

COMMON DISCOVERY ISSUES IN PERSONAL INJURY LITIGATION



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I. SCOPE

This paper is intended to be a brief discussion of some of the more common discovery issues that arise in personal injury litigation. It will address specific issues, outline the law regarding the issue, and then briefly discuss the practical application of the rules. This article is not meant to be a comprehensive study of the Texas or Federal discovery rules, nor an exhaustive treatment of the specific issues covered. The paper is offered as a practical tool for the busy attorney or paralegal who is looking for a quick and useful resource on some discovery issues common to personal injury litigation in Texas.

II. WITNESS STATEMENTS

Rule 192.3(h), TRCP

Statements of persons with knowledge of relevant facts. A party may obtain discovery of the statement of any person with knowledge of relevant facts – a “witness statement” -- regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness’s oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.

Rule 192.5, TRCP

(a) **Work product defined. Work product comprises:**

(1) **material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or**

(2) **a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.**

* * *

(c) **Exceptions. Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:**

(1) **information discoverable under Rule 192.3 concerning experts, trial witnesses, *witness statements*, and contentions;**

TEX. R. CIV. P. 192.5(c)(1) (emphasis provided).

Rule 192.5(c)(1) establishes an exception to the work product privilege for statements meeting the definition of “witness statements” detailed above and in Rule 192.3(h). TEX. R. CIV. P. 192.5(c)(1) and 192.3(h). Additionally, Rule 194.2(i) requires a party to disclose “any witness statements described in Rule 192.3(h)” and prohibits any

objection of work product. TEX. R. CIV. P. 194.2(i) and 192.5. Therefore, even if a “witness statement” is taken in anticipation of litigation, it is not protected by the work product privilege.

It is also important to note that “witness statements” as defined in Rule 192.3(h) are only those statements meeting the criteria set forth in the Rule. They are not, however, limited to statements of “witnesses,” but rather, include statements of “any person with knowledge of relevant facts” regardless of whether they personally witnessed anything or have personal knowledge of the facts. *In re Team Transport, Inc.*, 996 S.W.2d 256 (Tex. App. – Houston [14th Dist.] 1999, no pet).

In the personal injury context, the issue of witness statements often becomes important when attempting to obtain statements made by parties or witnesses to the insurance carriers involved as part of the carriers’ investigations. For example:

Matagorda Co. Hosp. Dist. v. Burwell, 94 S.W.3d 75 (Tex. App. – Corpus Christi 2002, pet. filed). Appellate court affirmed trial court’s decision to exclude trial testimony from defense witnesses who rendered statements that were not disclosed. Statements were from co-workers of plaintiff and were discoverable. Defendant failed to timely supplement its discovery responses and disclose the statements or identify the witnesses.

In re Learjet, Inc., 59 S.W.3d 842 (Tex. App. – Texarkana 2001, no pet). Edited and unedited videotapes of witness interviews used during mediation were discoverable.

In re Jimenez, 4 S.W.3d 894 (Tex. App. – Houston [1st Dist] 1999, no pet). Defendant’s statement to his insurance carrier is a discoverable witness statement.

In re Team Transport, Inc., 996 S.W.2d 256 (Tex. App. – Houston [14th Dist.] 1999, no pet). Defendant’s letter to its insurance carrier containing a statement of one of its employees was a discoverable witness statement.

In re W & G Trucking Inc., 990 S.W.2d 473 (Tex. App. – Beaumont 1999, reh’g overruled). Defendant’s vice-president’s statement to the company’s insurance investigator was not work product and, therefore, discoverable. Vice-president was not a “client,” therefore, the attorney-client privilege did not apply.

In re Ford Motor Co., 988 S.W.2d 714 (Tex. 1998) (pre-rules change). Plaintiff’s statement to insurance carrier was not protected by attorney-client privilege and was not work product.

All witness statements are not automatically discoverable, however, but are subject to other rules, such as the attorney-client privilege. TEX. R. CIV. P. 192, cmt. 9, (“Elimination of the ‘witness statement’ exemption does not render all witness statements automatically discoverable but subjects them to the same rules concerning the scope of discovery and privileges applicable to other documents or tangible things.”).

Furthermore, Rule 194 permits a party to assert the attorney-client privilege should a witness statement qualify for such protection. *See* TEX. R.

Civ. P. 194, cmt. 1 (“A party may assert any applicable privileges other than work product using the procedures of Rule 193.3 applicable to other written discovery.”); *see also*, TEX. R. EV. 503 (regarding the attorney client privilege).

A couple of cases discussing this issue are the following:

In re Arden, 2004 Tex. App. LEXIS 2596 (Tex. App. – El Paso 2004) (unpublished). Statement by defendant to his insurance carrier two days after the collision in anticipation of litigation was protected by the attorney-client privilege because the adjuster took the statement while acting as defendant’s representative for the purpose of obtaining and facilitating defendant’s legal defense.

In re Fontenot, 13 S.W.3d 111 (Tex. App. – Fort Worth 2000, no pet). Defendant physician’s statement to his attorney and insurance carrier was not a discoverable “witness statement.”

It is very important to consider the above rules when deciding how to investigate your case. If the attorney, paralegal or investigator interviews a witness before trial, they may want to avoid having to disclose the substance of the interview. In those cases, the attorney, paralegal or investigator will not want to record the interview or have the witness sign a statement. On the other hand, there may be other instances when the attorney, paralegal or investigator needs to lock the witness into their story or produce a favorable statement for settlement negotiations. Whatever the case may be, it is critical for the practitioner to know beforehand when a statement must be disclosed so

they may make intelligent decisions about how to investigate their case.

