CATCHING THE LOOPHOLE IN TEXAS EXPERT DISCOVERY

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I. INTRODUCTION

On September 14, 2010, the Texas Supreme Court appointed the Supreme Court Rules Advisory Committee to examine whether the recently adopted amendments concerning federal discovery, namely Federal Rule of Civil Procedure 26, should be incorporated in some fashion as part of the Texas Rules of Civil Procedure.[1]

This Comment demonstrates a prime example of the ambiguities that exist under Texas's present expert-discovery structure. The ambiguity, unresolved and largely unrecognized, flows from the combined effect of two Texas Supreme Court cases which have created a potential conflict regarding expert discovery.[2] In *Axelson*, the Texas Supreme Court held that a party's employee may be forced to divulge expert opinions to an opponent.[3] Subsequently, in *In re Christus Spohn*, the Texas Supreme Court held that anything provided to a testifying expert is discoverable.[4] Does this create a conduit for one party to discover anything provided to an opposing party's employee by arguing it to be relevant to that employee's expert opinion, even if it would otherwise be protected as work product? This and other ambiguities regarding expert discovery in Texas will be resolved by the adoption of the model Federal Rule 26.[5]

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[1] Memorandum from the Discovery Rules Subcomm. to the Supreme Court Rules Advisory Comm. 1, 3 *Dec. 1, 2010), *available at* http://www.supreme.courts.state.tx.us/rules/pdf/SCAC_FRCP26_subcommittee_report.pdf (regarding amendments to Federal Rule of Civil Procedure 26).

[2] *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 439 (Tex. 2007); Axelson, Inc. v. McIlhaney, 798 S.W.2d 550 (Tex. 1990).

[3] *Axelson*, 798 S.W.2d at 555

[4] *In re Christus Spohn*, 222 S.W.3d at 445.

[5] *See* FED. R. CIV. P. 26 advisory committee's note (2010 Amendments). Under the amended

Pretrial discovery has become one of the primary battles in the adversarial process of civil litigation, and discovery privileges are among the principal strategic weapons in these battles.[6] Discovery disputes provide ammunition for numerous appellate decisions, including several Texas Supreme Court opinions.[7] Because litigators rely on discovery privileges to prevent their adversaries from learning information that might prove helpful to their case,[8] the discoverability of privileged information has been, and will continue to be, among the leading discovery battles.

The potential interplay between two Texas Supreme Court cases[9] addressing testifying experts, consulting experts, and work product privilege has been largely unrecognized. When read in conjunction, these two cases do not articulate a clear distinction as to what is discoverable and what is not discoverable regarding testifying experts.[10] A combined reading of these two Texas Supreme Court cases opens the door to the possibility that one litigant could designate an opposing party's employee as a non-retained testifying expert and suddenly access anything otherwise protected by work product privilege.[11]

The following hypothetical helps raise the issue. Suppose there is a lawsuit stemming out of some aspect of business operations, and the vice president of operations is designated by the opposing party to be called adversely as a testifying expert.[12] The vice president will not be considered a consulting expert because he was neither hired in anticipation of litigation nor after the occurrence of events giving rise to the litigation. The knowledge and involvement of the vice president in the facts of the case

Federal Rule 26, a work product privilege is extended to the work a testifying expert does to prepare his testimony. *Id.*

[6] Alex Wilson Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 TEX. L. REV. 781, 782 (1992).

[7] *See, e.g.*, *In re Christus Spohn*, 222 S.W.3d at 439; Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 474 (Tex. 1997); Owens-Corning Fiberglas Corp. v. Caldwell, 818 S.W.2d 749, 750–51 (Tex. 1991); *Axelson*, 798 S.W.2d at 555; Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).

[8] *See* Albright, *supra* note 6, at 782.

[9] *See In re Christus Spohn*, 222 S.W.3d at 445; *Axelson*, 798 S.W.2d at 555.

[10] *See supra* note 9.

[11] *See supra* note 9.

[12] For an example of a party's expert being designated adversely by the opponent as an expert, *see* Hooper v. Chittaluru, 222 S.W.3d 103, 108 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (holding that a party may not be prevented from calling an expert witness to testify solely on the basis that the expert had originally been retained as an expert by the opposing party).

will be discoverable because the lawsuit arose out of performance of his job duties.[13] Assume that the lawsuit concerns the reasonableness of operations performed under the direction of the vice president. Whether he wants to express his opinions or not, he certainly has opinions about the reasonableness of operations and whether they were in conformity with industry standards. (To claim to have no opinion about the reasonableness of operations under his directions is not feasible; an opponent would be delighted with that answer.) The opponent, having designated the vice president as an adverse testifying expert and seeking to inquire into his expert opinions, inquires if the vice president has reviewed documents that in some way relate to that topic upon which he has expert opinions. Can the opponent now discover documents or information made available to the vice president that would otherwise be protected as work product?

