<u>Materials Relating to Proposed Amendment to TRE 511</u>

1. Federal Evidence Rule 502

2. Reasons for Federal Evidence Rule 502:
   a. resolve inadvertent disclosure and subject matter disclosure
   b. cost of discovery

3. Federal Evidence Rule 501
4. Federal Rule of Procedure 26(5)(b)(snapback rule)
5. Proposed State Bar Evidence Committee Rule 511
6. Proposed Supreme Court Advisory Evidence Committee Rule 511
7. Current Evidence Rule 511
8. Texas Rule of Civil Procedure 193.3(d)(snapback rule)
9. Texas Rule 192.5(work product)
10. Selective Waiver Rule (rejected by Federal Evidence Committee) (not recommended by either SBEC or SCAEC)

Virmani v. Novant Health Inc., 259 F.3d 284, 293 (4th Cir.2001). "We hold that the interest in obtaining probative evidence in an action for discrimination outweighs the interest that would be furthered by recognition of a privilege for medical peer review materials. Therefore, we decline to recognize such a privilege." *See also* ***Memorial Hosp. v. Shadur***, 664 F.2d 1058, 1063 (7th Cir.1981).

Carman v. McDonnell Douglas Corp., 114 F.3d 790, 794 (8th Cir.1997). "To justify the creation of a privilege, [the proponent of the privilege] must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information."

In re Sealed Case, 107 F.3d 46, 49 (D.C.Cir.1997). "[T]he attorney-client privilege is subject to what is known as the crime-fraud exception. Two conditions must be met. First, the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act. Second, the client must have carried out the crime or fraud. [¶] The privilege is the client's, and it is the client's fraudulent or criminal intent that matters. A third party's bad intent cannot remove the protection of the privilege."

Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir.1993). "[T]he journalist's privilege [is] a 'partial First Amendment shield' that protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike. *At 1293:* Before we weigh the competing interests ..., we must first decide two threshold legal questions ...: whether ... an investigative book author[ ] has standing to invoke the journalist's privilege, and whether the privilege operates to shield information provided by a source without an expectation of confidentiality." Held: Privilege applied. *See also* ***McKevitt v. Pallasch***, 339 F.3d 530, 531-34 (7th Cir.2003).

Hancock v. Hobbs, 967 F.2d 462, 466-67 (11th Cir. 1992). "Rule 501 is not clear as to which rule of decision should be followed when the federal and state laws of privilege are in conflict. ... We therefore hold that the federal law of privilege provides the rule of decision in a civil proceeding where the court's jurisdiction is premised upon a federal question, even if the witness-testimony is relevant to a pendent state law count which may be controlled by a contrary state law of privilege." *See also* ***Agster v. Maricopa Cty.***, 422 F.3d 836, 839 (9th Cir.2005); ***EEOC v. Illinois Dept. of Empl. Sec.***, 995 F.2d 106, 107 (7th Cir.1993).

von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). "We hold that the individual claiming the [journalist's] privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process. This requires an intent-based factual inquiry to be made by the district court. [¶] The intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like...."

FRE 502. ATTORNEY-CLIENT PRIVILEGE & WORK PRODUCT; LIMITATIONS ON WAIVER

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure made in a state proceeding.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule.—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions.—In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

See Explanatory Note and Statement of Congressional Intent to FRE 502, p. 1142.

See *Commentaries*, "Asserting claims of privilege & protection," ch. 6-A, §4.4.5(4), p. 367; "Disclosure of privileged or protected information – attorney-related privileges," ch. 6-A, §9.2.4, p. 380.

Source of FRE 502: As adopted Sept. 19, 2008, P.L. 110-322, §1, 122 Stat. 3537. Effective date: The amendments made by this Act shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.

ARTICLE VI. WITNESSES

FRE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Source of FRE 601: As adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975.

ANNOTATIONS

Estate of Suskovich v. Anthem Health Plans, 553 F.3d 559, 570 (7th Cir.2009). "[W]here state law provides a federal court with the grounds for its decisions, that court should ... apply state law restrictions on the competency of witnesses. The evidentiary standard in a case ... where both federal and state law claims are involved[ ] is less certain. District courts in this circuit ... have ... held that [FRE] 601, which creates a broad presumption of competency, applies to cases alleging both federal and state law claims. '[I]f the rule ... results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, ... the rule favoring reception of the evidence should be applied.' Accordingly, [we apply] Rule 601 ... to the competency of witnesses, at least insofar as the evidence relates to any of the federal claims." *See also* ***Rosenfeld v. Basquiat***, 78 F.3d 84, 88 (2d Cir.1996) (applying state competency law in diversity case).

U.S. v. Bedonie, 913 F.2d 782, 799 (10th Cir.1990). "'A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.' *At 800:* 'There is no rule which excludes an insane person as such, or a child of any specified age, from testifying, but in each case the traditional test is whether the witness has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth....'"

U.S. v. Moreno, 899 F.2d 465, 469 (6th Cir.1990). "What ... is often confused, is that 'competency' is a matter of status not ability. Thus, the only two groups of persons specifically rendered incompetent as witnesses by the [FREs] are judges ([FRE] 605) and jurors ([FRE] 606)." (Internal quotes omitted.)

U.S. v. Roman, 884 F.Supp. 126, 127 (S.D.N.Y.1995). "Whether a witness is competent to testify depends on the individual's ability to observe, to remember, to communicate, and to understand that the oath imposes a duty to tell the truth. Competency is usually an issue for the trier of fact."

Tab 2

Chair suggested that the Judicial Conference consider proposing a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would:

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake; and

- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to litigation.

> This new rule has two major purposes:
>
> 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.
>
> 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

Tab 3

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

See selected Congressional Discussion to FRE 414, p. 1140.

Source of FRE 414: As adopted Sept. 13, 1994, P.L. 103-322, §320935(a), 108 Stat. 2135, eff. July 9, 1995.

ANNOTATIONS

U.S. v. Kelly, 510 F.3d 433, 437 (4th Cir.2007). "[E]ven if a prior conviction qualifies for admission under [FRE] 414, evidence of that conviction may nonetheless 'be excluded if its probative value is substantially outweighed by the danger of unfair prejudice' to the defendant. In applying the [FRE] 403 balancing test to prior offenses admissible under Rule 414, a district court should consider a number of factors, including (i) the similarity between the previous offense and the charged crime, (ii) the temporal proximity between the two crimes, (iii) the frequency of the prior acts, (iv) the presence or absence of any intervening acts, and (v) the reliability of the evidence of the past offense." *See also U.S. v. Summage*, 575 F.3d 864, 877 (8th Cir.2009); *U.S. v. Bentley*, 561 F.3d 803, 815 (8th Cir.2009).

U.S. v. Sumner, 119 F.3d 658, 661 (8th Cir.1997). See annotation under FRE 413, p. 944.

U.S. v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997). "The language of Rule 414 does not address the question of staleness. ... The historical notes to the rules and congressional history indicate there is no time limit beyond which prior sex offenses by a defendant are inadmissible."

FRE 415. EVIDENCE OF SIMILAR ACTS IN CIVIL CASES CONCERNING SEXUAL ASSAULT OR CHILD MOLESTATION

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

See selected Congressional Discussion to FRE 415, p. 1140.

Source of FRE 415: As adopted Sept. 13, 1994, P.L. 103-322, §320935(a), 108 Stat. 2135, eff. July 9, 1995.

ANNOTATIONS

Seeley v. Chase, 443 F.3d 1290, 1294 (10th Cir. 2006). "This court has not addressed at length the requirements for admitting prior sexual assault testimony under [FRE] 415. We have, however, discussed these requirements in the context of [FRE] 413, which covers admission of prior sexual assaults in the context of a criminal trial. *At 1295:* Although we have not specifically stated that a district court must follow these procedures when applying Rule 415, we have stated that courts must 'make a reasoned, recorded statement of its [FRE] 403 decision when it admits evidence under [FREs] 413-415.' Moreover, we have noted that Rule 413 and Rule 415 are 'companion' rules. As such, ... a district court must follow the same procedure for determining whether evidence is admissible under Rule 415 as it would when admitting evidence under Rule 413." *See also* annotation under FRE 413, p. 944; *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 143-44 (3d Cir.2002).

ARTICLE V. PRIVILEGES

FRE 501. GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Tab 4

subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) **Protective Orders.**

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

See chart, "Summary of 2009 FRCP Time-Computation Changes," p. 737.

Tab 5

PROPOSED AMENDMENT TO
TEXAS RULE OF EVIDENCE 511

Rule 511. Waiver by Voluntary Disclosure

(a) General Rule

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

(b) Lawyer-Client Privilege and Work Product; Limitations on Waiver

Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work-product protection.

(1) Disclosure made in a federal or state proceeding or to a federal or state office or agency; scope of a waiver. — When the disclosure is made in a federal or state proceeding of any state or to a federal or state office or agency of any state and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness to be considered together.

(2) Inadvertent Disclosure in State Civil Proceedings. — When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Tex. R. Civ. P. 193.3(d).

(3) Controlling Effect of a Court Order. — A disclosure made pursuant to an order of a state court of any state that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in any Texas state proceeding. A disclosure made in litigation pending before a federal court that has entered such an order is likewise not a waiver in a Texas state proceeding.

(4) **Controlling Effect of a Party Agreement.** — An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

Comment

The addition of Rule 511(b) is designed to align Texas law with Federal Rule 502, which was enacted in 2008 and which governs only lawyer-client privilege and work-product waivers. Consequently, Rule 511(b) addresses only those waiver issues addressed in Federal Rule 502. As the phrase "in the circumstances set out" in the first sentence of Rule 511(b) makes clear, Rule 511(b) governs only certain types of waiver issues regarding the lawyer-client privilege and work-product. The failure to address in Rule 511(b) other waiver issues and waiver issues regarding other privileges or protections is not intended to affect the law regarding those other issues, privileges or protections.