III. PERSONNEL FILES

In personal injury cases, the parties often request copies of the personnel files of either their opponent or its employees. The defendant will often request the plaintiff’s personnel files from their past and current jobs in order to investigate a lost wage claim, a claim of loss of earning capacity, or to uncover previous or current injuries and claims for benefits. The plaintiff will often seek to obtain a corporate defendant’s employees’ personnel files to investigate any negligent hiring or supervision claims.

When requesting copies of a party’s “personnel files,” it is sufficient to simply ask for the specific individual’s personnel file. *Tri-State Wholesale Associated Grocers, Inc. v. Barrera*, 917 S.W.2d 391, 399 (Tex. App.- El Paso 1996, writ dismissed), (“We hold that the category “personnel file” is reasonably specific.”).

A personnel file includes documents and information regarding things like compensation, performance and job duties and is discoverable regardless of whether such information is located in the same file. See the following:

In Re Lavernia Nursing Facility, 12 S.W.3d 566 (Tex. App. - San Antonio 1999, writ refused) (even though employer kept all disciplinary records in separately named file and claimed such records were privileged, such records should have been included in employer’s

production of personnel records pursuant to employer's agreement to produce the personnel file).

Tri-State Wholesale Associated Grocers, Inc. v. Barrera, 917 S.W.2d 391(Tex. App.- El Paso 1996, writ dismiss'd), (performance evaluation is ordinarily something one would reasonably expect to find in a personnel file).

Director, State Employees Workers' Compensation Division v. Dominguez, 786 S.W.2d 68 (Tex. App. – El Paso 1990, no writ) (supervisor's handwritten notes were part of the personnel file even though they were maintained at a different location).

Besides relevance, the most common objection in response to a request for personnel files is that it requires the disclosure of confidential information and would violate the employee's right to privacy. Obviously, this would be a difficult objection to make for a plaintiff who was claiming lost wages or loss of earning capacity. Plaintiffs waive their right to privacy regarding such matters when they pursue a wage loss claim or claim that the defendant's negligence irreparably harmed their ability to earn an income in the future. It is, however, an objection commonly asserted by corporate defendants to protect their employees' personnel files from being discovered.

Texas courts, however, have been reluctant to recognize and apply a *per se* rule that an employee has a right to privacy of his or her personnel file under all circumstances. The fundamental rights thus far recognized by the Court as deserving protection from governmental interference have

been limited to (1) “the ability of individuals to determine for themselves whether to undergo certain experiences or to perform certain acts – *autonomy*” and (2) “the ability of individuals ‘to determine for themselves when, how, and to what extent information about them is communicated to others’ – the right to control information, or *disclosural privacy*.” *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 679 (Tex. 1976).

Even though personnel files will often contain private information, they are not excluded from discovery when such information is relevant and material to the case. *Humphreys v. Caldwell*, 881 S.W.2d 940, 946 (Tex. App. - Corpus Christi 1994, writ of mandamus granted, 888 S.W.2d 469 (Tex. 1994) (trial court did not abuse its discretion in ordering disclosure of claims adjusters' personnel files when such claims of privilege were supported solely by insufficient affidavits); *Kessell v. Bridewell*, 872 S.W.2d 837 (Tex. App. – Waco 1994, no writ) (claims adjusters' performance evaluations were discoverable in bad faith case).

The party resisting discovery and claiming a right of privacy has the burden to show the particulars of the expectation of privacy beyond merely conclusory allegations that the employer considers such information to be private and keeps it confidential. *Humphreys v. Caldwell*, 881 S.W.2d 940, 946 (Tex. App. - Corpus Christi 1994, writ of mandamus granted, 888 S.W.2d 469 (Tex. 1994)).

While there may be some administrative code sections controlling

disclosure of governmental employee's personnel files in response to an Open Records Act request, such requests are often still granted. *See, e.g., Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-551 (Tex. App. - Austin 1983, writ ref'd n.r.e.) (although contained within a personnel file, information including the names and qualifications of candidates for the office of president of university were not exempt from disclosure under the Texas Open Records Act); *Calvert v. Employees Retirement System of Texas*, 648 S.W.2d 418 (Tex. App. - Austin 1983, writ ref'd n.r.e.) (information about names and addresses of retired appellate judges contained within retirement records were considered as personnel records, but the disclosure of such information did not constitute clearly unwarranted invasion of personal privacy and should have been allowed).

Parties requesting personnel records can increase the chances of having the court compel the records if they limit the request to just what is needed and voluntarily exclude sensitive items such as retirement savings or withholding information, unless such information is relevant and material. Requesting parties should be prepared to offer to enter into a confidentiality agreement to protect the information from being disclosed outside of the lawsuit. Lastly, requesting parties should be able to articulate exactly why each part of the file (i.e., disciplinary reports, worker's compensation records, urinalysis results) is relevant and material and not obtainable through less intrusive means.

IV. INVESTIGATIONS

A. Photographs & Videos

Rule 192.5(c)(4), TRCP

(c) Exceptions. Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

* * *

(4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence;

Rule 1001(b), TRE

“Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

Another type of evidence that has been exempted from being work product are photographs and videos. Therefore, regardless of whether a photo or video was taken in anticipation of litigation, it is not work product and is discoverable, absent any other rule precluding its discovery. *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir., 1993) writ for cert. denied, 511 U.S. 1029 (1994) (holding surveillance tapes of plaintiff were discoverable); *but see, In re Weeks Marine, Inc.* 31 S.W.3d 389 (Tex. App. – San Antonio 2000, no pet) (finding that photographs and surveillance tape of plaintiff taken in anticipation of litigation were work product and not discoverable).