The ambiguities that exist under Texas's current expert discovery structure will be the focus of this Comment. Specifically, this Comment will focus on the question of whether designating an opposing party's employee as a non-retained testifying expert becomes a conduit to discover litigation-related documents provided to an opposing party's employee, even if those would otherwise be protected as work product. Part Two of this Comment will address the scope of discovery. Part Three will discuss what constitutes work product as well as provide relevant background information. Part Four will address Texas case law that has created this ambiguity regarding expert discovery. Part Five will look at examples of difficulties posed by the current law. Part Six will examine both parties' arguments addressing what is discoverable when an employee is designated as a non-retained testifying expert to be called adversely. Part Seven will explore possible solutions to preserve privilege from expert discovery including: (1) the *State Farm* interpretation; (2) the role of attorney-client privilege; and (3) a modification of Texas rules similar to the recent amendment of Federal Rule of Civil Procedure 26.

II. SCOPE OF DISCOVERY

In Texas state courts, the scope of discovery is governed by Texas Rule of Civil Procedure 192.3.[14] Specifically addressing discovery relating to experts, this rule provides:

[13] *See Axelson*, 798 S.W.2d at 554 (holding that the factual information gained by virtue of his involvement relating to the events giving rise to the litigation is discoverable).

[14] TEX. R. CIV. P. 192.3.

> A party may discover the following information regarding a testifying expert . . . (3) the facts *known* by the expert that *relate* to or form the basis of the expert's mental impressions and *opinions formed* or made in connection with the case in which discovery is sought, *regardless of when and how the factual information was acquired*; . . . (6) all documents, tangible things, reports, models, or data compilations that have been provided to, *reviewed* by or *prepared* by or for the expert *in anticipation* of a testifying expert's *testimony* . . . .[15]

Notably, the rule allows discovery of documents or tangible things reviewed or prepared in anticipation of an expert's testimony, not in anticipation of litigation.[16]

Because an expert's testimony has vast potential for influencing jurors, the expert-disclosure rule is exceptionally broad.[17] This is because an expert witness is perceived as "an objective authority figure more knowledgeable and credible than the typical lay witness,"[18] and is "generally unfettered by first-hand knowledge requirements that constrain the ordinary witness."[19]

III. THE WORK PRODUCT DOCTRINE

A. What Constitutes Work Product?

"Work product" is defined as "material prepared or mental impression developed in anticipation of litigation" or "a communication made in anticipation of litigation or for trial between a party" and other listed privies.[20] Because materials prepared, mental impressions developed, and communications made in anticipation of litigation are considered work

[15] *Id.* R. 192.3(e) (emphasis added).

[16] *See id.*

[17] *See In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 440 (Tex. 2007) (concluding that because of the importance of expert testimony, the jury should be aware of documents and tangible things provided to the expert that might have influenced the expert's opinion so long as the expert intends to testify).

[18] *Id.*; *see* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 553 (Tex. 1995).

[19] *In re Christus Spohn*, 222 S.W.3d. at 440.

[20] TEX. R. CIV. P. 192.5(a).

product[21] and are undiscoverable subject to exceptions,[22] the threshold question is: were the materials prepared, mental impressions developed, or communications made in anticipation of litigation?

The most commonly cited exception making work product discoverable requires a showing of substantial need and undue hardship.[23] Work product, other than core work product, may be discovered upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[24] This Comment, however, focuses on the exception articulated by Rule 192.5(c)(1), which specifically excludes "information discoverable under Rule 192.3 concerning experts"[25] from work product privilege.[26]

B. The Building Blocks

To fully understand the scope of this Comment it is essential to have a basic understanding of the difference between a consulting expert and a testifying expert, and the rules of civil procedure relating to each. Rule 192.3(e) provides the scope of discovery regarding testifying and consulting experts.[27] This rule provides, "The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable."[28] However, a party may discover information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert.[29] A "testifying expert" is defined as "an expert who may be called to testify as an expert witness at trial."[30] A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in

[21] *Id.* R. 192.5(b)(1).
[22] *Id.* R. 192.5(c).
[23] *See id.* R. 192.5(b)(2).
[24] *Id.*
[25] *Id.* R. 192.5(c)(1).
[26] *Id.* R. 192.5(c).
[27] *See id.* R. 192.3(e).
[28] *Id.*
[29] *Id.*
[30] *Id.* R. 192.7(c).

preparation for trial, but who is not a testifying expert."[31] The consulting expert exemption protects the identity, mental impressions, and opinions of consulting-only experts, but not the facts.[32]

The question then becomes, when can an employee be protected as a consulting expert? The Texas Rules of Civil Procedure provide requirements that a consulting-only expert must meet.[33] An employee may be specially employed as a consulting-only expert.[34] Nevertheless, not all employees necessarily qualify as "consulting-only" experts.[35] The Texas Supreme Court in *Axelson* recognizes that "[a]n employee who was employed in an area that becomes the subject of litigation can never qualify as a consulting-only expert because the employment was not in anticipation of litigation."[36] On the other hand, an employee who was not employed in an area that becomes the subject of litigation and is reassigned specifically to assist the employer in anticipation of litigation arising out of the incident or in preparation for trial may qualify as a "consulting-only" expert.[37]

IV. THE JUXTAPOSITION THAT CREATES THE AMBIGUITY

When the Texas Supreme Court *Axelson* case is read in conjunction with the Court's later *In re Christus Spohn* case, an unresolved question regarding expert discovery appears—whether the possibility exists for one party to designate an opposing party's employee as a non-retained testifying expert and suddenly access documents and information which would otherwise be protected by work product privilege.[38] Have *Axelson* and *In re Christus Spohn* created a discovery opportunity ripe for exploitation?