Rule 511(b) does not govern whether an inadvertent disclosure of privileged matter constitutes a waiver. An inadvertent disclosure that is made in the course of state civil discovery is governed by Texas Rule of Civil Procedure 193.3(d). An inadvertent disclosure that is made in a Federal proceeding or to a Federal office or agency is governed by Federal Rule 502(b).

Rule 511(b) intentionally does not define "work product." It is anticipated that courts will apply the definition of "work product" applicable at the time. *See, e.g.*, TEX. R. CIV. P. 192.5 (defining "work product" for civil cases), and *Pope v. State,* 207 S.W.3d 352, 357-363 (Tex. Crim. App. 2006) (addressing "work product" in criminal case).

Rule 511(b) provides the rule of decision governing the effect disclosures made to offices or agencies of any state, and to disclosures, orders, or agreements made in proceedings pending in courts of any state.

Report of AREC Regarding Proposed Amendment to Tex. R. Evid. 511

On September 19, 2008, the President signed into law S. 2450, which adopted new Fed. R. Evid. 502. Even before the adoption of Fed. R. Evid. 502, AREC was working on a draft of a Texas Rule of Evidence that would adopt the same principles embodied in Fed. R. Evid. 502. Transmitted with this report is the result of that work, a proposed new Tex. R. Evid. 511(b), modeled on Fed. R. Evid. 502.

In its comment accompanying the federal rule, the Advisory Committee on Evidence Rules states that the federal rule has two purposes:

> 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.
>
> 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

See Fed. R. Evid. 502 advisory committee note. In proposing a parallel rule for Texas, the Committee has kept these same purposes in mind, and proposes the rule to further those same goals. In addition, the Texas rule implements that portion of the federal rule which states that "[n]otwithstanding Rules 101 and 1101, this rule applies to State proceedings," and "notwithstanding Rule 501, this rule applies even if Sate law provides the rule of decision." Fed. R. Evid. 502(f).

The Committee recommends that the new rule be added to what is presently Tex. R. Evid. 511. To accomplish this, we have taken what is presently Rule 511 and made that subpart (a), and have added the new proposed rule as subpart (b). We have changed the caption of Rule 511 from "Waiver of Privilege by Voluntary Disclosure" to "Waiver by Voluntary Disclosure." Subpart (a) – which is exactly the same language that is contained in the current Rule 511 – would be titled "General Rule," and the new subpart would be titled "Lawyer-Client Privilege and Work Product; Limitations on Waiver."

To a large extent, we adopted the language of the federal rule. The most significant issue we had to face was whether the rule should apply (a) to disclosures made only to Texas offices or agencies or also to disclosures made to *other* states' offices or agencies and (b) to disclosures, orders or agreements in litigation pending only in Texas state courts, or also to those made in *other* state courts (the federal rule already requires that we are governed by disclosures, orders, or agreements made to or in federal offices, agencies, or courts). The unanimous view of the Committee was that the Texas rule should take the broader form, as this was far more consistent with both of the goals (discussed above) of the rulemaking. Thus, the rule we have proposed is intended to provide Texas courts with the rule of decision governing the effect of disclosures made to offices or agencies of any state, and to disclosures, orders, or agreements made in proceedings pending in courts of any state.

We are not aware of any other state having adopted or proposed a rule that parallels Fed. R. Evid. 502. Thus, in drafting the rule, we did not have the benefit of any other state's experience. We did, however, have the benefit of the extensive record of the drafting and public comment involved in the adoption of Fed. R. Evid. 502.

Rule 511. Waiver by Voluntary Disclosure

(a) General Rule

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

(b) Limitations on Waiver

Notwithstanding paragraph (a), the following provisions apply to privileges recognized by these rules or to the protection that Texas law provides for tangible material (or its intangible equivalent) under Tex. R. Civ. P. 192.5.

[Alternative]

Notwithstanding paragraph (a), the following provisions apply to disclosure of a communication or information privileged by these rules or covered by the work-product protection.

(1) Disclosure made in a federal or state proceeding or to a federal or state office or agency; scope of a waiver. — When the disclosure is made in a federal or state proceeding of any state or to a federal or state office or agency of any state and waives the privilege or protection, the waiver extends to an undisclosed communication or information only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness to be considered together.

(2) Inadvertent Disclosure in State Civil Proceedings. — When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Tex. R. Civ. P. 193.3(d).

(3) Controlling Effect of a Court Order. — A disclosure made pursuant to an order of a state court of any state that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in any Texas state proceeding. A disclosure made in litigation pending before a federal court that has entered such an order is likewise not a waiver in a Texas state proceeding.

(4) Controlling Effect of a Party Agreement. — An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

Comment

The addition of Rule 511(b) is designed to align Texas law with Federal Rule 502. One difference between this Rule and the Federal Rule, which was enacted in 2008, is that the Federal Rule governs only lawyer-client privilege and work-product waivers.

Rule 511(b) does not govern whether an inadvertent disclosure of privileged matter constitutes a waiver. An inadvertent disclosure that is made in the course of state civil discovery is governed by Texas Rule of Civil Procedure 193.3(d). An inadvertent disclosure that is made in a Federal proceeding or to a Federal office or agency is governed by Federal Rule 502(b).

Rule 511(b) intentionally does not define "work product." It is anticipated that courts will apply the definition of "work product" applicable at the time. *See, e.g.,* TEX. R. Civ. P. 192.5 (defining "work product" for civil cases), and *Pope v. State,* 207 S.W.3d 352, 357-363 (Tex. Crim. App. 2006) (addressing "work product" in criminal case).

Rule 511(b) provides the rule of decision governing the effect disclosures made to offices or agencies of any state, and to disclosures, orders, or agreements made in proceedings pending in courts of any state.

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TRE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

See *Commentaries*, "Waiver of objections & privileges," ch. 6-A, §25.3, p. 395; Hoffman, *Texas Rules of Evidence Handbook* (9th ed. 2009-10), p. 528.

History of TRE 511 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lll). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxvii): Numbers (1) and (2) were added; the words "unless such disclosure itself is privileged, or (2) he or his representative calls a person to whom privileged communications have been made to testify as to his character or a trait of his character, insofar as such communications are relevant to such character or character trait" were added; the last sentence was deleted. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] l). Source: See Unif. R. Evid. 510 (1980).

ANNOTATIONS

In re Bexar Cty. Crim. Dist. Atty's Office, 224 S.W.3d 182, 189 (Tex.2007). "Although the DA's Office turned over its prosecution file without objection, which waived the work-product privilege as to the file's contents, the record is devoid of any indication that by doing so the DA likewise enlisted its current and former personnel to testify in [P's] suit regarding their case materials and related impressions and communications. The DA's waiver here is limited, not limitless, and agreeing to produce a prosecution file does not in itself require the DA to produce its personnel so that their mental processes and related case preparation may be further probed."

In re Ford Motor Co., 211 S.W.3d 295, 301 (Tex. 2006). "The privilege to maintain a document's confidentiality belongs to the document owner, not to the trial court. ... Mistaken document production by a court employee in violation of a court-signed protective order cannot constitute a party's voluntary waiver of confidentiality. ... No matter how many people eventually [see] the materials, disclosures by a third-party, whether mistaken or malevolent, do not waive the privileged nature of the information. This principle should apply with particular force when documents are entrusted to a court."

Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553-54 (Tex.1990). "[D] resists discovery based on the attorney-client privilege under [TRE] 503(b) and the work product privilege under [TRCP 166b(3), now TRCP 192.5]. Since there was evidence that the investigation was disclosed to the FBI, IRS, and the *Wall Street Journal*, the court of appeals properly held that these privileges had been waived."

Jordan v. 4th Ct. of Appeals, 701 S.W.2d 644, 649 (Tex.1985). "If the matter for which a privilege is sought has been disclosed to a third party, thus raising the question of waiver of the privilege, the party asserting the privilege has the burden of proving that no waiver has occurred."

In re Hicks, 252 S.W.3d 790, 794 (Tex.App.—Houston [14th Dist.] 2008, orig. proceeding). "An assignment of rights and claims does not automatically include a waiver of attorney-client privilege unless specifically stated in the language of the assignment." *See also* ***In re General Agents Ins. Co.***, 224 S.W.3d 806, 814 (Tex.App.—Houston [14th Dist.] 2007, orig. proceeding).

TRE 512. PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

See Hoffman, *Texas Rules of Evidence Handbook* (9th ed. 2009-10), p. 538.

History of TRE 512 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] l). Source: Unif. R. Evid. 511 (1980).

TRE 513. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) Comment or Inference Not Permitted. Except as permitted in Rule 504(b)(2), the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel, and no inference may be drawn therefrom.

(b) Claiming Privilege Without Knowledge of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Claim of Privilege Against Self-Incrimination in Civil Cases. Paragraphs (a) and (b) shall not

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(2) asserts a specific privilege for each item or group of items withheld.

(c) *Exemption.* Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative—

(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which the discovery is requested.

(d) *Privilege not waived by production.* A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

193.4 Hearing and Ruling on Objections and Assertions of Privilege.

(a) *Hearing.* Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.

(b) *Ruling.* To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.

(c) *Use of material or information withheld under claim of privilege.* A party may not use—at any hearing or trial—material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.

193.5 Amending or Supplementing Responses to Written Discovery.

(a) *Duty to amend or supplement.* If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:

(1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and

(2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

(b) *Time and form of amended or supplemental response.* An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.

193.6 Failing to Timely Respond—Effect on Trial.

(a) *Exclusion of evidence and exceptions.* A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce

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(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

(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;

(7) the expert's current resume and bibliography.