“Photograph” is defined in Rule 1001 of the Texas Rules of Evidence and

includes videotapes, among other images. *But see, County of Dallas v. Harrison*, 759 S.W.2d 530 (Tex. App. – Dallas 1988, no writ) (holding that a request for “all photographs” did not include videotapes).

Because of the discoverability of video and still images, counsel must be careful about what they document during their investigation. If the images depict the “underlying facts,” they are arguably discoverable, regardless of whether the party intends on using them at trial. Even images or video taken solely for purposes of settlement discussions may be discoverable. *In re Learjet, Inc.*, 59 S.W.3d 842 (Tex. App. – Texarkana 2001, no pet) (edited and unedited videotapes of witness interviews used during mediation were discoverable).

B. Claims File & Investigation.

If a party believes that their investigation is protected and should not be revealed, it may assert a privilege under Tex. R. Civ. P. 193.3. A party, however, may not invoke the protective cloak of privilege indiscriminately or merely for the purposes of concealment and obfuscation. Therefore, any party asserting an investigative privilege may invoke it only when the documents a party seeks to protect are prepared in connection with the prosecution, defense, or investigation of the lawsuit. *Dunn Equip., Inc. v. Gayle*, 725 S.W. 2d 372, 374 (Tex. Ct. App.- Houston [14th Dist.] 1987, no writ). Further, “[t]he burden is on the party resisting discovery to prove that the evidence is acquired or developed in anticipation of litigation.” *Turbodyne Corp v. Heard*, 720 S.W.2d 802, 804 (Tex. 1986) *citing Lindsey v. O’Neill*, 689 S.W.2d 400 (Tex. 1985).

In order to determine whether the investigative materials were gathered or prepared in anticipation of litigation, the Texas Supreme Court has developed a two-pronged test: if, (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation, the materials are protected. *Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 195 (Tex. 1993). *See also, In re Toyota Motor Corp.*, 94 S.W.3d 819, 823 (Tex. App. – San Antonio 2002, no pet), (holding that the courts must look to the circumstances in deciding whether litigation was anticipated); *In re Monsanto*, 998 S.W.2d 917 (Tex. App. – Waco 1999, no writ) (applying the *National Tank* test).

Further, the investigation needs to have been *conducted primarily for the purposes* of preparing for the expected litigation. *Nat’l Tank, supra* at 206, n. 13 (emphasis provided). Although a party need not be absolutely convinced that litigation will occur, the investigation must actually be conducted for the purpose of preparing for such litigation in order to be protected. *Henry P. Roberts Investments, Inc. v. Kelton*, 881 S.W.2d 952, 955 (Tex. App. – Corpus Christi 1994, writ denied). In order for the privilege to apply, preparation for litigation must be *the primary motivating purpose* underlying the investigation, even though non-litigating factors may also be involved. *Id.* (emphasis added.)

Conducting a routine post-accident investigation does *not* rise to the level of preparing for litigation. “If the primary motivating factor of the investigation is to determine whether the claim should be paid or settled and the potential lawsuit avoided, then it would *not* appear to meet the test set forth in *National Tank*.” *In Re Farmers Insurance Exchange*, 990 S.W.2d 337, 342 (Tex. App – Texarkana 1999, writ of mandamus denied by *In re Texas Farmers Ins. Exch.*, 12 S.W.3d 807 (Tex. 2000) (emphasis provided); *Kelton*, 881 S.W.2d at 956.

The mere hiring of a lawyer by a plaintiff does not necessarily mean litigation is likely or reasonably anticipated. *Morris v. Texas Employers Ins. Assoc.*, 759 S.W.2d 14 (Tex. App. – Corpus Christi 1988, writ denied) (“We disagree that the mere hiring of an attorney by an injured worker automatically means the employer would necessarily anticipate litigation.”); *Wiley v. Williams*, 769 S.W.2d 715 (Tex. App. – Austin 1989, writ of mandamus overruled) (holding that materials were not discoverable, but noting that “[T]he opposite extreme position is that work done after an attorney is retained is always privileged. This position wrongly assumes that every controversy results in litigation.”).

An insurer’s claims file regarding the case at hand is generally discoverable. *In re Ford Motor Co.*, 988 S.W.2d 714 (Tex. 1998) (defendant allowed to discover claims file from plaintiff’s insurance carrier); *Dunn Equip. v. Gayle*, 725 S.W.2d 372 (Tex. App. – Houston [14th Dist.] 1987, no

writ) (plaintiff entitled to discovery of defendant’s carrier’s claims file).

An insurer’s claims file regarding a different case than the case at hand can also be discovered. *Turbodyne Corp. v. Heard*, 720 S.W.2d 802 (Tex. 1986) (claims file in underlying case discoverable in subsequent subrogation matter); *Lewis v. Wittig*, 877 S.W.2d 52 (Tex. App. – Houston [14th Dist.] 1994, no writ) (claims files for client’s carriers discoverable in subsequent legal malpractice case); *Eddington v. Touchy*, 793 S.W.2d 335 (Tex. App. – Houston [1st Dist.] 1990, writ of mandamus overruled) (claims file discoverable in subsequent case where lawyer sued carrier for settling the claim directly with his client without lawyer’s permission); *but see, Humphreys v. Caldwell*, 888 S.W.2d 469 (Tex. 1994) (defendant in underlying suit brought subsequent lawsuit against plaintiff’s carrier and court held claims file not discoverable).

