## RULE 296. TRIAL COURT MAY MAKE ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

In any case tried in the district or county court without a jury, the trial court may orally state its findings of fact and conclusions of law on the record, in the presence of counsel, promptly after the close of the evidence. The court shall cause the court reporter to promptly transcribe the findings of fact and conclusions of law, file the same, and send a copy to each party.

## RULE 297 REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW WHEN NO ORAL FINDINGS OF FACT ARE MADE

(a) ***Request for Findings of Fact and Conclusions of Law.***

If oral findings of fact are not made by the trial court, any party may make a written request to the court to make findings of fact and conclusions of law. The request should be entitled "Request for Findings of Fact and Conclusions of Law" and must be filed with the clerk of the court within thirty days after judgment is signed. The clerk must immediately call such request to the attention of the judge who tried the case.

(b) ***Duty to Make Findings and Conclusions.***

The judge must make findings of fact and conclusions of law on each ultimate issue raised by the pleadings and evidence. Unless otherwise required by law, findings of fact should be in broad form whenever feasible. The trial court's findings must include only so much of the evidentiary facts as are necessary to disclose the factual basis for the court's decision. Unnecessary or voluminous evidentiary findings are not to be made.

(c) ***Time To Make Written Findings of Fact and Conclusions of Law.***

Upon timely request, the court must make and file its written findings of fact and conclusions of law within fifty days after the date a final judgment is signed and promptly send a copy to each party.

## RULE 298. ADDITIONAL OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(a) ***Request for Additional or Amended Findings and Conclusions.***

After the court makes original findings of fact and conclusions of law pursuant to Rule 296 or Rule 297, any party may file a request for additional or amended findings of fact or conclusions of law. The request must state the specific additional or amended findings of fact or conclusion of law requested and be made no later than twenty days after the filing of the court's original findings of fact and conclusions of law, but in no event earlier than thirty days after the date the judgment is signed.

(b) ***Duty to Make Additional or Amended Findings and Conclusions.***

The court must make and file any additional or amended findings of fact and conclusions of law within twenty days after the request is filed and promptly send a copy to each party. Any additional or amended findings of fact and conclusions of law made by the trial court must be in writing and filed with the clerk.

## RULE 299. OMITTED FINDINGS

(a) ***Omitted Grounds.***

The trial court's findings of fact shall form the basis of the judgment upon all grounds of recovery or defense embraced therein. If no request is made for a finding on any element of a ground of recovery or defense and the ground has not been found by the trial court, the unrequested ground is waived unless the ground has been conclusively established under the evidence.

(b) ***Partially Determined Grounds: Presumed Findings.***

When the trial court has made findings on some but not all elements of a ground of recovery or defense, the omitted elements that are necessarily referable to the elements found are presumed in support of the judgment when supported by factually sufficient evidence. There is no presumed finding on the omitted element if a finding on that element has been requested.

(c) ***Trial Court's Failure To Make Findings of Fact.***

A trial court's failure to make a requested additional finding will not result in a presumed finding. Refusal of the court to make a requested finding shall be reviewable on appeal.

## RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

Findings of fact must be filed apart from the judgment as a separate document. If there is a conflict between recitals in a judgment and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes. Rules 296-299a do not apply to any recitals of findings of fact in a judgment.

To: Texas Supreme Court Advisory Committee
From: William V. Dorsaneo, III
Date: December 1, 2010
Re: Proposed Civil Procedure Rule 301

Proposed Civil Procedure Rule 301 makes several significant modifications of current law. Under current law, unlike motions for new trial and motions to modify the trial court's judgment, motions for judgment nov and to disregard particular jury findings are not overruled by operation of law. Thus, the failure to obtain an express ruling waives the complaints made in a Rule 301 motion.

Motions for judgment also are not overruled by operation of law under the current law, but the signing of a judgment that does not award the relief requested in the motion should be sufficient to preserve complaints and requests for relief included in motions for judgment.