(f) ***Indemnity and insuring agreements.*** Except as otherwise provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.

(g) ***Settlement agreements.*** A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.

(h) ***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.

(i) ***Potential parties.*** A party may obtain discovery of the name, address, and telephone number of any potential party.

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

192.4 Limitations on Scope of Discovery. The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

192.5 Work Product.

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

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

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

(b) ***Protection of work product.***

(1) *Protection of core work product—attorney mental processes.* Core work product—the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories—is not discoverable.

(2) *Protection of other work product.* Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

(3) *Incidental disclosure of attorney mental processes.* It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) *Limiting disclosure of mental processes.* If a court orders discovery of work product pursuant to subparagraph (2), the court must—insofar as possible—

protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

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

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

(2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4;

(3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;

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

(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

(d) *Privilege.* For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.

192.6 Protective Orders.

(a) *Motion.* A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.

(b) *Order.* To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that:

(1) the requested discovery not be sought in whole or in part;

(2) the extent or subject matter of discovery be limited;

(3) the discovery not be undertaken at the time or place specified;

(4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

192.7 Definitions. As used in these rules—

(a) *Written discovery* means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.

(b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.

(c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.

(d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.

Comments to 1999 change:

1. While the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context. See *In re American Optical Corp.*, 988 S.W.2d 711 (Tex.1998) (per curiam); *K-Mart v. Sanderson*, 937 S.W.2d 429 (Tex.1996) (per curiam); *Dillard Dept. Stores v. Hall*, 909 S.W.2d 491 (Tex.1995) (per curiam); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex.1995) (per curiam); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex.1989).

2. The definition of documents and tangible things has been revised to clarify that things relevant to the subject matter of the action are within the scope of discovery regardless of their form.

3. Rule 192.3(c) makes discoverable a "brief statement of each identified person's connection with the case." This provision does not contemplate a narrative statement of the facts the person knows, but at most a few words describing the person's identity as relevant to the lawsuit. For instance: "treating physician," "eyewitness," "chief financial officer," "director," "plaintiff's mother and eyewitness to accident." The rule is intended to be consistent with *Axelson v. McIlhany*, 798 S.W.2d 550 (Tex.1990).

4. Rule 192.3(g) does not suggest that settlement agreements in other cases are relevant or irrelevant.

5. 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.

6. The sections in former Rule 166b concerning land and medical records are not included in this rule. They remain within the scope of discovery and are discussed in other rules.

7. The court's power to limit discovery based on the needs and circumstances of the case is expressly stated in Rule 192.4. The provision is taken from Rule 26(b)(2) of the Federal Rules of Civil Procedure. Courts should limit discovery under this rule only to prevent unwarranted delay and expense as

One remaining issue is whether we want to take up the question of selective waiver that the feds did not. Here's a good summary of some of the issues which can be found at http://federalevidence.com/node/177

The circuits are divided on whether a selective waiver rule should apply, with most circuits rejecting the selective waiver doctrine. *See* ***In re: Qwest Communications International Inc., Securities Litigation***, 450 F.3d 1179 (10th Cir. 2006) (discussing circuit split) (reviewed in 3 FED. EVID. REV. 885 (July 2006)). Because this issue is likely to come up again, it is useful to review recent developments on this issue.

The initial request for the Judicial Conference to consider and propose reform legislation concerning the attorney-client privilege included a request for a proposal which would "allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation." *See* **Letter of House Judiciary Committee Chairman James Sensenbrenner, Jr. to Ralph Mecham, Director, Administrative Office of the U.S. Courts** (dated Jan. 23, 2006).

The Advisory Committee on Evidence Rules considered the following selective waiver language:

"(c) Selective waiver. — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law."

The Draft Advisory Committee Note explained the purpose of the provision:
"Subdivision (c): Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of 'selective waiver,' holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America*

RULE 504. HUSBAND-WIFE PRIVILEGES
(this the current rule)

(a) Confidential Communication Privilege.

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

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

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

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

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

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

(C) *Crime against spouse or minor child.* In a proceeding in which the party is accused of conduct which, if proved, is a crime against the person of the spouse, any minor child, or any member of the household of either spouse, or, in a criminal proceeding, when the offense charged is under Section 25.01 Penal Code (Bigamy).

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

(E) *Proceeding to establish competence.* In a proceeding brought by or on behalf of either spouse to establish competence.

(b) Privilege not to Testify in Criminal Case.

(1) *Rule of privilege.* In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. A spouse who testifies on behalf of an accused is subject to cross-examination as provided in rule 611(b).

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(2) *Failure to call as witness.* Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(3) *Who may claim the privilege.* The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse.

(4) *Exceptions.* The privilege of a person's spouse not to be called as a witness for the state does not apply:

(A) *Certain criminal proceedings.* In any proceeding in which the person is charged with a crime against the person's spouse, a member of the household of either spouse, or any minor, or in an offense charged under Section 25.01, Penal Code (Bigamy).

(B) *Matters occurring prior to marriage.* As to matters occurring prior to the marriage.

Notes and Comments

Comment to 1997 change: The rule eliminates the spousal testimonial privilege for prosecutions in which the testifying spouse is the alleged victim of a crime by the accused. This is intended to be consistent with Code of Criminal Procedure article 38.10, effective September 1, 1995.

RULE 504. HUSBAND-WIFE PRIVILEGES

(Prof Janicke's proposed changes, in redline)

(a) Confidential Communication Privilege.

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

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

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

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

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

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

(C) *Crime against spouse or minor child.* In a proceeding in which the party is accused of conduct which, if proved, is a crime against the person of the spouse, any minor child, or any member of the household of either spouse, or, in a criminal proceeding, when the offense charged is under Section 25.01 Penal Code (Bigamy).

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

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(2) *Failure to call as witness.* Failure by an accused to call the accused's spouse as a witness, where other evidence indicates that the spouse could testify to relevant matters, is a proper subject of comment by counsel.

(3) *Who may claim the privilege.* The privilege not to testify may be claimed by the accused's spouse or by that spouse's guardian or representative but not by the accused.

Deleted: person

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(4) *Exceptions.* The privilege of an accused person's spouse not to be called as a witness for the state does not apply:

(A) *Certain criminal proceedings.* In any proceeding in which the accused person is charged with a crime against the accused person's spouse, a member of the household of either spouse, or any minor, or in an offense charged under Section 25.01, Penal Code (Bigamy).

(B) *Matters occurring prior to marriage.* As to matters occurring prior to the marriage.

PROPOSED AMENDMENT TO TEXAS RULE OF EVIDENCE 511
(Jan 20, 2011 revised draft)

Rule 511. Waiver by Voluntary Disclosure

(a) General Rule

A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

(b) Limitations on Waiver

Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information privileged by these rules or covered by the work-product protection.

(1) Disclosure made in a federal or state proceeding or to a federal or state office or agency; scope of a waiver. — When the disclosure is made in a federal or state proceeding of any state or to a federal or state office or agency of any state and waives the privilege or protection, the waiver extends to an undisclosed communication or information only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness to be considered together.

(2) Inadvertent Disclosure in State Civil Proceedings. — When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Tex. R. Civ. P. 193.3(d).

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(3) Controlling Effect of a Court Order (alternative #1)

A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(3) Controlling Effect of a Court Order (alternative #2)

(A) *Order of any state court.* A disclosure made pursuant to an order of a state court of any state that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in any Texas state proceeding.

(B) *Order of a federal court.* A disclosure made in litigation pending before a federal court that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(3) Controlling Effect of a Court Order (alternative #3- currently favored by AREC)

(A) *Generally.* A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(B) *Limitation for order of a state court.* The order of a state court of any state that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is not effective in a Texas state proceeding (except the proceeding in which the order is entered) unless the disclosure was made either pursuant to the court order or pursuant to an agreement of the parties, subsequently incorporated into an order of the court, regarding the effect of a disclosure.

(4) **Controlling Effect of a Party Agreement.** — An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

Comment

The addition of Rule 511(b) is designed to align Texas law with Federal Rule 502, which was enacted in 2008 and which governs only lawyer-client privilege and work-product waivers. Consequently, Rule 511(b) addresses only those waiver issues addressed in Federal Rule 502. As the phrase "in the circumstances set out" in the first sentence of Rule 511(b) makes clear, Rule 511(b) governs only certain types of waiver issues regarding the lawyer-client privilege and work-product. The failure to address in Rule 511(b) other waiver issues and waiver issues regarding other privileges or protections is not intended to affect the law regarding those other issues, privileges or protections.

Rule 511(b) does not govern whether an inadvertent disclosure of privileged matter constitutes a waiver. An inadvertent disclosure that is made in the course of state civil discovery is governed by Texas Rule of Civil Procedure 193.3(d). An inadvertent disclosure that is made in a Federal proceeding or to a Federal office or agency is governed by Federal Rule 502(b).

Rule 511(b) intentionally does not define "work product." It is anticipated that courts will apply the definition of "work product" applicable at the time. *See, e.g.,* TEX. R. CIV. P. 192.5 (defining "work product" for civil cases), and *Pope v. State*, 207 S.W.3d 352, 357-363 (Tex. Crim. App. 2006) (addressing "work product" in criminal case).

Rule 511(b) provides the rule of decision governing the effect disclosures made to offices or agencies of any state, and to disclosures, orders, or agreements made in proceedings pending in courts of any state.

Rule 511(b)(3) recognizes that "[c]onfidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery." Advisory Committee's Note to Federal Rule of Evidence 502. Rule 511(b)(3) authorizes the use of such confidentiality orders and addresses to extent to which Texas courts are bound by such confidentiality orders entered by a federal court, the court of another state, or another Texas court.