If, however, the material sought from another case is work product, such privilege is perpetual and the material is not discoverable in subsequent litigation. *Owens-Corning v. Caldwell*, 818 S.W.2d 749 (Tex. 1991).

When attempting to discover an opponent’s investigation, it is important to lay the groundwork before seeking the court’s assistance. For example, during the defendant’s deposition, the plaintiff may want to inquire of the defendant whether they thought this incident would ever result in a lawsuit, whether they were surprised when they were served with the petition, whether their insurance carrier told them it would likely result in a lawsuit before the petition was filed, etc. Most of the time, when asked

correctly, defendants will admit that they did not anticipate litigation until they were served. This testimony may aid you in arguing to the court later that the resisting party's argument that they anticipated litigation immediately is disingenuous.

It is also important to force the resisting party to comply with all the procedures necessary to assert the privilege. Request a privilege log immediately upon receiving a response asserting privilege. Demand that the privilege log state with specificity what privilege the party is asserting for each document. Also ensure that the materials are described in enough detail that the applicability of the privilege can be evaluated from the log. If the privilege log is untimely or inadequate, argue that the resisting party has waived their claims of privilege. See *In re Monsanto*, 998 S.W.2d 917 (Tex. App. – Waco 1999, no writ) for a thorough discussion of the procedures required to assert privilege and the consequences of noncompliance.

The requesting party may also want to depose the insurance adjuster or investigator before moving the court to compel the investigative materials. During that deposition, the requesting party can probe the legitimacy of the adjuster's claim that they anticipated litigation almost immediately after the event. Odds are, the adjuster has a very small percentage of his claims go into litigation.

Additionally, most carriers have a form letter they send to their insured to warn them of an impending lawsuit and requesting the insured contact the carrier if the insured is served. Whether the

adjuster sent that letter out or not may give the court some insight into the credibility of the adjuster's claim that they anticipated litigation very soon.

The requesting party may want to talk to the adjuster in general terms about what investigation they did in and compare that to the investigation they have done in other similar cases. Had the adjuster made a determination regarding liability yet? Did he or she deny the claim yet? If the requesting party can show that the adjuster was merely conducting a routine post-accident investigation to determine liability and whether to make a settlement offer, it is more likely that related materials will be discoverable.

V. SIMILAR INCIDENTS

Evidence of similar incidents, or lack thereof, can be extremely powerful evidence in a personal injury case. For example, Plaintiffs may use evidence of other incidents to show:

1. a product is defective;
2. a defendant knew its product was resulting in injury but made no efforts to investigate or warn the public;
3. a defendant doctor negligently performed a certain procedure;
4. an intersection or roadway was negligently designed;
5. an intersection, roadway, signage, or signaling was negligently maintained;
or

6. a defendant retailer negligently stored or displayed its merchandise.

A defendant, on the other hand, may use evidence of a lack of other incidents to show the opposite side of the above-mentioned issues.

Discovery of similar (previous or subsequent) incidents is directly related to the *admissibility* of such evidence. If such information will not likely lead to the discovery of admissible evidence, then the court will probably not allow its discovery. It is necessary, then, to discuss the law regarding admissibility of similar incidents.

In general, the more similar the circumstances surrounding the other incidents are to the case at hand, the more likely they will be admissible. The degree of similarity required depends on the issue the evidence is offered to prove. For example, if the similar incidents are being offered simply to show the defendant knew there was an issue with its product and should have taken efforts to remedy the problem or warn consumers, less similarity is required. If, however, the evidence is offered to show that the product is unreasonably dangerous, the circumstances surrounding the other incidents will have to be very similar to the plaintiff's case.

For some cases discussing these issues, see the following:

Nissan Motor Co. Ltd. v. Armstrong, 145 S.W.3d 131 (Tex. 2004) (reversible error to admit evidence of similar incidents and previous customer complaints

without proof that such incidents were the result of the alleged defect and the complaints were true).

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (Tex. 1998) (trial court properly admitted evidence of lawsuits involving earlier accidents).

May v. Mo.-Kan.-Tex. R.R. Co., 600 S.W.2d 755 (Tex. 1980) (reversible error to exclude evidence of six previous collisions at railroad crossing where previous collisions occurred under similar circumstances as the instant collision).

Missouri P. R. Co. v. Cooper, 563 S.W.2d 233 (Tex. 1978) (reversible error to admit evidence of two previous collisions at railroad crossing when the previous collisions occurred during the day and the collision at issue occurred on a foggy night).

McKee v. McNeir, 151 S.W.3d 268 (Tex. App. – Amarillo 2004, no pet. h.) (prior medical malpractice claims against defendant doctor were not admissible).

N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103 (Tex. App. – Beaumont 2001, pet. denied) (evidence of other accidents involving defendant's drivers admissible to show that defendant knew or should have known its agents were using unqualified drivers).

Hyundai Motor Co. v. Alvarado, 989 S.W.2d 32 (Tex. App. – San Antonio 1998, pet. granted, judgment vacated w.r.m.) (testimony about previous incidents and other claims was sufficiently similar and admissible).

Farr v. Wright, 833 S.W.2d 597 (Tex. App. – Corpus Christi 1992, writ denied) (evidence of prior incidents of complications resulting from a defendant doctor’s performance of a certain procedure was admissible to show he was negligent in the performance of the procedure, as well as negligent in his diagnosis).

One of the most common objections to a request for similar incidents, claims or lawsuits, besides relevance, is undue burden. Often a defendant will claim that it is unduly burdensome to require them to search through their records for such documentation. When a resisting party makes such an objection, it is incumbent upon them to prove to the court that the cost and effort involved with producing the discovery would outweigh any benefit.