In contrast, subdivision (a) of the proposed rule provides that posttrial motions for judgment and motions for judgment nov or to disregard particular jury findings are overruled by operation of law. See proposed Tex. R. Civ. P. (a)(5), which contains alternative dates on which overruling by operation of law would occur, based on suggestions and arguments made at prior committee meetings.

Proposed subdivision (b) clarifies and simplifies the relationship between prejudgment motions for judgment, motions for judgment nov or to disregard particular jury findings and postjudgment motions to modify a judgment. Proposed subdivision (b)(2) specifically provides that motions to modify may be used to make the same requests for relief as the prejudgment motions which are not a prerequisite for filing postjudgment motions to modify the trial court's judgment. See proposed Tex. R. Civ. P. (b)(2). Thus, the proposed subdivision's treatment of the relationship between prejudgment and postjudgment motions is roughly analogous to the current relationship between prejudgment motions for mistrial and postjudgment motions for new trial.

Proposed subdivision (b)(1) also provides for postjudgment motions for new trial, which are discussed in detail in proposed Rule 302.

Proposed subdivision (b)(4) also provides for the timetable for filing and amending postjudgment motions to modify a final judgment or move for new trial, disposition of such motions by signed written order or by operation of law.

A new provision, subdivision (b)(4)(C), requires the Court clerk to call these postjudgment motions to the attention of the trial court.

Proposed subdivision (b)(3) incorporates a premature motions provision similar to current Rule 306c, which does not cover new trial motions.

Subdivision (b) also makes three significant changes in current law.

*First*, by using the term "in any respect" the proposed subdivision (b)(2) expands the scope of motions to modify. Although the procedural rules are silent on this issue, under current case law a motion to modify must seek a "substantive change in an existing judgment." Lane Bank Equip. Co. v. Smith Southern Equip., Inc., 10 S.W.3d 308, 314 (Tex. 2000) (per Phillips, C.J.); *see also Hecht, J.*, concurring in the judgment but criticizing the majority opinion. Justice Hecht's opinion "would hold that any requested change, however slight, other than a merely clerical change expressly excluded from Rule 329b(g), extends the trial court's plenary power and the appellate timetable." 10 S.W.3d at 321. Proposed subdivision (b) also eliminates the clerical change limitation currently contained within 329b(g) to avoid all arguments about whether the motion is sufficient to extend the trial court's plenary power and appellate timetables. Accordingly, under proposed subdivision (b)(2) it is not necessary to decide whether the requested change is "substantive" in some sense or a mere clerical change in order to extend trial and appellate timetables or to preserve complaints made in the motion.

*Second*, proposed subdivision (b)(3)(B) eliminates a technical requirement in current Rule 329b, which precludes a party from preserving a complaint in a postjudgment motion filed within 30 days after the final judgment is signed, if the party has filed a prior motion, which did not include the complaint, and the prior motion has been overruled by the trial court. In the case of In re Brookshire Grocery Co., 250 S.W.3d 66 (Tex. 2008), a bare majority of the Court determined that under current Rule 329b (b) and (e) an amended motion for new trial filed after a preceding motion has been overruled is not timely, even if it is filed within thirty days after the judgment or other order is signed. The basis for this holding is the text of the current rules, which unnecessarily penalize litigants who do not include all assignments of error in an original postjudgment motion. Justice Hecht's spirited dissent would have interpreted the text differently because "[t]ricky" procedural rules threaten substantive rights.

*Third*, by providing that a trial judge has discretion to rule on a tardy motion and that the ruling is subject to review on appeal, subdivision (b)(3)(E) is drafted to overrule Moritz v. Preiss, 121 S.W.3d 715 (Tex. 2003). In *Moritz*, the Court held that a tardy motion "is a nullity for purposes of preserving issues for appellate review." Although the Court did acknowledge an earlier opinion (Jackson v. Van Winkle, 660 S.W.2d 807, 808 (Tex. 1983)) allowing appellate review of issues raised and ruled upon before expiration of the court's plenary power, it concluded that "to give full effect to our procedural rules that limit the time to file new trial motions, today we hold that an untimely amended motion for new trial does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period." "Thus, *Moritz* eliminated the ability of the trial judge to permit a party to preserve a complaint about the trial court's judgment by ruling on the complaint, merely because the complaint should have been included in the party's earlier motion. If a trial judge considers a complaint while the court has plenary power over its judgment, the trial court's ruling should be subject to review on appeal.