Rule 511(b)(4) makes clear that a confidentiality agreement entered into between parties that has not been incorporated into a court order binds only the parties to the agreement. The effect of a confidentiality order entered by a court—whether of the court's own devising or that incorporates an agreement between the parties—is governed by Rule 511(b)(3).

Comments that could accompany Alternative #3 to part (3), above:

Rule 511(b)(3) recognizes that "[c]onfidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery." Advisory Committee's Note to Federal Rule of Evidence 502. Rule 511(b)(3) authorizes the use of such confidentiality orders and addresses to extent to which Texas courts are bound by such confidentiality orders entered by a federal court, the court of another state, or another Texas court.

When a federal court enters such an order--providing that a disclosure connected with the litigation pending before that court of lawyer-client or work-product privileged material does not constitute a waiver—Rule 511(b)(3)(A) provides that Texas courts must honor that order. That is mandated by Federal Rule of Evidence 502(d).

Likewise, when either another Texas state court or the state court of another state enters such a confidentiality order, Rule 511(b)(3)(A) provides that Texas courts must honor that order. Rule 511(b)(3)(B), however, limits in one respect this general rule with regard to such orders entered by either another Texas state court or the state court of another state. It does not allow a party who has waived the privilege to undo the waiver as to parties in other litigation or future adversaries by obtaining an after-the-fact order protecting already-waived material. For example, a party that deliberately discloses privileged material by blogging, see, e.g., Lenz v. Universal Music Corp., 2010 WL 4286329 (N.D.Cal. 2010), would ordinarily be deemed to have waived the privilege under the applicable provisions of Rule 511(a) and (b)(1)-(2). Even if the parties had previously agreed to or the court had previously entered a confidentiality order providing that disclosure of privileged material during discovery would not constitute a waiver, the disclosure by blogging would not have been pursuant to such an agreement or order and would still constitute a waiver. A party should not be permitted to undo the waiver by offering to settle the case on terms favorable to its opponent on the condition that the opponent not object to the party's obtaining a court order declaring that no waiver had occurred. If a court were to enter such an order, Rule 511(b)(3)(B) provides that a Texas court would not be bound by that order. This limitation in Rule 511(b)(3)(B) applies only to such orders entered by state courts because Federal Rule of Evidence 502(d) arguably would compel state courts to honor such orders entered by federal courts.

Rule 511(b)(4) makes clear that a confidentiality agreement entered into between parties that has not been incorporated into a court order binds only the parties to the agreement. The effect of a confidentiality order entered by a court—whether of the court's own devising or that incorporates an agreement between the parties—is governed by Rule 511(b)(3).

MEMORANDUM

To: Supreme Court Rules Advisory Committee
From: Discovery Rules Subcommittee
Date: December 1, 2010
Subject: Amendments to Federal Rule of Civil Procedure 26

The Texas Supreme Court has asked the SCAC to examine whether the recently adopted amendments to Federal Rule 26 should be incorporated in some fashion as part of the Texas Rules of Civil Procedure. Federal Rule 26 has two significant differences from state practice.

The first is that Rule 26(a)(2) requires that a party produce a written report for any expert who is "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." In contrast, current Texas practice provides that a party must request an expert report, and the responding party may either tender the expert for deposition or provide the report. If the requesting party desires a report in addition to an expert's deposition, it must seek a court order requiring a report. In other words, under Texas practice, an expert report is not required absent a request and a court order, so long as the party produces the expert for deposition. Under the new federal rule, a written report is required absent an agreement of the parties or a court order relieving the parties of the obligation to produce written reports. Here is the text of the Texas Rules and the new federal rule on this matter:

I. Current Texas Rule of Civil Procedure 195: Discovery Regarding Testifying Expert Witnesses

A. Rule 195.1. Permissible Discovery Tools:

A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 > [FN1] and through depositions and reports as permitted by this rule.

B. Rule 195.5. Court-Ordered Reports:

If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

II. Federal Rule 26(a)(2) (as amended). Disclosure of Expert Testimony:

A. In General. . . . a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

B. Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

C. Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

Recommendation: The subcommittee recommended that the SCAC keep the current Texas court practice on this matter for two reasons. First, and primarily, it is the subcommittee's view that the Texas state practice is more cost effective. It does not require reports when a deposition and initial disclosures will do, thus saving the cost of drafting and preparing formal reports in the many cases that do not warrant them. Second, the subcommittee is not aware that current Texas practice has presented any problems for the practitioner or the courts. The sub-committee notes, however, that, under the new federal rule, a party seeking the deposition of an expert who has provided a written report must pay that expert's reasonable fee for time spent in "responding to discovery," (i.e. preparing for and testifying by deposition?) and this cost-shifting should be factored into the analysis of whether to incorporate the federal rule in state practice.

* * *

The second difference has to do with work product protection for testifying experts. Under the new Federal Rule 26, a work product privilege is extended to the work a testifying expert does to prepare his report in a case, including discussions with counsel and draft reports. In contrast, Texas practice provides that any draft reports and discussions between counsel and a testifying expert are discoverable. Here is the text of the Texas Rules and the new Federal Rule on this matter:

I. Current Texas Rule of Civil Procedure 192: Expert Work Product

A. Rule 192.3(e). Testifying and Consulting Experts:

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. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

(1) the expert's name, address, and telephone number;
(2) the subject matter on which a testifying expert will testify;
(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 the discovery is sought, regardless of when and how the factual information was acquired;
(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
(5) any bias of the witness;
(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;
(7) the expert's current resume and bibliography.

B. Rule 192.5 (b). Protection of Work Product:

(1) Protection of Core Work Product-Attorney Mental Processes. Core work product--the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories--is not discoverable.

(2) Protection of Other Work Product. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

(3) Incidental Disclosure of Attorney Mental Processes. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) Limiting Disclosure of Mental Processes. If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

C. Rule 192.5(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;

II. Federal Rule 26(b)(3) and (4) (as amended). Trial Preparation, Materials and Experts:

A. Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

B. Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

C. Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

A. Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

B. Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

C. Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

D. Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

E. Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Recommendation: The subcommittee has no recommendation on this matter, and would like the input of the SCAC. Arguments for adopting the federal rule include that it is desirable in matters of privilege that conformity exist in state and federal practice so as not to trip up the practitioner, and that it allows for a healthy examination of the case between a retained expert and counsel in preparing a case for trial. In addition, a wide array of lawyer groups favored the adoption of the federal rule. Arguments against adopting the federal rule include that is cloaks at least some aspects of an expert's thought processes in secrecy and makes that expert's opinions less susceptible to testing by cross-examination. In addition, the sub-committee is unaware of any problems in current Texas practice, but it would like to hear the input of the entire committee before proceeding further.

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To: Discovery Rules Subcommittee
From: Jim M. Perdue, Jr.
Date: January 13, 2011
Subject: Amendments to Federal Rule of Civil Procedure 26

The subcommittee recently issued a memorandum addressing the amendments to Federal Rule of Civil Procedure 26 and the inconsistencies between the amended FRCP 26 and the Texas Rules of Civil Procedure governing discovery related to experts, specifically Rules 192 and 195.

The federal amendments are summarized as two changes from Texas Rules:

a. All retained experts must provide a signed report upon designation which must contain defined elements according to new Rule 26(a)(2)(B); and
b. Report drafts and communications between attorney and testifying expert are protected from discovery.

I certainly cannot speak for any group as discordant as plaintiff's civil trial lawyers. I did conduct an informal survey of attorneys through e-mails and listservers on this topic. Surprisingly, there appeared to be general consensus among members of the bar on these two changes:

1) Not a single attorney favored a mandatory report requirement for retained experts, citing additional litigation cost as the primary issue; and
2) Almost all attorneys favored expanding a work product protection to communications with experts and for draft reports.

I. MANDATORY REPORTS BY A RETAINED EXPERT

While their bases may have differed, not a single attorney favored a change to the Federal Rule mandating a report from any retained expert. The reason given by most is the additional expense this forces upon an already expensive civil litigation system. Corollary to that objection is the way the Federal Rule enforces a default position of expense, rather than a preference for allowing counsel and their clients to design a discovery plan specific for their case and their dispute. This lead to several compliments given the Tex. R. Civ. P. 195 and its default approach, which is considered to allow case specific design and more discretion. For example, one attorney responded:

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EXHIBIT
11-03
PENGAD 800-631-6989

> The discretionary report requirement of the Texas Rules enables the lawyer to tailor the strategy and expense load to the case. This flexibility is the true genius of the Texas Rules. Also, Federal Rule 26 is silent about the timing of expert depositions and there is always a fight about when the plaintiff's experts are going to be deposed.

The Texas Rules diverge from the Federal Rules in more ways than an inflexible report requirement. Engrafting a report requirement into the Texas Rule in the interest of uniformity makes little sense unless all of the Federal Rule's other differences become the Texas Rule. For example, Fed. R. Civ. P. 26(b)(4)(C) shifts the cost of deposing a retained expert to the party seeking to take the deposition and doing the question. Texas does not, instead keeping the deposition time costs for a retained expert the responsibility of the party who retained him or her. Tex. R. Civ. P. 195.7. Fee shifting for deposition costs makes fair sense when a detailed report has been provided to the other side informing them of the expert's opinion and what they will say at trial but that party still wants to depose the expert. But forcing a party to incur the expense of professional time to write a detailed report, and then require it to incur the additional expense of producing the expert for deposition simply allows parties to play games with litigation expense (and time) when the substance of the expert's opinions and potential trial testimony are already known. There is no more significant driver of litigation expenses than expert fees, and having a mandatory report rule inserted into the Texas Rule where a party must cover its own experts' deposition fees forces, without variance, a new, additional layer of expense on every case.

The Federal rule also attempts to define what must be included in a retained expert's report.