For cases discussing this issue, see the following:

K Mart Corp. v. Sanderson, 937 S.W.2d 429 (Tex. 1996) (request for description of all criminal conduct occurring at that location during preceding seven years was too broad).

Dillard Dep’t Stores, Inc. v. Hall, 909 S.W.2d 491 (Tex. 1995) (request for every claim file or incident report over a five-year period involving false arrest, civil rights violations, or excessive use of force was too broad).

General Motors Corp. v. Lawrence, 651 S.W.2d 732 (Tex. 1983) (request for fuel filler necks in every vehicle ever manufactured by defendant was too broad).

Fethkenher v. The Kroger Co., 139 S.W.3d 24 (Tex. App. – Ft. Worth 2004, no pet. h.) (plaintiff not entitled to obtain information regarding all prior incidents involving any mechanical door at all of defendant’s stores during the last ten years).

In re Lowe’s Companies, Inc., 134 S.W.3d 876 (Tex. App. – Houston [14th Dist.] 2004, no pet. h.) (refusing to allow plaintiff unlimited access to defendant’s database of claims).

Humphreys v. Caldwell, 881 S.W.2d 940 (Tex. App. – Corpus Christi 1994, writ of mandamus granted, 888 S.W.2d 469 (Tex. 1994) (defendant insurance carrier did not satisfy its burden to demonstrate that a request for similar lawsuits and complaints in the last five years was overly burdensome).

In order to increase the chances that the court will grant your request to compel a resisting party to produce evidence of other incidents, make sure the request is narrowly tailored to include only that information which is truly relevant. Limit the request to just incidents, lawsuits, claims and/or complaints with similar facts to the case at hand. Also, the request should cover only a reasonable time period considering the facts of the case.

VI. MEDICAL RECORDS

A. Medical records of a party.

“Generally, confidential communications between a physician and patient are privileged and may not be disclosed.” *Hogue v. Kroger Store*, 875 S.W.2d 477 (Tex. App. - Houston

[1st Dist.] 1994, writ denied). Additionally, Section 159.002 of the Texas Occupations Code and Texas Rule of Evidence 509 specifically provide that records of the identity, diagnosis, evaluation or treatment of a patient are confidential and privileged and may not be disclosed. Further, the Texas Health and Safety Code §241.151(2) provides that all health care information found in hospital records is privileged and cannot be disclosed without authorization. "Health care information" is defined as "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient."

Numerous other laws deal with the issue of who, other than the patient, may consent for the release of medical records. It is not within the scope of this paper to cover those laws. However, for a non-exhaustive list of references, see the Texas Health & Safety Code, Chapters 181, 241, 572; Chapter 32 of the Texas Family Code; Article 6701; Texas Occupations Code, Chs. 154, 159 and Government Code, Ch. 418 for some of the major Texas provisions.

Texas Rule of Evidence 509 (which creates the physician-patient privilege), however, has a number of exceptions, most notable of which are the following:

Rule 509(e). Exceptions in a Civil Proceeding. Exceptions to confidentiality or privilege in administrative proceedings or in civil proceedings in court exist:

(1) when the proceedings are brought by the patient against a physician, including but not limited to

malpractice proceedings, and in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

* * * *

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

Typically, in a personal injury lawsuit, the defense attempts to get medical records dating before the date of the incident and for any and all conditions, illnesses and injuries. The plaintiff, of course, attempts to limit the defense's access to just those records regarding treatment occurring after the date of the incident and only treatment directly related to those injuries being claimed in the lawsuit.

The seminal case on this subject is *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988). In that case, the Texas Supreme Court stated that, while a plaintiff waives her physician-patient privilege when she makes a claim for personal injuries, such waiver is limited. *Id.* at 601. The Court ruled that the trial court abused its discretion when it required plaintiffs to sign an unlimited medical authorization, over plaintiff's objection.

Six years later, the Supreme Court again ruled on the issue of what medical records are discoverable in *Groves v. Gabriel*, 874 S.W.2d 660

(Tex. 1994). The Court in *Groves* stated that the plaintiff waives her privilege “as to any medical records *relevant to her claim*” for damages. *Id.* at 661 (emphasis provided). The Court advised that “a trial court’s order compelling release of medical records should be restrictively drawn so as to maintain the privilege with respect to records or communications not relevant to the underlying suit.” *Id.*

Later that same year, the Supreme Court again addressed this issue in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). The Court explained the exception to the physician-patient privilege allowing discovery of medical records by stating the following:

The scope of the exception only permits discovery of records “relevant to an issue of the ... condition of a patient.” Therefore, even if a condition is “part” of a party’s claim or defense, patient records should be revealed only to the extent necessary to provide relevant evidence to the condition alleged. Thus, courts reviewing claims of privilege and inspecting records in camera should be sure that the request for records and the records disclosed are closely related in time and scope to the claims made so as to avoid any unnecessary incursion into private affairs.

Id. at 843.

This rationale seems to be followed by the Court even more recently outside of the medical record context. See, *In re CSX Corp.*, 124

S.W.3d 149 (Tex. 2003) (“A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.”). *Id.* at 153.

If the plaintiff does not produce all medical records related to the injuries for which she is seeking damages, the defense may ask the court to compel their production. Often, the defense requests that the plaintiff sign a medical authorization enabling the defense to obtain plaintiff’s records. There is authority, however, that holds that a court does not have the authority to compel a party provide a signed authorization. *In re Guzman*, 19 S.W.3d 522 (Tex. App. – Corpus Christi 2000, no. pet) (“We hold that the Texas Rules of Civil Procedure do not authorize a Court to order the creation of an authorization for a third party to deliver information to a litigant.”).

