29 Tex. Sup. Ct. J. 414 (June 11, 1986).

100. *See id.* at 415.

101. *Id.*

102. *See id.*

103. 29 Tex. Sup. Ct. J. 502 (July 2, 1986).

104. *Id.* at 502, *overruling in part*, Atchison, T. & S. F. Ry. v. Kirk, 705 S.W.2d 829 (Tex. App.—Eastland 1986, no writ).

soned: "The mere fact that an accident has occurred is not sufficient to clothe all post-accident investigations, which frequently uncover fresh evidence not obtainable through other sources, with a privilege."[105]

In the third case, *Turbodyne Corp. v. Heard*,[106] the court expressly overruled a lower court decision that had departed from the *Allen* standard.[107] The court further held that the burden is on the party asserting the post-occurrence investigation exemption to prove the evidence was acquired or developed in anticipation of the lawsuit in which the discovery is sought.[108]

Some question may arise regarding the nature of the claim giving rise to the suit. Communications relating to an initial "claim" are not within the exception unless *that* "claim" forms the basis of the suit.[109] For example, in an unfair insurance practices suit under article 21.21 of the Insurance Code, the basis of the suit is the insurer's lack of good faith in denying the insured's claim. Investigations before the claim is denied are discoverable because it is the *denial* that forms the basis of the suit. If the claim were not denied, there would be no lawsuit.[110]

Photographs are *not* "communications" within this exemption.[111] Also excluded are documents gratuitously prepared or submitted, and those not expressly created as part of a formal investigation.[112] The exception can apply to partial investigations. Further, it is not necessary that the agent have investigated every aspect of the occurrence.[113]

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105. *Id.*; *see also* Tucker v. Gayle, 709 S.W.2d 247, 249 (Tex. App.—Houston [14th Dist.] 1985, no writ).

106. 29 Tex. Sup. Ct. J. 521 (July 9, 1986).

107. *See id.* at 522.

108. *See id.* (affidavits merely stating that litigation was anticipated held insufficient).

109. *See* Texas Employer's Ins. Ass'n v. Fashing, 706 S.W.2d 801, 802 (Tex. App.—El Paso 1986, no writ); Service Lloyds Ins. Co. v. Clark, No. 14,689-CV, slip op. at 4 (Tex. App.—Austin, June 11, 1986, no writ) (not yet reported); State v. Clark, 695 S.W.2d 673, 675 (Tex. App.—Austin 1985, no writ).

110. *See* Aztec Life Ins. Co. v. Dellana, 667 S.W.2d 911, 915-16 (Tex. App.—Austin 1984, no writ).

111. *See, e.g.*, Terry v. Lawrence, 700 S.W.2d 912, 913-14 (Tex. 1985); Allen v. Humphreys, 559 S.W.2d 798, 802 (Tex. 1977); Houdaille Indus. v. Cunningham, 502 S.W.2d 544, 549 (Tex. 1972).

112. *See* Jordan v. Court of Appeals, 701 S.W.2d 644, 648 (Tex. 1985).

113. *See* Atchison, T. & S. F. Ry. v. Kirk, 705 S.W.2d 829, 832 (Tex. App.—Eastland

5. Privileged Communications

a. Attorney-Client Privilege

In general, there are at least two elements of the attorney-client privilege, and both must be present before any communication can be exempt from discovery: (a) the communication must be intended to be confidential; *and* (b) the communication must be made for the purpose of facilitating the rendition of legal services.[114] The attorney-client privilege is intended to promote unrestrained communication between attorney and client on matters involving professional advice, without fear that confidential communications will subsequently be disclosed.[115]

The privilege applies to attorney advice, as well as to client communications.[116] The mere fact that an attorney-client relationship exists is not enough to invoke the privilege as to any particular communication or document.[117] Questions of whether the privilege exists, as to any particular communication or document passing between an attorney and client, are matters for the court to determine.[118]

The privilege must be claimed by, or on behalf of, the client. It continues indefinitely and is unaffected by the disposition of the pending suit, the filing of another suit, or the termination of the attorney-client relationship.[119] The privilege also may be invoked by a "representative of the lawyer"—*e.g.*, an accountant or a private investigator.[120] In Texas, the claim of privilege should be strictly construed. As one court stated: "The policy of the Supreme Court of Texas has

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1986), *overruled in part on other grounds sub. nom.*, Stringer v. Eleventh Court of Appeals, 29 Tex. Sup. Ct. J. 502 (July 2, 1986).