Finally, proposed Rule 302 does not deal with motions for new trial following citation by publication or motions for judgment nunc pro tunc *see* Tex. R. Civ. P. 316, 329.

December 1, 2010

Rule 301. Motions Relating to Judgments

(a) Posttrial Motions

(1) Motion for Judgment on the Verdict. A party may move for judgment on the verdict at any time after rendition of a verdict.

(2) Motion for Judgment after Nonjury Trial. A party may move for judgment in a case tried to the court at any time after the evidence is closed.

(3) Motion for Judgment Notwithstanding the Verdict or to Disregard Jury Findings. A party may move for judgment notwithstanding the verdict after receipt of the jury's verdict, if a directed verdict would have been proper or may move to disregard one or more jury findings that will not support a judgment under the law or that have no support in the evidence.

(4) Form of Motion; Duty of Clerk. Complaints and requests for relief included in posttrial motion for judgment must be specific. [A posttrial motion for judgment may be made in open court on the record or may be made in writing and filed with the clerk of the court. The clerk must promptly call such a written motion to the attention of the judge, but the failure to do so does not affect the preservation of complaints made in the motion.]

(5) Disposition of Motions. A posttrial motion is overruled by operation of law [on the date the final judgment under Rule 300 is signed as to any requested relief not granted in the judgment *or* on the date the court's plenary power expires as provided in Rule 304 *or* 75 days after the date on which the judgment is signed.]

(6) Preservation of Complaints. A posttrial motion preserves complaints about the judgment that are made in the motion if the motion is

overruled by signed written order before it is overruled by operation of law or when it is overruled by operation of law.

(7) Form of Judgment. A party must submit a proposed form of judgment with a motion for judgment.

(b) Postjudgment Motions

(1) Motions for New Trial. A party may move to set aside in judgment and seek a new trial pursuant to Rule 302.

(2) Motions to Modify Final Judgments. A party may move to modify the judgment in any respect, including (without limitation) by [moving for] *or* [requesting] judgment on the verdict, judgment notwithstanding the verdict, or judgment in disregard of one or more jury findings, regardless of whether a posttrial motion seeking such relief has been made before judgment.

(3) Premature Motions. No postjudgment motion may be held ineffective because it was filed prematurely. Every such motion will be deemed to have been filed on the date of, but subsequent to, the signing of the judgment the motion assails.

(4) Disposition of Postjudgment Motions.

(A) Filing. A postjudgment motion for new trial or to modify a [final] judgment, if filed by a party, must be filed within 30 days after the [final] judgment was signed. The filing of a posttrial motion for judgment is not a prerequisite to the filing of a postjudgment motion to modify the judgment.

(B) Amendment. One or more amended or additional motions may be filed without leave of court within 30 days after the [final] judgment is signed, regardless of whether a prior motion has been overruled.

(C) Duty of Clerk. The trial court clerk must promptly call a postjudgment motion for new trial or to modify a [final] judgment to the attention of the judge. But the failure of the clerk to do so does not affect the preservation of complaints made in the motion.

(D) Disposition of Motions. If not determined by signed written order within 75 days after the final judgment was signed, a motion for new trial or a motion to modify a [final] judgment is overruled by operation of law on the expiration of that period.

(E) Discretion to Rule on Tardy Motions. As long as the trial court retains plenary power over its judgment, the trial court has discretion to consider and rule on a motion or an amended motion for new trial or to modify a [final] judgment that was not filed within 30 days after the signing of the trial court's [final] judgment. The court's express substantive ruling on the merits of such a late filed motion is subject to review on appeal.

# 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 sub-committee'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.

# Materials Relating to Proposed Amendment to TRE 511

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)

Tab 1

*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.

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*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.

Tab 6

**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.

Tab 7

## 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] lii). 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).

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***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

Tab 8

(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

Tab 9

(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

Tab 10

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*