Rule 194 seems to comport with the above decision’s rationale in that it allows the party seeking relief to *either* provide their medical records *or* sign an authorization enabling their opponent to obtain the records. TEX. R. CIV. P. 194.2(j) (emphasis provided); see also, *Martinez v. Rutledge*, 592 S.W.2d 398 (Tex. App. – Dallas 1979, writ of error refused) (affirming trial court’s order that plaintiff had to either provide the related medical records or an authorization for such records).

B. Medical records of a nonparty.

Rule 196.1(c), TRCP.

(c) Requests for production of medical or mental health records regarding nonparties.

(1) *Service of request on nonparty.* If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a.

(2) *Exceptions.* A party is not required to serve the request for production on a nonparty whose medical records are sought if:

(A) the nonparty signs a release of the records that is effective as to the requesting party;

(B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or

(C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required.

(3) *Confidentiality.* Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records.

The “litigation exception” to the physician-patient privilege included in Texas Rule of Evidence 509(e)(4) applies to non-parties as well as parties. *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex.

1994) (“The exception now terminates the privileges whenever any party relies upon the condition of the patient as a part of the party’s claim or defense, even though the patient has not personally placed the condition at issue, and even though the patient is not a party to the litigation.”)

From a review of the case law, however, the discovery of non-party medical records is generally not allowed. For example, see the following:

In re Columbia Valley Reg’l Med. Ctr., 41 S.W.3d 797 (Tex. App. – Corpus Christi 2001, no pet.) (en banc) (holding that non-party’s medical records were not discoverable even though privileged identifying data was redacted).

In re Xeller, 6 S.W.3d 618 (Tex. App. – Houston [14th Dist.] 1999, pet. denied) (medical records and worker’s compensation claims records of nonparties were not discoverable).

In re Dolezal, 970 S.W.2d 650 (Tex. App. – Corpus Christi 1998, no pet.) (medical records of nonparties not discoverable to try to impeach testifying medical expert).

Smith v. Gayle, 834 S.W.2d 105 (Tex. App. – Houston [1st Dist.] 1992, no writ) (non-party’s medical records were not discoverable in suit affecting parent-child relationship).

Cheatham v. Rogers, 824 S.W.2d 231, (Tex. App. – Tyler 1992, no writ) (reversed trial court’s decision to prevent disclosure of nonparty’s mental health records in a suit affecting the parent-child relationship).

Alpha Life Ins. Co. v. Gayle, 796 S.W.2d 834 (Tex. App. – Houston [14th Dist.] 1990, no writ) (holding that claims files, containing medical information, of nonparties were not discoverable unless court ordered identifying data redacted).

In re Christus Health Southeast Tex., 2005 Tex. App. LEXIS 5013 (Tex. App. – Beaumont 2005) (unpublished) (holding that relevance alone was not the test for the litigation exception; rather, the test was whether the jury was required to make a factual determination concerning the medical conditions as an "ultimate" issue for the claim).

When the request is sufficiently narrow and the information is material and being used as the basis of a claim or defense, such records may be discoverable. *In re Whiteley*, 79 S.W.3d 729 (Tex. App. – Corpus Christi 2002, no pet.) (non-party medical records and information discoverable in medical negligence case because defendant doctor using other patients' results to support his defense that he performed procedure correctly).

VII. EX PARTE DISCUSSIONS WITH TREATING PHYSICIANS

A practice that is becoming more popular amongst defense counsel in personal injury cases is to engage in *ex parte* contacts with the plaintiff's former or current treating physicians.¹ Until recently, Federal and state courts in Texas consistently held that such

¹ For a more comprehensive discussion of this issue, see *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R.4th 714 (2004).

invasions of the physician-patient privilege were prohibited. See *Travelers Ins. Co. v. Woodard*, 461 S.W.2d 493 (Tex. App. – Tyler 1970, writ of error refused); *Perkins v. United States*, 877 F. Supp. 330 (E.D. Tex. 1995); *Horner v. Rowan Co. Inc.*, 153 F.R.D. 597 (S.D. Tex. 1994).

The rationale employed by these courts was the same as that reasoning discussed above with regard to discoverability of medical records. While the plaintiff waives her right to the physician-patient privilege when she makes a claim for damages, she does so only to the extent that such information and records relate to her claims. *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988). Allowing an *ex parte*, unsupervised interview by defense counsel of a plaintiff's treating physician would not offer any protection of plaintiff's privacy rights regarding unrelated treatment or conditions. *Id.* (reversing a trial court's ruling ordering plaintiff to provide an unlimited medical authorization "because it would effectively allow defendants counsel to question the physicians outside the presence of plaintiffs' counsel.")

When an unauthorized, *ex parte* contact is made, the court has the option to strike the testimony of the offending doctor. *James v. Kloos*, 75 S.W.3d 153 (Tex. App. – Ft. Worth 2002, no pet.) (holding that if court's decision not to strike treating doctor's testimony was error, it was harmless); *Perkins v. U.S.*, 877 F. Supp. 330, 334 (E.D. Tex. 1995) ("Generally, *ex parte* communication with treating physicians should be presumed prejudicial....The normal response should be to strike the

physician's testimony, even if no bad faith is involved.”).