114. *See* TEX. R. EVID. 503(b).

115. *See* Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 458 (Tex. 1982); West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978).

116. *See* DeWitt & Rearick, Inc. v. Ferguson, 699 S.W.2d 692-93 (Tex. App.—El Paso 1985, no writ) (citing R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 421 (Texas Practice 3d ed. 1980)).

117. *See* Ballard v. Ballard, 296 S.W.2d 811, 816 (Tex. Civ. App.—Galveston 1956, no writ); *see also* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL §§ 421-30 (Texas Practice 3d ed. 1980).

118. *See* Williams v. Williams, 108 S.W.2d 297, 299-300 (Tex. Civ. App.—Amarillo 1937, no writ).

119. *See* Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 458 (Tex. 1982); Bearden v. Boone, 693 S.W.2d 25, 27-28 (Tex. App.—Amarillo 1985, no writ).

120. *See* TEX. R. EVID. 503; Bearden v. Boone, 693 S.W.2d 25, 27-28 (Tex. App.—Amarillo 1985, no writ).

been to restrict the application of the rule of privilege because it tends to prevent the full disclosure of the truth."[121]

When a corporation, rather than an individual, is involved, different issues arise. If the communication in question indicates that the attorney was advising on matters of *business*, the attorney-client privilege does not apply.[122] To act as a lawyer for purposes of the privilege, the attorney must give the corporation predominently legal advice and not solely, or even largely, business advice.[123] Moreover, the attorney-client privilege is not available "to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."[124]

Of course, the privilege may be waived once its existence is established. Disclosure generally is held to waive the privilege.[125] The privilege has been held to be waived even when documents have been stolen.[126] Of course, any voluntary disclosure, such as to a federal agency, waives any alleged attorney-client privilege.[127]

The privilege cannot be used offensively to shield information relevant to issues raised by the party claiming the privilege. For example, when a plaintiff sued to recover amounts paid in settlement to a third party in a prior suit, the defendant was allowed discovery of the basis for plaintiff's settlement, including the advice of plaintiff's counsel. The court held that the plaintiff could not seek affirmative relief and still maintain a privilege against disclosure of the prior settlement.[128]

b. Spousal Privilege

A communication is confidential if it is made privately by any person to their spouse and is not intended for disclosure to any other person.[129] The spousal privilege does not apply: (a) in furtherance of

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121. Hurley v. McMillan, 268 S.W.2d 229, 232 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.).

122. *See* United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 753 (D. Del. 1943).

123. *See* Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del. 1954).

124. *See* Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963).

125. *See* United States v. Krasnov, 143 F. Supp. 184, 190 (E.D. Pa. 1956).

126. *See In re* Grand Jury Proceedings Involving Burkeley & Co., 466 F. Supp. 863, 868 (D. Minn. 1979).

127. *See* Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981).

128. *See* DeWitt & Rearick, Inc. v. Ferguson, 699 S.W.2d 692, 694 (Tex. App.—El Paso 1985, no writ).

129. *See* TEX. R. EVID. 504(a).

crime or fraud; (b) in proceedings between spouses; (c) in commitment proceedings including one spouse or his or her property; or (d) in competency proceedings on behalf of a spouse.[130]

c. Trade Secrets Privilege

A valid propriety interest in certain information may justify denying or limiting discovery.[131] The clearest case in which discovery may be limited is when a competitor seeks discovery of competitively sensitive information.[132] Once the trade secrets privilege has been properly raised, the trial court must examine the documents before compelling disclosure.[133] If the proprietary interest of the party resisting discovery can be safeguarded by a protective order restricting extra-judicial disclosure, it is an abuse of discretion to deny discovery.[134]