The work product doctrine, announced by the United States Supreme Court over fifty years ago in *Hickman v. Taylor* and which the Texas Supreme Court has held to be essential, generally shelters from involuntary

[31] *Id.* R. 192.7(d).

[32] Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 554 & n.8 (Tex. 1990) ("The consulting expert exemption has its genesis in the attorney work product privilege, which protects only the mental impressions, opinions, and conclusions of the lawyer and not the facts.").

[33] *See* TEX. R. CIV. P. 192.7(d).

[34] *See Axelson*, 798 S.W.2d at 555; *see also* Barker v. Dunham, 551 S.W.2d 41, 43–44 (Tex. 1977), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992).

[35] *See Axelson*, 798 S.W.2d at 555.

[36] *Id.*

[37] *See id.*

[38] *See In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 445 (Tex. 2007); *Axelson*, 798 S.W.2d at 555.

disclosure materials such as "specific documents, reports, communications, memoranda, mental impressions, conclusions, opinions, legal theories, and other materials prepared and assembled for litigation and in actual anticipation of litigation or for trial."[39]

Axelson addresses the discoverability of expert opinions of a party's employee.[40] An employee who possesses first-hand knowledge of relevant facts and also serves as a "consulting-only" expert is referred to as a "dual-capacity" witness.[41] Both the factual knowledge and opinions acquired by an individual who is an expert and an active participant in the events material to the lawsuit are discoverable.[42] This information is not shielded from discovery by merely changing the designation of a person with knowledge of relevant facts to a "consulting-only" expert.[43] The consulting expert exemption protects the identity, mental impressions, and opinions of a "consulting-only" expert, but not the facts.[44] However, persons who gain factual information by virtue of their pre-existing employment and resulting involvement in the incident or transaction giving rise to the litigation do not qualify as "consulting-only" experts because the consultation is not their only source of information.[45] An employee who was employed in an area that becomes the subject of litigation can never qualify as a "consulting-only" expert because the employment was not in anticipation of litigation.[46] The court in *Axelson* held that expert opinions of a party's employee are discoverable as expert opinions.[47] Therefore, if an employee does not qualify as a "consulting-only" expert, and the employee with expert knowledge is designated by the other side as a non-retained testifying expert to be called adversely, what is discoverable?

Subsequent to *Axelson*, in an issue of first impression, the Texas Supreme Court addressed the tension between the "snap-back" provision that protects privileged documents and the expert disclosure requirements.[48]

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[39] 329 U.S. 495 (1947), *superseded by statute*, FED. R. CIV. P. 26(b)(3); *see also* Albright, *supra* note 6, at 828–29.

[40] *See* 798 S.W.2d at 555.

[41] *Id.* at 554.

[42] *Id.*

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.* at 555.

[47] *See id.* at 554–55.

[48] *See In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 439 (Tex. 2007).

In addition to documents "prepared by or for the expert," the rule mandates discovery of documents "that have been provided to, [or] reviewed by" a testifying expert.[49] Texas Rule of Civil Procedure 192.5(c)(1) specifically states that work product loses its protected status when it is provided to a testifying expert.[50] This rule provides that even if made or prepared in anticipation of litigation or for trial, the following is not protected from discovery: information discoverable under Rule 192.3 concerning experts.[51] In resolving the tension between the "snap-back" provision and the expert disclosure requirement, the court considered the interests the rules were designed to protect.[52] In considering these interests, the court remarked that by permitting the recovery of documents inadvertently produced to the opposing side, the rule preserves the important interests that the work product doctrine was designed to protect, while at the same time visiting no harm upon the recipient for having to return documents to which it was not entitled in the first place.[53] Under Rule 193.3(d), the production of documents without the intent to waive a claim of privilege does not waive the claim.[54] The concepts of waiver and the intent required to effect it, however, do not appear in the testifying-expert disclosure rule.[55] The court noted that Rule 192.5, which governs work product, speaks not in terms of waiver but rather states that documents and tangible things provided to a testifying expert under Rule 192.3 "even if made or prepared in anticipation of litigation or for trial . . . *is not work product* protected from discovery."[56] Thus, the court concluded that, from the rule's plain language, documents and tangible things provided to a testifying expert lose their work product status irrespective of the intent that accompanied their production.[57] However, the court noted that only documents were at issue in this case, and voiced no opinion on whether information provided to an expert orally would be discoverable.[58]

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[49] TEX. R. CIV. P. 192.3(e)(6).

[50] *Id.* R. 192.5(c)(1).

[51] *Id.*

[52] *See In re Christus Spohn*, 222 S.W.3d at 439.