> The report must contain:
>
> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B).

The effort by rule to define what "must" be in a report inevitably proves as difficult as defining beauty. Texas medical malpractice law exposes the hazards of this approach. While the proposed report requirement does not meet the level of a statutorily required predicate, it still defines what must be included in the report. That substantive question is the essence of what has become a litigation dispute in every Texas medical malpractice case -- whether a report satisfies the relatively benign definition of a qualifying report under Texas Civil Practice & Remedies Code § 74.351. Since that enactment, trial court challenges to reports have been followed by appellate challenges in almost every case, evidenced by the enormous volume of cases forced to address a factually case specific issue and leading one appellate justice to observe:

> Having practiced in the medical malpractice area for seventeen years prior to taking the bench, I have closely followed the development of the law with regard to the requirement of expert reports. I also have closely followed the gamesmanship that has rapidly spawned in this area of the law. This gamesmanship is directly at odds with the ethical concept that the law's procedures should be used "only for legitimate purposes." Tex. Disciplinary R. Prof'l Conduct, preamble ¶ 4.

Regent Care Ctr. of Laredo v. Abrego, 2006 WL 3613190 (Tex. App.–San Antonio Dec. 13, 2006, memorandum opinion) (J. Speedlin, concurring).

It appears unavoidable that the question of whether a mandatory report satisfies the rule will become a "mini-litigation" event. It is easy to foresee Motions to Strike Expert Witness, Motions to Declare Designation Insufficient, and Motions for Summary Judgment all based upon a requirement to provide a report intended to disclose opinions under a scope of discovery standard but that "must" contain certain undefinable elements. It is undeterminable at this point what the stakes of that dispute may be in federal courts until cases interpret the new rule and explain the ramification of a "non-qualifying report." But it is hard to envision an interpretive development where the report requirement in Fed. R. Civ. P. 26(a)(2)(B) will not add time, litigation expense, and create additional substantive disputes before trial and appellate courts regarding expert reports.

II. WORK PRODUCT PROTECTION FOR COMMUNICATIONS WITH EXPERTS AND DRAFT REPORTS

Contrary to the unanimous objection to the report requirement, there was a general consensus in support of the changes embodied in Fed. R. Civ. P. 26(b)(3)-(4). The substantive effect is to protect drafts of reports and the communications between attorney and expert from the scope of discovery. Presumptively, these changes would become proposed changes to Tex. R. Civ. P. 192.3(e) and 192.5. I never lose faith in this committee's ability to debate an issue, but this particular issue has been studied by more than a few deliberative bodies before.

The ABA House of Delegates recommended the changes to Rule 26 that would substantively provide a work product privilege to all attorney communications with retained experts and their draft reports. The text of the ABA resolution read:

> RESOLVED, That the American Bar Association recommends that applicable federal, state and territorial rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report, as follows:
>
> (i) an expert's draft reports should not be required to be produced to an opposing party;
>
> (ii) communications, including notes reflecting communications, between an expert and the attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;
>
> (iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.
>
> FURTHER RESOLVED, That the American Bar Association recommends that, until federal, state and territorial rule and statutory amendments are adopted, counsel should enter voluntary stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

Resolution of the American Bar Association House of Delegates, adopted August 7-8, 2006.

The Report of the Judicial Conference Committee on Rules of Practice and Procedure recommended the changes to Rule 26 with similar consensus and explained the substantive basis:

> The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.
>
> Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt

> to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts - one for consultation, to do the work and develop the opinions, and one to provide the testimony - to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report.
>
> Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work. Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

Report of the Judicial Conference, Rules, September 2009, pp. 10-12.

In my personal experience, counsel's efforts to define an expert's opinions through examination into their correspondence and communication are a rote area of deposition questioning. Anecdotally, most attorneys reported personal experiences where far too much time is spent in deposition marking as exhibits then reciting every transmittal letter ever sent the expert, followed by questions like "What did he mean by that?" or "Didn't that tell you what to do?" The issue of charges and compensation is addressed routinely, but nothing in the rules change prevents fully obtaining that information. The amounts and source of such is usually explored, and the rules change allows fully obtaining that information.

Two additional criteria in measuring a restriction on the scope of discovery can be considered. Accepting that a large amount of time is spent on discovery into attorney-expert communication, how does the volume of discovery efforts translate to trial? This can be considered both (a) in the substantive exploration of an expert's opinion and (b) in collateral issues on which an expert may be persuasively attacked. The lone objection I received to the rule change felt that the effort by opposing counsel to direct the opinion of an expert was a substantive issue in the analysis. Obviously, whether an expert's methodology and opinion has a non-judicial use is a potential substantive consideration of admissibility. The fact that an expert worked closely with the attorney and modified his or her reports at the attorneys direction does not precisely translate to the ultimate inquiry of non-judicial use. Nothing appears in the rules change to limit the scope of discovery into that substantive admissibility element.

This leaves consideration of persuasive points during cross examination. Most experiences that were registered, mine included, state that cross-examination at trial rarely addresses the communication between expert and attorney. Cross examination of an expert with communications from opposing counsel at trial invariably is based in the effort to put opposing counsel's conduct on trial. Personally, I have rarely seen that approach have much success. Exposure of an expert relying on incorrect data, at variance with recognized literature, or stretching opinions defying the science or medicine in his field is both more substantive and more persuasive in trial. While there may indeed be some instance where focus on counsel's communication is professional and appropriate, the Federal Rule appears to allow discovery in those instances. Fed. R. Civ. P. 26(b)(3)(A) and (b)(4)(C). I believe most attorneys would admit the situation of an attorney crafting from whole cloth an expert's opinion or successfully misleading an expert into a conclusion that cannot be exposed substantively are rare. Rather, the Federal change sets the rule at an appropriate default position -- where deposition practice will be to focus attorneys on the substance of the expert's opinion, litigation will assume that attorney communications with their experts were professional and ethical, and cross-examination will assume that the expert holds ultimate ownership of whatever he or she puts in a report or is willing to testify to on the record. Present Texas practice, with the inordinate amount of time used to depose experts on any detail of attorney-expert communication, reflects a default assumption that within communications there must be something untoward or unethical. That in itself may be a reason for the change.

J.M.P., Jr.

IN THE SUPREME COURT OF TEXAS

Misc. Docket Nos. 08-9010 and 08-9046

FINAL REPORT OF
THE ANCILLARY PROCEEDINGS TASK FORCE

Submitted to the Supreme Court of Texas on January 24, 2011

TO THE HONORABLE SUPREME COURT:

I. INTRODUCTION

The task force was established by the Texas Supreme Court pursuant to Misc. Docket No. 08-9010 and No. 08-9046. The task force was charged with the responsibility of reviewing and making recommendation of necessary revisions to ancillary proceeding rules contained in Part VI of the Texas Rules of Civil Procedure to clarify the procedures, modernize the language of the rules, resolves conflicts with other civil procedure rules, and reflect developments in the law.

The following persons served on the Task Force:

Professor Elaine Carlson, Chair-South Texas College of Law, Houston
Bruce A. Atkins, Law Offices of Bruce Atkins, Houston
Frederick J. Barrow, Littler Mendelson P.C., Dallas
Michael S. Bernstein, Michael S. Bernstein, P.C., Garland
Mark P. Blenden, The Blenden Law Firm, Dallas
Donna Brown, Donna Brown, P.C., Austin
Professor William V. Dorsaneo III, Southern Methodist Univ. School of Law, Dallas

Patrick J. Dyer, Law Offices of Patrick Dyer, Houston
R. David Fritsche, Law Offices of R. David Fritsche, San Antonio
Captain Ryan Gable, Harris County Constable Precinct Four, Houston
Daniel J. Goldberg, Ross, Banks, May, Cron, & Cavin, P.C., Houston
Kent D. Hale, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
O. Carl Hamilton, Jr., Atlas & Hall, L.L.P., McAllen
John T. Huffaker, Sprouse Shrader Smith P.C., Amarillo
Woody Hughes, Titus County Sheriffs Office, Mount Pleasant
The Honorable Tom Lawrence, Harris County JP Precinct 4-2, Humble
Clyde Lemon, Harris County District Clerk's Office
Chief Deputy Carlos Lopez, Travis County Constable Precinct Five, Austin
Raul Noriega, Texas RioGrande Legal Aid, San Antonio
Ronald Rodriguez, Law Offices of Ronald Rodriguez, Laredo
Stuart R. Schwartz, Scott, Hulse, Marshall, Feuille, Finger, & Thurmond P.C., El Paso
Carl Weeks, Chair, Process Server Review Board, Austin
The Honorable Randy Wilson, 157th Civil District Court, Houston
Dulcie Wink, The Wink Law Firm, Houston
Bonnie Wolbrueck, former Williamson County District Clerk (retired)
Christopher K. Wrampelmeier, Underwood Wilson, Berry, Stein, & Johnson, P.C., Amarillo
The Honorable Stephen Yelenosky, 345th Civil District Court, Austin
Staff Attorney: **Kennon Peterson,** Rules Attorney, Texas Supreme Court

II. PROCESS OF REVIEW

The task force began meeting in April 2008. Ten full task force meetings were held in Houston at South Texas College of Law and in Austin at the law offices of Haynes & Boone. In addition, the various subcommittees held numerous meetings across the state to prepare recommendations for the full committee's consideration. Thereafter, an editing subcommittee comprised of Professor Elaine Carlson, Dulcie Wink, David Fritsche, Pat Dyer, Judge Tom Lawrence and Kennon Peterson undertook the task of modernizing the language of the rules, organizing the rules in a logical sequence and harmonizing the full committee draft proposals. The edited final proposals were sent back to subcommittees for any proposed suggestions and for approval.