d. Physician-Patient Privilege

The physician-patient privilege applies to confidential communications between physician and patient relating to, or in connection with, any professional services of the physician. This includes records of the identity, diagnosis, evaluation, or treatment of the patient.[135] A "physician" is anyone licensed to practice medicine or believed to be so by the patient.[136] The privilege may be claimed by the patient or the doctor acting on the patient's behalf.[137] The privilege does not apply: (a) in a suit by the patient against the doctor; (b) when the patient has consented in writing to disclosure; (c) in a suit to collect for medical services rendered; (d) in a suit or proceeding to collect damages for any physical or mental condition of the patient; (e) in disciplinary proceedings against the doctor; (f) in a suit affecting the parent-child relationship; (g) in an involuntary commitment proceeding; or (h) in a proceeding relating to neglect or abuse of an institutional resident.[138]

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130. *See id.* 504(b).

131. *See* Jampole v. Touchy, 673 S.W.2d 569, 574 (Tex. 1984); *see also* TEX. R. EVID. 507.

132. *See* Jampole v. Touchy, 673 S.W.2d 569, 574 (Tex. 1984).

133. *See* Automatic Drilling Mach., Inc. v. Miller, 515 S.W.2d 256, 259-60 (Tex. 1974).

134. *See* Jampole v. Touchy, 673 S.W.2d 569, 574-75 (Tex. 1984); Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 278 (Tex. Civ. App.—Texarkana 1978, no writ).

135. *See* TEX. R. EVID. 509(b).

136. *See id.* 509(a).

137. *See id.* 509(c).

138. *See id.* 509(d).

e. Psychotherapist-Patient Privilege

The psychotherapist-patient privilege applies to confidential communications between a patient and a mental health care "professional."[139] "Professional" includes physicians, persons licensed or certified in mental health care, drug counselors, or anyone believed to be one of the preceding by the patient.[140] This privilege cannot be used offensively to shield discovery of information that relates to a claim or defense asserted by the party.[141] The privilege may be claimed by the patient, the patient's representative, or the mental health care professional.[142] The privilege does not apply: (a) in a suit by the patient against the professional; (b) if the patient waives the privilege in writing; (c) in a suit to collect for professional services rendered; (d) when the patient communicates with a professional pursuant to a court-ordered examination after being warned no privilege will apply; (e) in a suit where a party's claim or defense relies on the patient's physical, mental, or emotional condition; (f) in a suit affecting the parent-child relationship; or (g) in a proceeding relating to neglect or abuse of an institutional resident.[143] The exceptions found in Rule 510 of the Texas Rules of Evidence have been held to expand the narrower statutory exceptions found in article 5561h of the Texas Revised Civil Statutes.[144]

f. Other Privileges

A statute restricting, but not prohibiting, disclosure will not support a claim of privilege by one who has the authority to request disclosure.[145] Similarly, a statutory privilege prohibiting disclosure except as required by law may be overcome by an order compelling discovery.[146] Medical committee investigative records are protected; however, ordinary business records relating to a privileged investiga-

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139. *See* TEX. R. EVID. 510(b); *see also Ex parte* Abell, 613 S.W.2d 255, 258 (Tex. 1981).

140. *See* TEX. R. EVID. 510(a).

141. *See* Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 107 (Tex. 1985); Wimberly Resorts Property, Inc. v. Pfeuffer, 691 S.W.2d 27, 29 (Tex. App.—Austin 1985, no writ).

142. *See* TEX. R. EVID. 510(c).

143. *See id.* 510(d).

144. *See* Wimberly Resorts Property, Inc. v. Pfeuffer, 691 S.W.2d 27, 29 (Tex. App.—Austin 1985, no writ).

145. *See* Martinez v. Rutledge, 592 S.W.2d 398, 399 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (federal hospital records).