[53] *Id.*

[54] *Id.*

[55] *See id.*; *see* TEX. R. CIV. P. 192.5(c)(1).

[56] *See In re Christus Spohn*, 222 S.W.3d at 439; TEX. R. CIV. P. 192.3, 192.5.

[57] *In re Christus Spohn*, 222 S.W.3d at 439–40.

[58] *Id.* at 440 n.2 ("We note that only documents are at issue in this case. No discovery requests regarding whether the Hospital's counsel provided information to Menzies orally is

The ambiguity in Texas's current expert discovery structure exists as a result of two potentially conflicting rules—namely that: (1) expert opinions of a party's employee are discoverable by the opponent as expert opinions,[59] and (2) anything provided to a testifying expert is discoverable.[60] The combination of *Axelson* and *In re Christus Spohn* has blurred where the line is drawn regarding what is discoverable and what is not discoverable.[61] Does the work product privilege or the waiver of that privilege recognized in *In re Christus Spohn* apply when the employee has been involved in matters relating to the preparation of the case for trial but is also designated as a testifying expert by the litigation opponent? Can the unilateral expert designation by one party of an opponent's employee create a waiver of work product privilege and make discoverable all documents reviewed by the testifying expert? There is an obvious need for clarification as to whether anything provided to a party's own employee, who is designated by the other side as a non-retained testifying expert to be called adversely, loses its work product protection.

V. EXAMPLES OF DIFFICULTIES POSED BY THE CURRENT LAW

The current case law has not articulated how to distinguish between what is discoverable and what is not discoverable when the other side designates a non-retained testifying expert to be called adversely.[62] This section will explore how different considerations can lead to different results. Examples of difficulties regarding expert discovery posed by the current law include: (1) whether the distinction between what is and what is not discoverable is based on documents and facts, and, if so, how far that distinction extends;[63] (2) whether the distinction between what is and what is not discoverable is based on what has actually been relied upon (rather than simply reviewed by) the expert in forming his opinion;[64] (3) whether the distinction between what is and what is not discoverable is based on whether the designated expert is a party's own expert, an opposing party's

before us, and we voice no opinion on whether such discovery would be permitted.").

[59] *See* Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 555 (Tex. 1990).

[60] *See In re Christus Spohn*, 222 S.W.3d at 445.

[61] *See id.*; *Axelson*, 798 S.W.2d at 555.

[62] *See, e.g.*, *In re Christus Spohn*, 222 S.W.3d at 445; *Axelson*, 798 S.W.2d at 555.

[63] *See In re* State Farm Mut. Auto. Ins. Co., 100 S.W.3d 338, 343 (Tex. App.—San Antonio 2002, no pet.).

[64] *See* TEX. R. CIV. P. 192.3(e).

expert, or a neutral expert;[65] and (4) if a party de-designates its employee as a testifying expert, and the other side cross designates that employee as a testifying expert, what is discoverable?[66]

In *State Farm*, the appellate court distinguished between documents and facts and held that all underlying facts are discoverable, but as for documents, only those documents prepared or reviewed by an expert in anticipation of giving his testimony are discoverable.[67] Admittedly, this *State Farm* distinction between facts and documents does not fully effectuate the purpose of work product protection because it still allows discovery of documents provided to an employee during litigation, which might otherwise be covered by the work product privilege.[68] Nevertheless, it does utilize distinctions in the language of 192.3(e)(3) and 192.3(e)(6) to at least limit the extent of work product waiver.[69]

It is also possible that 192.3(e)(3) and 192.3(e)(6) can be read as drawing a distinction between what has been reviewed and relied upon in the formation of the expert opinion, as opposed to what has been reviewed with any relation to the lawsuit generally but not to an expert opinion specifically.[70] As one commentator notes, we have made a conscious decision to have an adversarial system, and forced disclosure of documents that do not form the basis of the employee's opinion would change our adversarial system into a non-adversarial system.[71]

Another consideration involves the interpretation of the decision by the court in *In re Christus Spohn*. Although the court reached the result that anything provided to a testifying expert is discoverable, the court dealt only with information provided by a party to that party's own testifying expert.[72] The court in that case had no reason to make a clear distinction between a party's own testifying expert and the designation of an opponent's employee as a non-retained testifying expert to be called adversely.[73]

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[65] *See In re Christus Spohn*, 222 S.W.3d at 439; Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 558–60 (Tex. 1990).

[66] *See supra* note 65.

[67] 100 S.W.3d at 343.

[68] *See id.*; TEX. R. CIV. P. 192.3(e)(6), 192.5(c)(1).

[69] *See In re State Farm*, 100 S.W.3d at 341–43; TEX. R. CIV. P. 192.3(e)(3), (6).

[70] *See* TEX. R. CIV. P. 192.3(e).

[71] *See* Albright, *supra* note 6, at 797.

[72] *See In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 439 (Tex. 2007).