The court may also allow the doctor to be cross-examined regarding the *ex parte* discussion in front of the jury. *James v. Kloos*, 75 S.W.3d 153 (Tex. App. – Ft. Worth 2002, no pet.) (holding that if excluding cross-examination questions regarding unauthorized communications by treating doctor was error, it was harmless); *Hogue v. Kroger*, 875 S.W.2d 477 (Tex. App. – Houston [1st Dist.] 1994, writ denied) (affirming trial court's limiting cross-examination of offending doctor regarding unauthorized communication with defense counsel); *Harrison v. Tex. Employers Ins. Ass'n*, 747 S.W.2d 494 (Tex. App. – Beaumont 1988, writ denied) (holding that excluding cross-examination questions to offending doctor about *ex parte* communication with opposing counsel was error, but was harmless).

Another type of sanction that is available is to disqualify the lawyer or law firm that conducted the *ex parte* questioning of the treating doctor and prevent them from communicating any of the information they learned to subsequent counsel. See *Jakobi v. Ager*, 2000 WL 1142688 (Pa. Com. Pl.) (disqualifying defense law firm for unauthorized communications with treating physician in violation of state law).

The defense often cites *Hogue v. Kroger*, 875 S.W.2d 477 (Tex. App. – Houston [1st Dist.] 1994, writ denied) for the proposition that *ex parte* interviews of the plaintiff's treating physicians is permissible. The court in *Hogue*, however, did not comment directly on

this issue. The court simply ruled that it was not error to exclude or limit counsel's cross-examination of the treating doctor regarding the *ex parte* communications.

There are two other appellate court cases out of San Antonio, however, that addressed this issue and ruled in favor of allowing *ex parte* interviews. *Durst v. Hill Country Mem'l Hosp.*, 70 S.W.3d 233 (Tex. App. – San Antonio 2001, no pet.); *Rios v. Tx. Dept. Mental Health and Mental Retardation*, 58 S.W.3d 167 (Tex. App. – San Antonio 2001, no pet.). In both cases, the court found that, because there was no specific ethics rule or statute prohibiting *ex parte* interviews with treating physicians, it could not find that such interviews were inappropriate or deserving of sanctions.

The split of authority seems to originate at least in part with the courts' differing views as to whose obligation it is to protect the plaintiff's privilege. Some of the opinions place that obligation on the plaintiff as owner of the privilege and, therefore, no interview should be allowed without plaintiff or her counsel's presence to ensure only non-privileged information is disclosed. See e.g., *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988) (reversing the court's order compelling plaintiffs to sign an unlimited medical authorization because the authorization provided “no reasonable method to allow the Mutters to preserve whatever claims of privilege they might have because it would effectively allow defendant's counsel to question the physicians outside the presence of plaintiffs' counsel.”). If there is a violation, prejudice is presumed. *Perkins v. U.S.*, 877 F. Supp. 330 (E.D. Tex. 1995) (“Generally, *ex*

parte communication with treating physicians should be presumed prejudicial.”); *Horner v. Rowan Cos.*, 153 F.R.D. 597 (S.D. Tex. 1994) (“*ex parte* interviews like the ones here are impermissible and presumptively prejudicial”). Whether that prejudice will result in a reversal, however, is another question. *Harrison v. Tex. Employers Ins. Ass’n*, 747 S.W.2d 494 (Tex. App. – Beaumont 1988, writ denied) (holding that excluding cross-examination questions to offending doctor about *ex parte* communication with opposing counsel was error, but was harmless).

The courts permitting *ex parte* interviews of plaintiff’s treating physicians seem to place the obligation of protecting plaintiff’s privilege on the physician and defense counsel. *Durst v. Hill Country Mem’l Hosp.*, 70 S.W.3d 233 (Tex. App. – San Antonio 2001, no pet.) (“in a practical sense, a doctor bears the burden of refraining from revealing irrelevant (and thus privileged) matters when responding to requests for discovery....”). Furthermore, these court’s place the burden of showing prejudice on the plaintiff. If the plaintiff does not demonstrate that privileged information was disclosed, it is not likely the interview will result in any sanction.

Interestingly, relatively recent changes to the Texas Civil Practice and Remedies Code §74.052, pertaining to medical malpractice claims, will now not only require a litigant to disclose the identity of his/her physicians and other health care providers who have examined, evaluated and treated him/her in connection with the injuries arising from the claim and authorize release of

those records, but may also require the plaintiff identify medical providers within the prior five years and either authorize release or exclude specific ones. Exclusion must be on the basis of relevancy. It is important to note that the §74.052 authorization includes both written and verbal information and therefore arguably authorizes *ex parte* communications between the defendant and the plaintiff’s health care providers.

One thing that is becoming more clear is that if the plaintiff does not want her treating physicians discussing the case with the defense counsel, it is incumbent upon her to seek the court’s protection. *Durst v. Hill Country Mem’l Hosp.*, 70 S.W.3d 233 (Tex. App. – San Antonio 2001, no pet.) (citing *Mutter* and *Martinez v. Rutledge*, and stating that “a plaintiff may invoke the court’s protection for privileged material, and it appears it is his burden to do so.”). Therefore, a plaintiff’s counsel who is concerned with this issue should immediately contact the plaintiff’s medical providers, inform them that plaintiff is not authorizing any verbal communication whatsoever with anyone but the patient and counsel, and seek a protective order from the court.

VIII. CONTENTIONS AND LEGAL THEORIES

Rule 192.3(j), TRCP

Scope of Discovery. (j) Contentions. A party may obtain discovery of any other party’s legal contentions and the factual bases for those contentions.

Rule 192, Cmt. 5, TRCP

Rule 192.3(j) makes a party's legal and factual contentions discoverable but does not require more than a basic statement of those contentions and does not require a marshaling of evidence.

Rule 192.5(c)(1), TRCP

(c) Exceptions. Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

(1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions;

TEX. R. CIV. P. 192.5(C)(1) (emphasis provided).