III. RECOMMENDATIONS

Attached are the Task Force recommended changes to the Ancillary Proceeding Rules of Procedure, currently contained in Rules 592-734, affecting attachment, garnishment, sequestration, distress warrants, injunctions, execution, turnover and receiverships, trial of right of property and mandamus proceedings. The Committee was constrained by governing statutes pertaining to ancillary proceedings. For that reason, the proposed rules are presented together with companion statutory provisions, as both must be considered in tandem to comprehend the applicable procedures.

IV. CONCLUSION

The Task Force proposed amendments to the rules of civil procedure pertaining to Ancillary Proceedings are submitted for consideration of the Supreme Court. We appreciate the opportunity to participate in this collaborative process.

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Texas Rules of Civil Procedure Part V: Rules Relating To Ancillary Proceedings

PART VI. Rules Relating To Ancillary Proceedings

SECTION 1. INJUNCTIONS

Rule INJ 1 (592). Temporary Restraining Orders[1]

(a) *Application.* A temporary restraining order may be sought by a motion or application[2] that must:

(1) contain a plain and intelligible statement of the grounds for injunctive relief;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action; and

(5) if sought without notice to the adverse party or its attorney, demonstrate through specific facts, supported by verification or affidavit, that:

(A) notice was not possible or practicable; or

(B) the applicant will sustain substantial damage before notice can be served and a hearing held.

(b) *Verification.* All facts supporting the application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence. Pleading on information and belief is insufficient to support the granting of the application.[3]

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[1] This rule has been rewritten completely and contains information from existing Rules 680 through 683.

[2] Throughout the injunction rules, the term "application" refers to an application or a motion.

[3] This draft requires each element of the application to be supported by sworn allegations. The existing Texas Rules of Civil Procedure only expressly require sworn averments for TROs that are issued *without notice*. *In re Texas Natural Resource Conservation Commission* cites *Millwrights Local Union No. 2484 v. Rust Engineering Company* for the proposition that a TRO may issue on merely a sworn petition, whereas a temporary injunction requires evidence. *See In re Tex. Natural Resource Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (orig. proceeding); *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 685-87 (Tex. 1968). Neither case addresses the issue of whether a TRO may be granted without sworn allegations of the elements so long as the opposing party is given notice of the TRO hearing. No Texas case addresses this issue directly, most likely because TROs are not usually appealable. However, existing Rule 682 provides that *no* writ of injunction may be granted without a pleading verified by affidavit. Because a TRO is a writ of injunction, the sworn pleading rule should apply.

(c) *Time for Hearing.* The court may conduct a hearing on the application at such time and upon such notice, if any, as directed by the court.

(d) *Order.* A court may grant the application with or without written or oral notice to the adverse party or its attorney. Unless provided otherwise by the Texas Family Code or other statute, every order granting an application for a temporary restraining order must:

(1) state the date and hour of issuance;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary restraining order is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action;

(5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;

(6) set a specific date and time for hearing on the application for the temporary or permanent injunction sought;

(7) state the amount and terms of the applicant's bond, if a bond is required;

(8) if granted without notice to the adverse party or its attorney:

(A) state why it was granted without notice; and

(B) set a hearing of the application for a temporary injunction that is at the earliest possible date, taking precedence over all matters except older matters of the same character;

(9) state the duration of the order;

(10) state that the order is binding on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise; and

(11) be filed promptly in the clerk's office.

(e) *Duration and Extension.*

(1) The duration of a temporary restraining order may not exceed fourteen days from the date of issuance.

(2) The court may extend the duration of a temporary restraining order for a like period not to exceed fourteen days. The reasons for the extension must be stated in the order.

(3) The parties may agree to extend the duration beyond the above-referenced time periods.

(f) *Applicant's Bond.* No temporary restraining order may be issued unless the applicant first posts a bond or other security pursuant to Rule **INJ 4 (595)**.

(g) *Motion to Dissolve or Modify.*[4] On two days' notice to the party who obtained the temporary restraining order, or shorter if the court directs, a party may move for dissolution or modification of the temporary restraining order. The court must hear and determine the motion as expeditiously as practicable. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, verified denial, testimony, or other evidence.

(h) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

PROPOSED COMMENTS TO RULE **INJ 1 (592(a))**: Throughout the injunction rules, the term "application" refers to an application or a motion.

A party seeking a temporary restraining order should include a request for a temporary or permanent injunction in its live pleadings. The application for a temporary restraining order may be included in the party's petition or in a separate pleading.

Rule INJ 2 (593). Temporary Injunctions[5]

(a) *Application.* A temporary injunction may be sought by a motion or application that must:

(1) contain a plain and intelligible statement of the grounds for injunctive relief;

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[4] The existing rules also contain a "Bond on Dissolution" provision. The Injunctive Rule Subcommittee recommends deleting that rule completely. *See* July 2, 2008 Memorandum from Dulcie Green Wink to the Ancillary Task Force, Injunctive Rule Subcommittee (hereinafter referred to as "Attachment A").

[5] This draft rule incorporates information from existing Rules 681 and 682, and is prepared to be relatively parallel to pleading requirements for a TRO.

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;

(3) state why the applicant has no adequate remedy at law; and

(4) state why the applicant has a probable right to recover on a cause of action.

(b) *Verification.* All facts supporting the application must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated.

(c) *Notice and Hearing.* The application cannot be granted without notice to the adverse party and an evidentiary hearing. The court must conduct the hearing at such time and upon such reasonable notice as the court may direct. An application for temporary injunction cannot be granted without evidence of each element in the hearing.

(d) *Order.* Every order granting an application for a temporary injunction must:

(1) state the date and hour of issuance;

(2) state why immediate and irreparable injury, loss, or damage will result if the temporary injunction is not granted;

(3) state why the applicant has no adequate remedy at law;

(4) state why the applicant has a probable right to recover on a cause of action;

(5) describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be mandated or restrained;

(6) state that the temporary injunction shall apply until trial on the merits with respect to the ultimate relief sought;

(7) set the cause for trial on the merits with respect to the ultimate relief sought;

(8) state the amount and terms of the applicant's bond, if a bond is required; and

(9) be filed promptly in the clerk's office.

(e) *Effect of Appeal.* Unless ordered otherwise, the appeal of a temporary injunction may not delay the trial.

(f) *Applicant's Bond.* No temporary injunction may be issued unless the applicant first posts a bond or other security pursuant to Rule **INJ 4 (595)**.

(g) *Motion to Dissolve or Modify.*[6] On reasonable notice to the party who obtained the temporary injunction, which may be less than three days, a party may move for dissolution or modification of the temporary injunction. The court must hear and determine the motion as expeditiously as practicable. If the grounds for the motion to dissolve or modify are based on an issue of fact, the motion must be supported by specific facts shown by affidavit, verified denial, testimony, or other evidence.

(h) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

PROPOSED COMMENTS TO RULE **INJ 2 (593(a))**: Throughout the injunction rules, the term "application" refers to an application or a motion.

A party seeking a temporary injunction should include a request for a temporary and/or permanent injunction in its live pleadings. The application for the temporary injunction, itself, may be included in the party's petition or in a separate pleading.

The parties may agree to expedited discovery in preparation for the injunction hearing. On a motion by a party, the court has the discretion to order expedited discovery to facilitate the parties' preparation for the injunction hearing. The expedited discovery can, but is not required to, be limited to the injunctive issues. In determining whether and to what extent the discovery should be limited to the injunctive issues, the court should consider the facts and circumstances of the case, the ability to sever the injunctive issues from the other issues in the case, judicial economy, the costs to the parties and the potential harassment that can arise in injunctive cases. An order granting expedited discovery should specify whether and to what extent the discovery is limited to injunctive issues.

Rule INJ 3 (594). Permanent Injunctions

(a) *Pleading.* To be awarded a permanent injunction, a party's pleading must:

(1) contain a plain and intelligible statement of the grounds for injunctive relief;

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[6] The existing rules also contain a "Bond on Dissolution" provision. The Injunctive Rule Subcommittee recommends deleting that rule completely. *See* Attachment A.

(2) state why immediate and irreparable injury, loss, or damage will result if the permanent injunction is not granted; and

(3) state why the applicant has no adequate remedy at law.

(b) *Verification.* All facts supporting the plea for a permanent injunction must be verified or supported by affidavit by one or more persons having personal knowledge of relevant facts that are admissible in evidence; however, facts may be stated based on information and belief if the grounds for belief are specifically stated. A permanent injunction cannot be granted without evidence of each element in the trial.

(c) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

Rule INJ 4 (595). Applicant's Bond or Other Security[7]

(a) *Requirement of Bond.* Unless otherwise provided by statute,[8] a writ of injunction may not be issued unless the applicant has filed with the clerk a bond:

(1) payable to the respondent in the amount set by the court's order;

(2) with sufficient surety or sureties to be approved by the clerk; and

(3) conditioned that the applicant will abide the decision which may be made in the cause, and that the applicant will pay all sums of money and costs that may be adjudged against the applicant if the temporary restraining order or temporary injunction shall be dissolved in whole or in part.

(b) *Other Security.* In lieu of a bond, the applicant may deposit cash or other security in compliance with Rule 14c.

(c) *Bond in Family Code Case.* To the extent permitted by the Texas Family Code, the court in its discretion may dispense with the necessity of a bond in connection with an ancillary injunction.[9]

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[7] This draft rule is derived from existing Rule 684.

[8] The Injunctive Rule Subcommittee recommends that the Supreme Court of Texas include a comment to the draft rule containing language such as: This rule recognizes that there are some statutes that dispense with the necessity of a bond under certain circumstances. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.041-65.043.

[9] This language comes from existing Rule 693a.