[73] *See id.*

This leaves litigants wondering: is there a distinction as to what is discoverable and what is not discoverable based on whether the testifying expert is a party's own non-retained expert, or a non-retained testifying expert designated by the other side to be called adversely? Does the *In re Christus Spohn* rule of disclosure only apply when information is provided to a party's own testifying expert, and should there be a completely different rule if one side is designating the employee for opinion testimony and the other side is providing him with information? But this explanation can lead to an absurd result as well. Consider the following illustration: a personal injury litigant needs to designate a treating physician as a testifying expert, and the defense provides documents to that doctor to influence the doctor to testify contrary to the patient's position in the case. Does that mean this information is not discoverable? The obvious answer is no. This has to be discoverable. Rather than having a distinction as to what is discoverable and what is not discoverable depend on whether the expert is a party's own testifying expert versus a non-retained testifying expert to be called adversely, perhaps the court's rule of disclosure applies only to a neutral expert.

Suppose a party designates an employee as a testifying expert and provides information to the expert. This information is discoverable unless the party de-designates the employee as a testifying expert.[74] Texas courts have consistently held that a testifying expert may be de-designated as long as it is not part of a bargain between adversaries to suppress testimony or for some improper purpose.[75] If a party de-designates an employee as a testifying expert and the other side cross designates that employee as a testifying expert, can the other side now discover what would otherwise be protected by work product privilege? If the pronouncements of *In re Christus Spohn* are applied without limitation, it would seem that all information would be discoverable.[76] However, that would frustrate the purpose behind de-designating the employee, which is to maintain work product status of information provided to the employee expert.[77]

[74] *Id.* at 443.

[75] *See* Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 560 (Tex. 1990); *In re* State Farm Mut. Auto. Ins. Co., 100 S.W.3d 338, 340 (Tex. App.—San Antonio 2002, no pet).

[76] *See In re Christus Spohn*, 222 S.W.3d at 440–45.

[77] *See* Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 474 (Tex. 1997).

VI. ARGUMENT IN FAVOR OF ENDLESS DISCOVERY AND ARGUMENT IN FAVOR OF WORK PRODUCT PROTECTION

The work product doctrine has long been recognized as a valid resolution of the conflict between open discovery and the adversarial system's need for confidentiality.[78] The doctrine recognizes that while too little discovery clearly inhibits the search for truth, too much discovery will have a chilling effect and also hinder the search for truth.[79] With too much discovery the perceived advantages of thorough preparation decrease, and the incentives to thoroughly prepare decrease as well.[80] If the results of investigative efforts are routinely discovered, any harmful results discovered by a party will inevitably be used against that party.[81] Thus, when a party is planning to investigate circumstances that will likely lead to litigation, fear that the results may be discovered will compel a more cautious and less thorough effort than under rules protecting unqualified privacy.[82] The party may decide not to investigate the circumstances surrounding the dispute at all or limit the scope of the investigation.[83] Furthermore, parties may refrain from writing memos and reports that describe the events forming the basis of the dispute.[84] At the very least, harmful results of investigation are not likely to be reduced to written form, which is more easily discoverable than results existing only in recollections likely to dull over time.[85] Less than glowing evaluations and analyses of the facts will be chilled as well.[86] The work product doctrine involves a

[78] Albright, *supra* note 6, at 793.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See* Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 384 (1990) ("Just as too few songs would be written if there were no copyrights, too little legal information would be produced in the absence of the work product doctrine.").

[83] *See* Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 228 (remarking that lawyers may postpone their investigation to avoid turning results over to the opponent).

[84] *See* A. Harold Frost, *The Ascertainment of Truth by Discovery*, 28 F.R.D. 89, 95 (1960) ("If the physical evidence at the scene is damaging—don't take the picture. If the witness is obviously hostile—don't take the statement.").

[85] Albright, *supra* note 6, at 794.

[86] Hickman v. Taylor, 329 U.S. 495, 512–14 (1947), *superseded by statute*, FED. R. CIV. P. 26(b)(3) (discussing discovery privileges and how the concern of the new federal rules was to protect confidentiality); *see also id.* at 513 (arguing that such protection is necessary to maintain

balancing of the interests of open discovery and the adversary system.[87] It recognizes that all facts should be available to both sides but also demands that protection be given to trial preparation.[88]

Relying on *In re Christus Spohn*, the party who has designated the opposing party's employee as a non-retained testifying expert will argue that *that* employee has expert opinions, whether he wants to express them or not, that he has been designated as a testifying expert, that the opponent knew he had opinions when they chose to provide this "discoverable" information, and that presumably one of the reasons for providing information to the employee is to influence his opinions.[89] Either way, work product status is lost, and all is discoverable.[90] This argument seems to effectuate the ultimate purpose of discovery, which is to seek truth so that disputes may be decided by those facts revealed rather than concealed.[91] When a party designates the opponent's non-retained testifying expert to be called adversely, the party will also argue that information regarding an expert's opinions is discoverable regardless of how the information was acquired or whether such information would normally be subject to the work product privilege.[92]

The party whose employee has been designated by the other side as a non-retained testifying expert cannot argue that the employee is a "consulting-only" expert because the employee was employed in the area that has become the subject matter of litigation.[93] The argument will find its roots in the underlying policy behind the privilege and will be that work product privilege provides "a sphere of protection and privacy."[94] An employee who does not qualify as a consulting expert will be just a fact

the standards of the legal profession); *id.* at 516–17 (Jackson, J., concurring); Albright, *supra* note 6, at 794; Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 360–61 (arguing restricting the scope of discovery privileges would decrease pre-litigation investigation and the accuracy of case results).