146. *See* Bearden v. Boone, 693 S.W.2d 25, 27 (Tex. App.—Amarillo 1985, no writ) (private investigator statute).

tion do not fall within this privilege.[147] The Fifth Amendment privilege against self-incrimination may be invoked in appropriate cases, but it will not bar production of incriminating documents prepared by others or business records voluntarily created.[148] Finally, the privilege relied upon must be invoked as to each specific question and document.[149]

VI. ASSERTING PRIVILEGES

Absent a valid objection, requested information is discoverable.[150] It naturally follows then that the burden is on the party resisting discovery to come forward and show evidence that the particular information is not subject to discovery, due to confidentiality, privilege, or irrelevance.[151] In *Peeples v. Fourth Supreme Judicial District*,[152] the Texas Supreme Court held:

> [A]ny party who seeks to exclude documents, records or other matters from the discovery process has the affirmative duty to specifically plead the particular privilege or immunity claimed and to request a hearing on his motion. The trial court should then determine whether an *in camera* inspection is necessary. If such inspection is ordered by the trial court, those materials for which the inspection is sought must be segregated and produced to the court. Failure to follow the above procedure constitutes a waiver of any complaint of the trial court's action.[153]

The party resisting production must inform the court of the specific ground relied upon for resisting the discovery of each item—*e.g.*, "work product doctrine," "attorney-client privilege," "not reasonably calculated to lead to the discovery of admissible evidence." Indeed, it would be difficult, if not impossible, for a court to intelligently determine discoverability if the party resisting discovery had not informed the court of the basis for not producing a particular document or other information. The court should not be put in the position of

147. *See* Jordan v. Court of Appeals, 701 S.W.2d 644, 647-48 (Tex. 1985).

148. *See* Sinclair v. Savings & Loan Comm'r, 696 S.W.2d 142, 147-50 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); Wielgosz v. Millard, 679 S.W.2d 163, 166-67 (Tex. App.—Houston [14th Dist.] 1984, no writ). *But see* Smith v. White, 695 S.W.2d 195, 197 (Tex. App.—Houston [1st Dist.] 1985, no writ).

149. *See* Sinclair v. Savings & Loan Comm'r, 696 S.W.2d 142, 147 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (fifth amendment privilege).

150. *See* Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984).

151. *See* Giffin v. Smith, 688 S.W.2d 112, 114 (Tex. 1985).

152. 701 S.W.2d 635 (Tex. 1985).

153. *Id.* at 637.

having to guess the basis for resisting discovery and then determine the merit of the presumed objection. To facilitate an *in camera* inspection, it is likewise incumbent upon the party resisting discovery to identify the grounds relied upon for the nonproduction of each document (or any portion thereof), before the court can even begin to make its determination as to whether or not such grounds should be sustained.

VII. DEFEATING PRIVILEGES

A. *Failure to Properly Assert the Privilege*

Rules 167, 168, and 169 specify deadlines for responding to discovery requests and for raising any objections to such requests. The Rules also allow for extensions of time, if the extension is timely requested. If no response, objection, or motion for extension of time is filed, all objections are waived.[154] The rules and case law clearly set both time and procedure requirements for claiming and establishing privileges or exemptions. If the party resisting discovery fails to meet *each* requirement, the broad policy favoring discovery mandates that discovery must be allowed.

The precise holding in *Peeples* was that a party who failed to accomplish *each* of the specific steps could not complain if the trial court ordered production.[155] The Texas Supreme Court did not reach the related question of whether it would be error for the trial court *not* to order production when the resisting party fails on one or more of the steps. The court's reasoning in *Peeples* and *Giffin*, in placing the burden squarely on the resisting party to prove an exemption from discovery,[156] supports the conclusion that failing to order production in those circumstances would be error. A party seeking discovery can defeat a claim of privilege by showing that the party resisting discovery: (a) failed to object within the time allowed; (b) failed to specifically plead the privilege or immunity claimed; (c) failed to request a

154. *See* Laycox v. Jaroma, Inc., 709 S.W.2d 2, 3 (Tex. App.—Corpus Christi 1986, no writ); Cantu-Johnston Pools, Inc. v. Solis, 705 S.W.2d 299, 300 (Tex. App.—San Antonio 1986, no writ).