(d) *Restraining Governmental Entities.* Where the temporary restraining order or temporary injunction is against the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and the State, municipality, State agency, or subdivision of the State in its governmental capacity has no pecuniary interest in the suit and no monetary damages can be shown, the bond shall be allowed in the sum set by the court, and the liability of the applicant will be for its face amount if the temporary restraining order or temporary injunction shall be dissolved in whole or in part. The court rendering judgment on the bond may allow recovery for less than its full face amount under equitable circumstances and for good cause shown by affidavit or otherwise.

(e) *Review of Applicant's Bond.* On reasonable notice, which may be less than three days, any party shall have the right to prompt judicial review of the applicant's bond. Any party may move to increase or reduce the amount of the bond, or question the sufficiency of the surety or sureties. The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence. After a hearing, the court must issue a written order on the motion.

PROPOSED COMMENT TO RULE **INJ 4 (595)**: This rule recognizes that there are some statutes that dispense with the necessity of a bond under certain circumstances. *See, e.g.* TEX. CIV. PRAC. & REM. CODE ANN. §§ 65.041-65.043.

Rule INJ 5 (596). Contents of Writ of Injunction[10]

(a) *General Requirements.* Unless provided otherwise by statute, every writ of injunction, whether it be a temporary restraining order, temporary injunction, or permanent injunction must:

(1) be styled "The State of Texas";

(2) be dated and signed by the clerk officially;

(3) bear the seal of the court;

(4) state the names of the parties to the proceedings, the name of the applicant, the nature of the application, and the court's action on the application;

(5) be directed to the person or persons enjoined; and

(6) have a copy of the order granting the application for the writ attached.

[10] This draft rule is derived from existing Rules 683 and 687. The Injunctive Rule Subcommittee has provided a proposed form for writs of injunction.

(b) *Command of Writ.* The writ must command the person or persons to whom it is directed to, until the time specified:

(1) cease and refrain from performing the acts enjoined in the court's issuing order or judgment, a copy of which must be attached to the writ; and

(2) to the extent the injunction is mandatory in nature, obey and execute the terms of the issuing order or judgment, a copy of which must be attached to the writ.

(c) *Setting of Hearing or Trial.* If the writ is a temporary restraining order, it must state the date and time for the temporary injunction hearing. If the writ is a temporary injunction, it must state the date and time for trial on the merits.

(d) *Return of Writ.* The writ must be made returnable to the court that ordered the issuance of the writ in the same manner as a citation.

(e) *Form of Writ.*

(1) If the writ is a temporary restraining order, it shall be substantially in the following form:

"The State of Texas.

"To ________, [Respondent]:

"Whereas, in the _________ Court of _________ County, in a certain cause wherein _________________ is plaintiff and _______________ is defendant, as shown by a true copy of the attached Petition;

"And whereas _________________ [Applicant] applied for a temporary restraining order against _______________ [Respondent] as shown by true copy of the attached application;

"And whereas the Honorable Judge of said court, upon presentment of the application, entered an order granting the application for temporary restraining order, a true copy of which is attached.

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF SAID ORDER, and that you cease and refrain from performing all of the acts said Order restrains you from performing, [*and/or, to the extent the injunction is mandatory in nature*: "and that you obey and execute the terms of the said Order,"] until hearing on an application for temporary injunction to be held before the Judge of said Court, on the ______ day of _________________, 2____ at _________ o'clock _____ M, in the courtroom for the _______ Court in __________ County, in _________, Texas, and when and where you will appear and show cause why a temporary injunction should not be issued as prayed for in the application, and why the other relief prayed for therein should not be granted.

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in __________ [City], ___________ County, Texas, this the _____ day of ______, 2____."

(2) If the writ is a temporary injunction, it shall be substantially in the following form:

"The State of Texas.

"To ________, [Respondent]:

"Whereas, in the __________ Court of __________ County, in a certain cause wherein __________________ is plaintiff and _________________ is defendant, as shown by a true copy of the attached Petition;

"And whereas __________________ [Applicant] applied for a temporary injunction against _______________ [Respondent] as shown by true copy of the attached application;

"And whereas the Honorable Judge of said court, upon presentment of the application, granted a temporary injunction and entered an Order, a true copy of which is attached;

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF THE ATTACHED ORDER, and that you cease and refrain from performing all of the acts said Order restrains you from performing, [*and/or, to the extent the injunction is mandatory in nature*: "and that you obey and execute the terms of the said Order,"] until trial on the merits with respect to the ultimate relief sought, which shall be conducted on the _ ______ day of __________________, 2____ at _________ o'clock _____ M, in the courtroom for the _______ Court in __________ County, in __ ______, Texas, or such other date and time as said Court shall order.

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in __________ [City], ___________ County, Texas, this the _____ day of ______, 2____."

(3) If the writ is a permanent injunction, it shall be substantially in the following form:

"The State of Texas.

"To ________, [Respondent]:

"Whereas, in the _________ Court of _________ County, in a certain cause wherein _______________ is plaintiff and _______________ is defendant;

"And whereas _______________ [Applicant] applied for a permanent injunction against _____________ [Respondent];

"And whereas the Honorable Judge of said court, upon presentment of the application in trial granted a permanent injunction against ___________ [Respondent] and entered a Judgment, a true copy of which is attached;

"THEREFORE YOU ARE COMMANDED TO OBEY ALL OF THE TERMS OF THE ATTACHED JUDGMENT, and that you permanently cease and refrain from performing all of the acts said Judgment restrains you from performing [*and/or, to the extent the injunction is mandatory in nature*: "and that you permanently obey and execute the terms of the said Order"].

"ISSUED AND GIVEN UNDER MY HAND and seal of said Court at my office in _________ [City], __________ County, Texas, this the ____ day of ______, 2____."

(f) *Conflict.* If there is a conflict between a provision of this rule and the Texas Family Code, the Texas Family Code shall prevail.

Rule INJ 6 (597). Delivery, Service, and Return of Writ[11]

(a) *Delivery of Writ.*

(1) The clerk issuing a writ of injunction must deliver the writ to the sheriff, constable, or other person authorized by Rule 103, or the applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103.

(2) If several persons are enjoined, residing in different counties, the clerk must issue additional copies of the writ as requested by the applicant.

(b) *Service of Writ.*

[11] This draft rule is derived from existing Rule 689.

(1) A temporary restraining order or other writ of injunction is not effective until served upon the person(s) to be enjoined. The writ may be served by any person authorized by Rule 103 of the Texas Rules of Civil Procedure. Only a sheriff or constable may serve a temporary restraining order or other writ of injunction that requires the actual taking of possession of a person, property, or thing, or a writ requiring that an enforcement action be physically enforced by the person delivering the writ.

(2) The person authorized to serve the writ, upon receipt, must:

(A) endorse the writ with the date of receipt; and

(B) as soon as practicable, serve the writ on the party enjoined.

(c) *Return of Writ.*

(1) The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 executing the writ. The return must be filed with the issuing clerk within the time stated in the writ.

(2) The action of the sheriff, constable, or other person authorized by Rule 103 must be endorsed on or attached to the writ, showing how and when the writ was executed.

Rule INJ 7 (598). Scope of the Writ of Injunction[12]

Every writ of injunction, whether temporary or permanent in nature, is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule INJ 8 (599). Orders that are Issued Before the Petition is Filed[13]

A temporary restraining order or an order setting a time for hearing upon an application for temporary injunction may be issued prior to suit being filed. If so, the following must occur:

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[12] This draft rule is derived from existing Rule 683.

[13] This draft rule contains the substance of existing Rules 685 and 686, both of which seem to apply only when the applicant seeks a TRO or a date for an injunction hearing *before* filing the original petition. Thus, the two rules have been combined here for clarity.

(a) *Filing and Docketing.* The party for whom the order is granted must file the order and the petition as soon as practicable with the clerk of the proper court.

(b) *Issuance of Citation.* The clerk must then docket the case to the court to which the case is permanently assigned. The clerk must also issue a citation to the defendant as in other civil cases, which will be served and returned in like manner as ordinary citations. When a true copy of the petition is attached to the temporary restraining order or the order setting a time for the temporary injunction hearing, it is not necessary to attach a separate copy of the petition to the citation; instead, it is sufficient for the citation to refer to plaintiff's petition.[14]

Rule INJ 9 (600). The Answer[15]

The defendant to a cause involving an application for a temporary restraining order, a temporary injunction, or a permanent injunction may answer as in other civil actions. No injunction shall be dissolved before final hearing because of the denial of the material allegations of the application, unless the answer denying the allegations is supported by a verification or affidavit.

Rule INJ 10 (601). Disobedience[16]

The court may punish disobedience of a temporary restraining order, a temporary injunction, or a permanent injunction as contempt. The complainant may file in the court in which the injunction is pending an affidavit stating what person is guilty of disobedience and describing the acts constituting the disobedience. The court may then issue a writ of attachment for the disobedient person, directed to the sheriff or any constable of any county, and requiring that officer to arrest the person therein named if found within any county and have the person brought before the court at the time and place named in the writ. Alternatively, the court may issue a show cause order requiring the person to appear on a designated date and show cause why the person should not be adjudged in contempt of court. On return of the writ of attachment or show cause order, the court must proceed to hear proof. If satisfied that the person has disobeyed the injunction, either directly or indirectly, the court may commit the person to jail without bail until the person is purged of the contempt in the manner and form as the court may direct.

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[14] Existing Rule 685(b) has been incorporated here. The last sentence of existing Rule 685(b) has been moved to Rules <u>INJ 1(c) (592(c))</u> and <u>INJ 2(a) (593(a))</u>.

[15] This draft rule is modeled after existing Rule 690.

[16] This draft rule is modeled after existing Rule 692.

Rule INJ 11 (602). Principles of Equity Applicable[17]

The principles, practice, and procedure governing courts of equity govern proceedings in injunctions when not in conflict with these rules or the provisions of the statutes.