[87] *See* Albright, *supra* note 6, at 794.

[88] *See In re* State Farm Mut. Auto. Ins. Co., 100 S.W.3d 338, 342–43 (Tex. App.—San Antonio 2002, no pet.).

[89] *See* 222 S.W.3d 434, 444 (Tex. 2007).

[90] *See id.* at 445.

[91] *See* Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833 (Tex. 1992).

[92] *See In re* Family Hospice, Ltd., 62 S.W.3d 313, 316 (Tex. App.—El Paso 2001, no pet.).

[93] *See* Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 555 (Tex. 1990).

[94] *See* Gen. Motors Corp. v. Gayle, 951 S.W.2d 469, 474 (Tex. 1997).

witness.[95] Information that may be discovered from a fact witness does not, however, include information about an opponent's work product.[96] Were the courts to apply Rule 192.3(e)(3) and its broader scope of discovery to any documents or other tangible things, the result would be a fishing expedition.[97] If lawyers were faced with such a situation, no lawyer would dare to conduct critical evaluations of his case for fear that such information would be discoverable to adversaries in litigation.[98]

VII. SOLUTIONS TO PRESERVE PRIVILEGE FROM EXPERT DISCOVERY

A. State Farm *Interpretation*

An alternative solution to resolve the ambiguity concerning expert discovery is to follow the principle announced by *In re State Farm Mutual Insurance Company*, a case that predates *In re Christus Spohn*, concerning the discoverability of information reviewed by a testifying expert.[99] State Farm designated two of its own employees as non-retained testifying experts who would express opinions regarding State Farm's handling of the policy holder's claim.[100] When the policy holder sought discovery of privileged documents that had been reviewed by one of the employees, State Farm de-designated both employees as experts.[101] The court concluded that State Farm's unilateral decision to de-designate its employee-experts, who were likely fact witnesses in any event, was for an improper purpose.[102] Nevertheless, the court held that the privileged documents in dispute had been generated as part of the underlying claim, not in connection with the policy holder's lawsuit against State Farm, and therefore, were not discoverable as documents prepared or reviewed by an expert witness in anticipation of his testimony.[103] In reaching this conclusion, the court distinguished between documents and facts

[95] *In re* Bell Helicopter Textron, Inc., 87 S.W.3d 139, 150 (Tex. App.—Fort Worth 2002, no pet.).

[96] *Id.* at 151.

[97] *In re* State Farm Mut. Auto. Ins. Co., 100 S.W.3d 338, 342 (Tex. App.—San Antonio 2002, no pet.).

[98] *See* Easterbrook, *supra* note 86, at 360–61.

[99] *See In re State Farm*, 100 S.W.3d at 338.

[100] *Id.* at 339.

[101] *Id.* at 339–40.

[102] *Id.* at 341.

[103] *Id.* at 343.

(intangibles).[104] If Rule 192.3(e)(3) were to apply in this situation, it would eviscerate all kinds of privileges because everything an expert has ever looked at or reviewed in any fashion that relates to the facts of the case would be discoverable.[105] In drawing the distinction between documents and facts, the San Antonio Court of Appeals ultimately concluded that under Rule 192.3(e) an expert can be questioned about anything he has learned, but in terms of documents, he can only be questioned about things that he has reviewed or prepared in anticipation of giving his testimony.[106] Once again, the problem with this decision: How far does it go?

B. Attorney-Client Privilege Remains

One partial solution for protecting privilege amid these decisions[107] is to recognize that, based on the plain language of Texas Rule of Civil Procedure 192.5, attorney-client privilege remains intact.[108] Although the Texas Supreme Court held that anything provided to a testifying expert is discoverable,[109] the court only addressed Rule 192,[110] which governs work product and in no way mentions attorney-client privilege.[111] Texas Rule of Civil Procedure 192.5(c)(1) specifically states that work product loses its protected status when it is provided to a testifying expert;[112] the loss of work product protection does not eliminate any separate attorney-client privilege. Although the crux of this Comment focuses on work product rather than attorney-client privilege, a party resisting discovery must not forget about the availability of attorney-client privilege. The attorney-client privilege protects communications, made for the purpose of facilitating professional legal services, between a client's lawyer and a client or his representative.[113] Under Texas law, attorney-client privilege protects employees under both the control-group test and the subject-matter test.[114]

[104] *Id.* at 342.

[105] *See id.*

[106] *See id.* at 343.

[107] *See supra* note 60–71.

[108] *See* TEX. R. CIV. P. 192.5.

[109] *In re* Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 445 (Tex. 2007).

[110] *Id.*

[111] *See* TEX. R. CIV. P. 192.

[112] *Id.* R. 192.5(c)(1).

[113] *See* TEX. R. EVID. 503(b)(1).