155. *See* Peeples v. Fourth Supreme Judicial Dist., 701 S.W.2d 635, 637 (Tex. 1985).

156. *Compare* Peeples v. Fourth Supreme Judicial District, 701 S.W.2d 635, 637 (Tex. 1985) (procedural requirements set out in detail) *with* Giffin v. Smith, 688 S.W.2d 112, 114 (Tex. 1985) (burden on party asserting privilege to produce evidence in support of claimed privilege).

hearing on the claimed privilege (laying behind the log until the other party seeks a hearing on sanctions should not suffice); (d) failed to segregate those materials for which a privilege is claimed and produce them to the court if an *in camera* inspection is ordered; (e) failed to present *evidence* (not just argument) supporting the existence of the privilege; or (f) failed to rebut waiver.

B. *Waiver of the Privilege*

Voluntary disclosure of privileged material waives the privilege. If information has been disclosed to a third party, the party asserting the privilege has the burden of proving no waiver.[157] A party cannot pick and choose to whom it will disclose information, and disclosure to one person may waive any claim of privilege as to all.[158] Waiver may occur through inadvertent disclosure, but some courts suggest that evidence of mistake or inadvertence would revive the privilege.[159] Compelled disclosure does not waive the privilege.[160]

C. *Rebutting Evidence of Privilege*

Even if the party resisting discovery clears all the *Peeples* hurdles and produces evidence of both privilege and non-waiver, the claimed privilege may still be defeated by evidence rebutting any element. If conflicting evidence is presented, the trial court's decision will be deemed conclusive.[161]

D. *In Camera Inspection*

Of course, after the documents have been produced to the court and after the evidence has been heard, the court may then make its *in camera* inspection. The party seeking the discovery should always be able to argue that the failure of the party resisting discovery to meet

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157. *See* Jordan v. Fourth Supreme Judicial Dist., 701 S.W.2d 644, 649 (Tex. 1985).

158. *See* Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. App.—El Paso 1985, no writ).

159. *See* Fuller v. Preston State Bank, 667 S.W.2d 214, 220 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); *see also* Santa Rosa Medical Center v. Spears, 709 S.W.2d 720, 723 (Tex. App.—San Antonio 1986, no writ).

160. *See* Atchison, T. & S. F. Ry. v. Kirk, 705 S.W.2d 829, 833 (Tex. App.—Eastland 1986), *overruled in part on other grounds sub. nom.*, Stringer v. Eleventh Court of Appeals, 29 Tex. Sup. Ct. J. 502 (July 2, 1986).

161. *See* Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 773 (Tex. App.—El Paso 1985, no writ).

any one of the requirements of *Peeples* or *Giffin* should relieve the judge of the necessity to inspect the documents and that they should simply be handed over.

VIII. SANCTIONS

A. *Sanctions Under Rule 215 - Deterring Abuse of Discovery*

Deterrence of future discovery abuses by the party involved *and* by others is expressly recognized as a proper purpose of sanctions.[162] Rule 215 has revolutionized the discovery process. As stated by one Texas justice:

> In recent years, a new concept of the office of sanctions has clearly emerged in answer to new challenges facing the Texas judicial system. Through decisions and rule changes, our courts have recognized that discovery sanctions must do more than just obtain compliance of the recalcitrant party. The most important of the newly-embraced purposes is deterrence of future violations. Moreover, courts have held that sanctions are properly used to insure that the abuser does not profit by his wrong, and that his adversary does not suffer by it. The sanction power may now also be used to protect an innocent party from an unreasonable burden and expense caused by misuse of discovery. Finally, prevention of needless delay and consumption of court time has been approved as a legitimate sanction goal.[163]

This language reinforced the position taken by other justices after the 1981 revisions which strengthened sanctions.[164]

B. *Procedure for Sanctions*

Probably the most important aspect of the new sanctions rule is that a motion to compel and an order compelling discovery are no longer necessary in all cases as prerequisites to obtaining sanctions.[165]

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162. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985).

163. Kilgarlin & Jackson, *Sanctions for Discovery Abuse under New Rule 215*, 15 ST. MARY'S L.J. 767, 774-75 (1984) (footnotes omitted).