Rule 197.1, TRCP

Interrogatories. A party may serve on another party – no later than 30 days before the end of the discovery period – written interrogatories to inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.

TEX. R. CIV. P. 197.1 (emphasis provided).

Rule 197 cmt 1., TRCP

Interrogatories about specific legal or factual assertions – such as, whether a party claims a breach of implied warranty, or when a party contends that limitations began to run – are proper, but interrogatories that ask a party to state all legal and factual assertions are improper. As with requests for disclosure, interrogatories may be used to ascertain basic legal and factual claims and defenses but may not be used to force a party to marshal evidence. Use of the answers to such interrogatories is limited, just as the use of similar disclosures under Rule 194.6 is.

Rule 194.2(c), TRCP

Content. A party may request disclosure of any or all of the following:

* * *

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

Even if a party's legal contentions can be gleaned from other documents in the case, that party can still be compelled to explain in general their contentions or the factual bases of their legal theories. *In re Ochoa*, 2004 Tex. App. LEXIS 4866 (Tex. App. – Tyler 2004) (unpublished) (responding party was required to explain their defense of pre-existing condition in spite of the fact requesting party had equal access to medical records and such contention could have been determined from the records).

However, if a party inadvertently omits a claim or defense from their disclosure response, it will not typically prevent them from presenting such claim or defense unless it would operate an unfair surprise to their opponent. *National Family Care Life Ins. Co. v. Fletcher*, 57 S.W.3d 662 (Tex. App. – Beaumont 2001, pet. denied) (While defendant did not detail a specific defense in their response to plaintiff’s request for disclosure, plaintiff was on notice of their defense from other documents and, therefore, it was error to prevent defendant from cross-examining based on that theory.)

Written discovery tools are not the only means by which to learn of a party’s contentions or legal theories. It seems that a party may inquire into another party’s contentions during an oral deposition as well. *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991).

IX. TAX RETURNS

Often in personal injury cases, the defendant requests copies of plaintiff’s tax returns for a period extending before the date of injury to present. This is typically in response to a claim by the plaintiff for lost wages or loss of earning capacity. Sometimes, plaintiffs also seek tax returns for an organization in order to investigate potential alter ego or single business enterprise theories against corporate defendants.

Generally, tax returns in their entirety are not discoverable in most personal injury cases.² The courts

recognize the sensitive nature of the documents and require the requesting party to demonstrate that the information is relevant and material before disclosure is required. *Hall v. Lawlis*, 907 S.W.2d 493 (Tex. 1995).

The seminal case on this subject is *Maresca v. Marks*, 362 S.W.2d 299 (Tex. 1962). In that case, the Texas Supreme Court found that the trial court abused its discretion when it ordered a party to disclose its tax returns in their entirety. The court stated:

Subjecting federal income tax returns of our citizens to discovery is sustainable only because the pursuit of justice between litigants outweighs protection of their privacy. But sacrifice of the latter should be kept to the minimum, and this requires scrupulous limitation of discovery to information furthering justice between the parties which, in turn, can only be information of relevancy and materiality to the matters in controversy.

Id. at 301.

For examples of other cases addressing this issue since *Maresca*, see the following:

Hall v. Lawlis, 907 S.W.2d 493 (Tex. 1995) (court issued mandamus vacating trial court’s order requiring party to produce individual tax returns).

Sears, Robuck & Co. v. Ramirez, 824 S.W.2d 558 (Tex. 1992) (it was an abuse

² For a more extensive discussion on this issue, see *Discovery and Inspection of Income Tax*

Returns in Actions Between Private Individuals, 70 A.L.R.2d 240 (2004).

of discretion for trial court to order party to produce tax returns containing information that could have been elicited from its annual reports).

Narro Warehouse, Inc. v. Kelly, 530 S.W.2d 146 (Tex. Civ. App. – Corpus Christi 1975, writ of error refused) (holding that “[i]ncome tax returns were not wholly privileged, but before discovery the trial judge was required to view them and make a finding on whether they were relevant and material to the action.”).

Texhoma Stores, Inc. v. Am. Central Ins. Co., 424 S.W.2d 466 (Tex. Civ. App. – Dallas 1968, writ of error refused) (reversing trial court’s order to produce federal income tax returns).

X. AUTOMATIC AUTHENTICATION

Rule 193.7, TRCP

Production of Documents Self-Authenticating. A party’s production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless – within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used – the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the

remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

The purpose of the above Rule is to promote efficient and economic adjudication of civil disputes. Allowing a party to automatically authenticate documents provided by their opponent saves time and money. This is not, however, a tool to attempt to authenticate a party’s own documents. *Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444 (Tex. App. – Dallas 2002, no pet.) (party was not allowed to self-authenticate its own documents under Rule 193.7).

The 10-day period for objections to authenticity starts when the party who intends to use the documents gives the other party notice that the document will be used. TEX. R. CIV. P. 193.7, cmt. 7. Some attorneys, in an effort to trigger the 10-day objection period, place a notice in their discovery requests informing the responding party that all materials produced will be used at trial and that if the responding party objects, they need to do so within ten days of production. Whether this tactic would effectively trigger the 10-day objection period or not has not been addressed by any case known to this author.

It is also important to note that Rule 193.7 addresses only authenticity. The Rule does not speak to admissibility. TEX. R. CIV. P. 193.7, cmt. 7 *citing* TEX. R. EVID. 901(a). Therefore, even if a document is admissible, the proponent of the evidence still needs to overcome other

hurdles to admissibility such as
relevance, hearsay or best evidence.