[114] *See id.* R. 503(a)(2)(A)–(B). Texas Rule of Evidence 503(a)(2) formerly included only the language now found in Texas Rule of Evidence 503(a)(2)(A), which is known as the control-

Thus, attorney-client privilege can come into play concerning communications with a party employee.[115] While perhaps not the best all-encompassing solution, it is nonetheless a partial solution to the ambiguity regarding expert discovery in Texas.

C. Adoption of the Federal Rule

Effective December 1, 2010, Federal Rule of Civil Procedure 26 was amended to address concerns about expert discovery.[116] Under the new version of Rule 26, most communications with retained testifying experts are protected as privileged communications.[117] This amendment is a complete reversal of the prior rule.[118] The largely unrecognized conflict in Texas law regarding expert discovery[119] would be cured by adopting the approach taken by the new federal rule.

Federal Rule of Civil Procedure 26 was amended in order to protect a testifying expert's work product from discovery.[120] The amendments to Federal Rule of Civil Procedure 26 require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data considered by the witness.[121] The new version of Rule 26 provides work product protection against discovery regarding draft expert disclosures or reports by testifying expert witnesses and, with three specific exceptions, communications between testifying expert witnesses and counsel.[122]

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group test. *See e.g.*, Ford Motor Co. v. Leggat, 904 S.W.2d 643 (Tex. 1995). Texas Rule of Evidence 503 was subsequently amended to add Texas Rule of Evidence 503 (a)(2)(B), which is known as the subject matter test. *See* TEX. R. EVID. 503(a). Thus, Texas Rule of Evidence 503 now includes both routes, the subject-matter test and the control-group test, for establishing attorney-client privilege. *See id.* R. 503(a)(2)(A)–(B). The control group test at 503(a)(2)(A) has not been rejected, but semantic reference is made to the subject-matter test as being the more expansive rule that includes both routes. *See id.* The subject-matter test does not exclude the control-group test; it subsumes it.

[115] *See* TEX. R. EVID. 503(a)(2)(B).

[116] FED. R. CIV. P. 26 advisory committee's note (2010 Amendments).

[117] *See id.* R. 26.

[118] *See id.* R. 26 advisory committee's note (2010 Amendments).

[119] *See* Memorandum from the Discovery Rules Subcomm., *supra* note 1, at 3.

[120] *See id.*

[121] *See* FED. R. CIV. P. 26.

[122] *Id.* R. 26 advisory committee's note (2010 Amendments).

Many courts interpreted the prior Rule 26 disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports.[123] Complete discovery of an expert's file, including communications with counsel and all draft reports, has resulted in "significant practical problems."[124] Under the old version of Rule 26, lawyers and experts took elaborate steps to avoid creating a discoverable draft report or any discoverable communications between the lawyer and expert, while at the same time taking elaborate and costly steps to attempt to discover all of the other side's drafts and communications.[125] These steps, including attorneys hiring two sets of experts (one for purposes of consultation to do the work and develop opinions and another to testify), are "artificial and wasteful discovery-avoidance."[126] Conduct taken to avoid creating discoverable drafts or communications, while at the same time trying to discover every change in draft reports by experts and communications between the expert and counsel, is not only inefficient, costly, and wasteful, but also rarely produces information that is either relevant to the merits of the case or relevant in pointing out the strengths or weaknesses of the expert's opinions.[127]

The amendments to Rule 26 address these problems.[128] Rule 26(a)(2)(B)(ii) was amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or information" disclosure prescribed in 1993.[129] By explicitly providing work product protection against discovery regarding draft reports and disclosures or attorney-expert communications, this amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.[130] The refocus of disclosure on "facts or data" is meant to limit the disclosure to material of a factual nature by

[123] COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE, REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE 10–11 (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf.

[124] *See id.*

[125] *Id.* at 11.

[126] *Id.*

[127] *Id.* at 13.

[128] *See id.* at 10.

[129] *See* FED. R. CIV. P. 26 advisory committee's note (2010 Amendments).

[130] *Id.*

excluding theories or mental impressions of counsel.[131] But at the same time, "facts or data" is to be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.[132] This disclosure requirement extends to any facts or data "considered" by the expert in forming his opinions to be expressed, not only those relied upon by the expert.[133]

Additionally, the new version of Rule 26 modifies how lawyers must disclose opinions to be offered by expert witnesses not required to provide a Rule 26 report (expert witnesses who are not retained or specially employed to provide expert testimony).[134] Rule 26(a)(2)(C) mandates disclosure of the subject matter of the expert's testimony and a summary of the facts and opinions to which the witness is expected to testify.[135] For lawyers practicing in Texas state courts, this amended rule is close to the form expert disclosure rule in Texas Rule of Civil Procedure 194.2(f).[136]

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony.[137] Frequent examples include physicians and employees of a party who do not regularly provide expert testimony.[138] Parties must identify such witnesses under Rule (26)(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C).[139] However, the disclosure obligation does not include facts unrelated to the expert opinions the witness will present.[140]

Rule 26(b)(4)(B) is added to provide work product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures.[141] This

[131] *See id.*

[132] *See id.*

[133] *See id.*

[134] *See id.* R. 26.