164. *See* Pope & McConnico, *Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 482-83 (1980); Spears, *The Rules of Civil Procedure: 1981 Changes in Pre-Trial Discovery*, 12 ST. MARY'S L.J. 633, 651 (1981). Chief Justice Pope pinpointed the real issue as being who will bear the cost—the abuser or the abusee. *See* Pope & McConnico, *Practicing Law with the 1981 Texas Rules*, 32 BAYLOR L. REV. 457, 482-83 (1980).

165. *See* TEX. R. CIV. P. 215(1)(b); *see also* Lewis v. Illinois Employers Ins. Co., 590 S.W.2d 119, 120 (Tex. 1979) (per curiam); Notgrass v. Equilease Corp., 666 S.W.2d 635, 638 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Fears v. Mechanical & Indus. Tech., Inc., 654 S.W.2d 524, 528-29 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

In the case of interrogatories or a request for production of documents, all one needs to do is file a motion for sanctions seeking expenses, attorney's fees, and one or more of the listed sanctions contained in Rule 215(2)(b).

Likewise, there is no longer the need, under Rule 169, to file a motion to deem matters admitted if a party fails to respond to requests for admissions within thirty days. Rule 169 deems the matter admitted as a matter of law.[166] To avoid automatic deeming, a motion to extend time must be filed *before* the answer date. After the deadline, a motion to "undeem" must be filed showing an excuse for missing the deadline.[167] If an answer is evasive or incomplete, then a motion for sanctions will have to be filed pursuant to Rule 215(4) deeming the matter admitted. Rule 215(4) treats an incomplete or evasive answer as a failure to answer, but a motion will still have to be filed, and a court will have to deem the answer incomplete.[168]

C. *Particular Sanctions*

Various sanctions are included in Rule 215(2), but the most severe are that pleadings can be stricken, a default judgment can be rendered, and all or any portion of the expenses of discovery and taxable court costs can be charged against both the disobedient party and the attorneys advising such party.[169]

Rule 215(2)(b) authorizes the trial court to make such orders "as are just." The non-exhaustive list of sanctions set forth in Rule 215 includes the following: (a) disallowing further discovery, in whole or in part; (b) charging expenses of discovery and court costs against the disobedient party and his attorney; (c) deeming certain facts established; (d) refusing to allow the disobedient party to support or oppose certain claims or defenses; (e) refusing to allow certain evidence at trial; (f) striking pleadings; (g) staying further proceedings until an order is complied with; (h) dismissing with or without prejudice all or part of a party's cause of action; (i) rendering a default judgment; (j) treating the failure to comply as contempt; and (k) ordering the party or attorney to pay reasonable expenses, including attorney's fees,

166. *See* Cantu-Johnston Pools, Inc. v. Solis, 705 S.W.2d 299, 300 (Tex. App.—San Antonio 1986, no writ).

167. *See id.*

168. *See* TEX. R. CIV. P. 215(4).

169. *See id.* 215(2).

caused by the failure to comply.[170]

The sanctions allowed by Rule 215 are flexible and cumulative, and are not limited to those expressly listed.[171]

Attorney's fees are expressly authorized,[172] and the amount allowed is in the trial court's discretion.[173] A party who successfully presents a motion to compel is automatically entitled to fees, unless the court finds that "opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."[174] The court *may* award fees against an unsuccessful movant.[175]

A court may preclude evidence from an undisclosed expert.[176] A court may also preclude testimony of an undisclosed non-expert witness.[177]

Numerous cases support striking pleadings or rendering a default judgment.[178] A party seeking discovery is not required to seek lesser sanctions before moving for a default judgment or an order striking the opponent's pleadings.[179] When moving for or imposing sanctions, it bears noting that even a hurricane has been held no excuse for non-

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170. *See id.* 215(2)(b).

171. *See* City of Houston v. Arney, 680 S.W.2d 867, 871 (Tex. App.—Houston [1st Dist.] 1984, no writ) (quoting *Bottinelli v. Robinson*, 594 S.W.2d 112, 117 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)); Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 277 (Tex. Civ. App.—Texarkana 1978, no writ).