Rule INJ 12 (603). Bond on Dissolution[18]

[NO RULE CONTENT RECOMMENDED]

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[17] This draft rule is modeled after existing Rule 693.

[18] The Injunctive Rule Subcommittee recommends deleting existing Rule 691. *See* Attachment A. Rule 691 reads:

> Upon the dissolution of an injunction restraining the collection of money, by an interlocutory order of the court or judge, made in term time or vacation, if the petition be continued over for trial, the court or judge shall require of the defendant in such injunction proceedings a bond, with two or more good and sufficient sureties, to be approved by the clerk of the court, payable to the complainant in double the amount of the sum enjoined, and conditioned to refund to the complainant the amount of money, interest and costs which may be collected of him in the suit or proceeding enjoined if such injunction is made perpetual on final hearing. If such injunction is so perpetuated, the court, on motion of the complainant, may enter judgment against the principal and sureties in such bond for such amount as may be shown to have been collected from such defendant.

A number is retained for the rule in case the Supreme Court Advisory Committee disagrees with the recommendation.

Injunction Statutes
Texas Civil Practice & Remedies Code

§ 65.011. Grounds Generally

A writ of injunction may be granted if:

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;

(2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;

(4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or

(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

§ 65.012. Operation of Well or Mine

(a) A court may issue an injunction or temporary restraining order prohibiting subsurface drilling or mining operations only if an adjacent landowner filing an application claims that a wrongful act caused injury to his surface or improvements or loss of or injury to his minerals and if the party against whom the injunction is sought is unable to respond in damages for the resulting injuries.

(b) To secure the payment of any injuries that may be sustained by the complainant as a result of subsurface drilling or mining operations, the party against whom an injunction is sought under this section shall enter into a good and sufficient bond in an amount fixed by the court hearing the application.

(c) The court may appoint a trustee or receiver instead of requiring a bond if the court considers it necessary to protect the interests involved in litigation concerning an injunction under this section. The trustee or receiver has the powers prescribed by the court and shall take charge of and hold the minerals produced from the drilling or mining operation or the proceeds from the disposition of those minerals, subject to the final disposition of the litigation.

§ 65.013. Stay of Judgment or Proceeding

An injunction may not be granted to stay a judgment or proceeding at law except to stay as much of the recovery or cause of action as the complainant in his petition shows himself equitably entitled to be relieved against and as much as will cover the costs.

§ 65.014. Limitations on Stay of Execution of Judgment

(a) Except as provided by Subsection (b), an injunction to stay execution of a valid judgment may not be granted more than one year after the date on which the judgment was rendered unless:

(1) the application for the injunction has been delayed because of fraud or false promises of the plaintiff in the judgment practiced or made at the time of or after

rendition of the judgment; or

(2) an equitable matter or defense arises after the rendition of the judgment.

(b) If the applicant for an injunction to stay execution of a judgment was absent from the state when the judgment was rendered and was unable to apply for the writ within one year after the date of rendition, the injunction may be granted at any time within two years after that date.

§ 65.015. Closing of Streets

An injunction may not be granted to stay or prevent the governing body of an incorporated city from vacating, abandoning, or closing a street or alley except on the suit of a person:

(1) who is the owner or lessee of real property abutting the part of the street or alley vacated, abandoned, or closed; and

(2) whose damages have neither been ascertained and paid in a condemnation suit by the city nor released.

§ 65.016. Violation of Revenue Law

At the instance of the county or district attorney or the attorney general, a court by injunction may prevent, prohibit, or restrain the violation of any revenue law of this state.

§ 65.017. Cigarette Seller, Distribution, or Manufacturer

In addition to any other remedy provided by law, a person may bring an action in good faith for appropriate injunctive relief if the person sells, distributes, or manufactures cigarettes and sustains a direct economic or commercial injury as a result of a violation of:

(1) Section 48.015, Penal Code; or

(2) Section 154.0415, Tax Code.

§ 65.018. to 65.020 [Reserved for expansion]

§ 65.021. Jurisdiction of Proceeding

(a) The judge of a district or county court in term or vacation shall hear and determine applications for writs of injunction.

(b) This section does not limit injunction jurisdiction granted by law to other courts.

§ 65.022. Return of Writ; Hearing by Nonresident Judge

(a) Except as provided by this section, a writ of injunction is returnable only to the court granting the writ.

(b) A district judge may grant a writ returnable to a court other than his own if the resident judge refuses to act or cannot hear and act on the application because of his absence, sickness, inability, inaccessibility, or disqualification. Those facts must be fully set out in the application or in an affidavit accompanying the application. A judge who refuses to act shall note that refusal and the reasons for refusal on the writ. A district judge may not grant the writ if the application has been acted on by another district judge.

(c) A district judge may grant a writ returnable to a court other than his own to stay execution or restrain foreclosure, sale under a deed of trust, trespass, removal of property, or an act injurious to or impairing riparian or easement rights if satisfactory proof is made to the nonresident judge that it is impracticable for the applicant to reach the resident judge and procure the action of the resident judge in time to put into effect the purposes of the application.

(d) A district judge may grant a writ returnable to a court other than his own if the resident judge cannot be reached by the ordinary and available means of travel and communication in sufficient time to put into effect the purpose of the writ sought. In seeking a writ under this subsection, the applicant or attorney for the applicant shall attach to the application an affidavit that fully states the facts of the inaccessibility and the efforts made to reach and communicate with the resident judge. The judge to whom application is made shall refuse to hear the application unless he determines that the applicant made fair and reasonable efforts to reach and communicate with the resident judge. The injunction may be dissolved on a showing that the applicant did not first make reasonable efforts to procure a hearing on the application before the resident judge.

§ 65.023. Place for Trial

(a) Except as provided by Subsection (b), a writ of injunction against a party who is a resident of this state shall be tried in a district or county court in the county in which the party is domiciled. If the writ is granted against more than one party, it may be tried in the proper court of the county in which either party is domiciled.

(b) A writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the judgment was rendered.

§ 65.024. to 65.030 [Reserved for expansion]

§ 65.031. Dissolution; Award of Damages

If on final hearing a court dissolves in whole or in part an injunction enjoining the collection of money and the injunction was obtained only for delay, the court may assess damages in an amount equal to 10 percent of the amount released by dissolution of the injunction, exclusive of costs.

§ 65.032. to 65.040 [Reserved for expansion]

§ 65.041. Bond Not Required for Issuance of Temporary Restraining Order for Certain Indigent Applicants

A court may not require an applicant for a temporary restraining order to execute a bond to the adverse party before the order may issue if:

(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to the court; and

(2) the court finds that the order is intended to restrain the adverse party from foreclosing on the applicant's residential homestead.

§ 65.042. Bond Not Required for Issuance of Temporary Injunction for Certain Indigent Applicants (a) A court may not require an applicant for a temporary injunction to execute a bond to the adverse party before the injunction may issue if:

(1) the applicant submits an affidavit that meets the requirements of Section 65.043 to

the court; and

(2) the court finds that the injunction is intended to enjoin the adverse party from foreclosing on the applicant's residential homestead.

(b) If the affidavit submitted under Subsection (a)(1) is contested under Section 65.044, the court may not issue a temporary injunction unless the court finds that the applicant is financially unable to execute the bond.

§ 65.043. Affidavit

(a) The affidavit must contain complete information relating to each and every person liable for the indebtedness secured by or with an ownership interest in the residential homestead concerning the following matters:

(1) identity;

(2) income, including income from employment, dividends, interest, and any other source other than from a government entitlement;

(3) spouse's income, if known to the applicant;

(4) description and estimated value of real and personal property, other than the applicant's homestead;

(5) cash and checking account;

(6) debts and monthly expenses;

(7) dependents; and

(8) any transfer to any person of money or other property with a value in excess of $ 1,000 made within one year of the affidavit without fair consideration.

(b) The affidavit must state: "I am not financially able to post a bond to cover any judgment against me in this case. All financial information that I provided to the lender was true and complete and contained no false statements or material omissions at the time it was provided to the lender. Upon oath and under penalty of perjury, the statements made in this affidavit are true."

(c) In the event the applicant is married, both spouses must execute the affidavit.

(d) The affidavit must be verified.

§ 65.044. Contest of Affidavit

(a) A party may not contest an affidavit filed by an applicant for a temporary restraining order as provided by Section 65.041.

(b) A party may contest an affidavit filed by an applicant for a temporary injunction as provided by Section 65.042:

(1) after service of a temporary restraining order in the case; or

(2) if a temporary restraining order was not applied for or issued, after service of notice of the hearing on the application for the temporary injunction.

(c) A party contests an affidavit by filing a written motion and giving notice to all parties of the motion in accordance with Rule 21a of the Texas Rules of Civil Procedure.

(d) The court shall hear the contest at the hearing on the application for a temporary injunction and determine whether the applicant is financially able to execute a bond against the adverse party as required by the Texas Rules of Civil Procedure. In making its determination, the court may not consider:

(1) any income from a government entitlement that the applicant receives; or

(2) the value of the applicant's residential homestead.

(e) The court may order the applicant to post and file with the clerk a bond as required by the Texas Rules of Civil Procedure only if the court determines that the applicant is financially able to execute the bond.
(f) An attorney who represents an applicant and who provides legal services without charge to the applicant and without a contractual agreement for payment contingent on any event may file an affidavit with the court describing the financial nature of the representation.

§ 65.045. Conflict with Texas Rules of Civil Procedure
(a) To the extent that this subchapter conflicts with the Texas Rules of Civil Procedure, this subchapter controls.
(b) Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this subchapter.
(c) The district courts and statutory county courts in a county may not adopt local rules in conflict with this subchapter.