[135] *See id.* R. 26 advisory committee's note (2010 Amendments).

[136] *Compare* FED. R. CIV. P. 26 (requiring disclosure of the subject matter of the expert's testimony and a summary of the facts that will be used to support the opinions to which the witness will testify to), *with* TEX. R. CIV. P. 194.2(f) (requiring disclosure of the subject matter on which the expert will testify, along with the general substance of the expert's mental impressions and opinions and a brief summary of the basis for those impressions and opinions).

[137] *See* FED. R. CIV. P. 26 advisory committee's note (2010 Amendments).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C).[142] Additionally, this protection applies regardless of the form in which the draft is recorded—whether written, electronic, or otherwise—and also applies to drafts of any supplementation.[143]

Rule 26(b)(4)(C) provides work product protection for attorney-expert communications regardless of the form of the communications—whether oral, written, electronic, or otherwise.[144] The new version of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery.[145] The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions.[146] The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).[147] Thus, communications between counsel and employees of a party who do not regularly provide expert testimony would not be protected by the rule itself.[148] However, the rule does not exclude protection under other doctrines, such as privilege or independent development of the work product doctrine.[149]

The new version of Rule 26 does not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions.[150] For example, the expert's testing of material involved in litigation, and notes regarding such testing, would not be exempted from discovery by this rule.[151] Similarly, inquiry about communications the expert had with anyone other than the party's counsel

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See id.*

[147] *Id.*

[148] *See id.* R. 26.

[149] *See id.* R. 26 advisory committee's note (2010 Amendments).

[150] *Id.*

[151] *Id.*

about the opinions expressed is not exempted by the rule.[152] Because the changes to Rule 26 do not affect probing into expert gatekeeping requirements, counsel are free to question the expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed.[153]

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions.[154] The discovery allowed by the exceptions does not extend beyond those specific topics.[155] Lawyer-expert communications cover many topics, and even when the excepted topics are included among other topics involved in a communication, the protection applies to all other aspects of the communication beyond the three excepted topics.[156] The three exceptions to the new version of Rule 26 specifically allow discovery of communications between a lawyer and testifying expert concerning: (i) compensation for the expert's work and testimony; (ii) facts or data that the party's attorney provided to the expert and that the expert considered in forming his opinions; and (iii) assumptions that the party's attorney provided and that the expert relied on in forming his opinion.[157] First, the objective of Rule 26(b)(4)(C)(i) exception is to permit full inquiry into potential sources of bias.[158] Second, the exception under 26(b)(4)(C)(ii) applies only to communications "identifying" the facts or data provided by counsel: further communications about the potential relevance of the facts or data are protected.[159] Third, the exception under 26(b)(4)(C)(iii) is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed.[160] More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.[161]

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[152] *Id.*

[153] *See id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* R. 26(b)(4)(C).

[158] *Id.* R. 26 advisory committee's note (2010 Amendments).

[159] *See id.*

[160] *Id.*

[161] *Id.*

Under the amended rule, discovery regarding attorney-expert communications outside the realm of the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order.[162] A party seeking such discovery must make the showing specified by Rule 26(b)(3)(A)(ii)—that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship.[163] Ordinarily, a party will be unable to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony.[164]

Arguments for adopting the changes to the federal rule include: (1) that it is desirable in matters of privilege that conformity exist in state and federal practice and (2) that it allows for a healthy examination of the case between a retained expert and counsel in preparing a case for trial.[165] Additionally, a wide array of lawyer groups favored the adoption of the amended federal rule.[166] Finally, the largely unrecognized problems in current Texas practice concerning expert discovery would be resolved by adopting the newly amended federal rule.

Undoubtedly, adoption of these same rule changes in Texas would cloak at least some aspects of an expert's thought processes in secrecy.[167] Complete transparency, however, comes at a cost substantially greater than the benefit. Truly proficient cross-examiners, who generally have extensive knowledge of the facts in the case already, will still be able to demonstrate not only what an expert has relied upon in forming opinions, but also what

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] Memorandum from the Discovery Rules Subcomm., *supra* note 1, at 6.

[166] Letter from the Honorable Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure (May 8, 2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202009/Excerpt-CV.pdf. Support from organized bar groups included: the American Bar Association; the Council of the ABA Litigation Section; the American Association for Justice; the American College of Trial Lawyers Federal Rules Committee; the American Institute of Certified Public Accountants; the Association of the Federal Bar of New Jersey Rules Committee; the Defense Research Institute; the Federal Bar Council of the Second Circuit; the Federal Magistrate Judge's Association; the Federation of Defense and Corporate Counsel; the International Association of Defense Counsel; the Lawyers for Civil Justice; the State Bar of Michigan U.S. Courts Committee; and the United States Department of Justice. *Id.*

[167] Memorandum from the Discovery Rules Subcomm., *supra* note 1, at 6.

has been ignored. And, there will be no loophole allowing one party to pierce the work product privilege of an opponent.