172. *See* Lindley v. Flores, 672 S.W.2d 612, 614 (Tex. App.—Corpus Christi 1984, no writ); Waguespack v. Halipoto, 633 S.W.2d 628, 633 (Tex. App.—Houston [14th Dist.] 1982, writ dism'd).

173. *See* Brantley v. Etter, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam); *see also* Bosnich v. National Cellulose Corp., 676 S.W.2d 446, 447-48 (Tex. App.—Houston [1st Dist.] 1984, no writ) (affirming order striking pleadings, in part, for failure to pay fees awarded as sanctions).

174. *See* TEX. R. CIV. P. 215(1)(d).

175. *See id.*

176. *See* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 442-43 (Tex. 1984); Trubell v. Patten, 582 S.W.2d 606, 611 (Tex. Civ. App.—Tyler 1979, no writ).

177. *See, e.g.*, Morrow v. H.E.B., Inc., 29 Tex. Sup. Ct. J. 546, 546-47 (July 16, 1986) (supreme court held that defendant's failure to supplement interrogatories concerning location of witnesses prohibited them from using witness at trial; exclusion of testimony held automatic upon failure to supplement); Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243, 246-47 (Tex. 1985); Texas Employer's Ins. Ass'n v. Meyer, 620 S.W.2d 179, 180 (Tex. Civ. App.—Waco 1981, no writ); Hochheim Prairie Farm Mut. Ins. v. Burnett, 698 S.W.2d 271, 277 (Tex. App.—Fort Worth 1985, no writ).

178. *See* Jarrett v. Warhola, 695 S.W.2d 8, 9-10 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd).

179. City of Houston v. Arney, 680 S.W.2d 871, 872 (Tex. App.—Houston [1st Dist.] 1984, no writ).

compliance.[180] Certainly then lesser excuses should not prevail.

Pleadings have been struck or default judgments have been rendered for the following bad acts or patterns of misconduct:

(a) failing to attend depositions or produce deponents, to inform opposing counsel in advance of non-appearance, and to attend sanctions hearing;[181]
(b) failing to timely or completely answer interrogatories, to supplement answers, and to pay attorneys' fees, all despite court orders and without any request for extension;[182]
(c) failure to appear twice at scheduled depositions;[183]
(d) failure to timely answer interrogatories after court order;[184]
(e) late filing of interrogatory answers, failure to timely respond to request production despite court order, failure to pay attorneys' fees, and failure to appear at hearing;[185]
(f) failure to produce all requested documents, despite court orders;[186] and
(g) failure to answer interrogatories relating to significant tangible evidence, despite court orders.[187]

Because a court has discretion to impose such harsh sanctions, it implicitly has the power to impose creative but less severe penalties, such as payment of cumulative penalties for each day of non-compli-

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180. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985).

181. *See id.*

182. *See* Jarrett v. Warhola, 695 S.W.2d 8, 9-10 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd); Bosnich v. Nat'l Cellulose Corp., 676 S.W.2d 446, 447 (Tex. App.—Houston [1st Dist.] 1984, no writ).

183. *See* McLendon v. Farmers Texas County Mut. Ins. Co., 682 S.W.2d 722, 725 (Tex. App.—Fort Worth 1985, no writ).

184. *See* City of Houston v. Arney, 680 S.W.2d 867, 871-73 (Tex. App.—Houston [1st Dist.] 1984, no writ); *see also* Notgrass v. Equilease Corp., 666 S.W.2d 635, 638-39 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Alexander v. Barlow, 671 S.W.2d 531, 534 (Tex. App.—Houston [1st Dist.] 1983, no writ); Fears v. Mechanical & Indus. Tech., Inc., 654 S.W.2d 524, 528-29 (Tex. App.—Tyler 1983, writ ref'd n.r.e.); Nutting v. National Homes Mfg. Co., 639 S.W.2d 721, 723 (Tex. App.—Austin 1982, no writ); Bass v. Duffey, 620 S.W.2d 847, 849-50 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Rainwater v. Haddox, 544 S.W.2d 729, 732 (Tex. Civ. App.—Amarillo 1976, no writ).

185. *See* Waguespack v. Halipoto, 633 S.W.2d 628, 630-33 (Tex. App.—Houston [14th Dist.] 1982, writ dism'd).

186. *See* Bottinelli v. Robinson, 594 S.W.2d 112, 115 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); Martinez v. Rutledge, 592 S.W.2d 398, 399-400 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

187. *See* Southern Pac. Transp. Co. v. Evans, 590 S.W.2d 515, 518 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

ance.[188] A court may not, however, order discovery of irrelevant material as a sanction for foot-dragging on relevant material.[189] One court of appeals has held that if the trial court elects to render a default judgment as a sanction, the defaulted party is still entitled to ten days notice and a jury trial on any unliquidated damages.[190]

D. *Standards for Appellate Review of Sanctions Orders*

The choice of sanctions to be imposed by the trial court is addressed to its sound discretion and will not be set aside unless the court's decision was arbitrary or unreasonable, which is decided under the particular facts of each case.[191] Sanctions are expressly reviewable on appeal after final judgment.[192] Unless exceptional circumstances exist, mandamus will be improper.[193] Circumstances justifying interlocutory mandamus relief might be present if the trial court compelled disclosure of privileged materials,[194] or if discovery of relevant material is broadly denied.[195] Neither of these situations, however, necessarily involves sanctions, as such.

On appeal or mandamus, sanctions can be set aside *only* upon a showing of clear abuse of discretion.[196] In other words, the trial court's action must be arbitrary and capricious, and without reference to controlling legal principles.[197] The trial court has very broad discretion initially, and the appellate courts are narrowly constrained in reviewing exercise of that discretion.[198] Without evidence or other sufficient record to show that materials were not discoverable, an appellate court cannot find an abuse of discretion by the trial court in

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188. *See* Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 277 (Tex. Civ. App.—Texarkana 1978, no writ).

189. *See* General Motors Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983).

190. *See* Chemical Exch. Indus. v. Vasquez, 709 S.W.2d 257, 260 (Tex. App.—Houston [14th Dist.] 1986, writ granted).

191. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985).

192. TEX. R. CIV. P. 215(1)(d), (2)(b)(8), and (3).

193. *See* Street v. Second Court of Appeals, 29 Tex. Sup. Ct. J. 456, 456-57 (June 25, 1986).

194. *See id.* at 457 (citing *Smith v. White*, 695 S.W.2d 295 (Tex. App.—Houston [1st Dist.] 1985, no writ)).

195. *See* Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984).

196. *See* Evans v. State Farm Mut. Auto Ins. Co., 685 S.W.2d 765, 768 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

197. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985).

198. *See* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917-18 (Tex. 1985).

ordering discovery.[199]

IX. CONCLUSION

In summary, the purpose of litigation is to find the truth and resolve disputes in light of what the truth reveals. The sole legitimate purpose of discovery is to find such truth. To this end, parties are entitled to broad discovery in hopes that all relevant information will be brought to the attention of the fact finder. The truth seeking function of litigation vitally depends on how successfully this discovery process provides a complete and accurate picture.

In the trial court, sanctions should be readily applied to goad or punish those who go too far, or not far enough, in seeking out and providing for discovery. Either abuse causes undue delay and expense, and frustrates the ultimate good of litigation. In making judgment calls on discoverability, courts should not only allow broad discovery, but should narrowly construe exemptions and privileges, all with an eye toward snaring relevant evidence.

Finally, in both discovery and sanctions, the trial court's discretion is very broad; the appellate standards will, in most cases, affirm that discretion. The path for effective discovery is laid. It is now up to the trial courts and counsel to follow it.

199. *See* Ward v. Cornyn, 700 S.W.2d 281, 282 (Tex. App.—San Antonio 1985, no writ); Harris Data Communications, Inc. v. Dellana, 680 S.W.2d 641, 642 (Tex. App.—Austin 1984, no writ).