

TEXAS YOUNG LAWYERS ASSOCIATION

PRIVILEGE 101

UNDERSTANDING PRIVILEGED
CONVERSATIONS UNDER THE LAW



An overview for attorneys, clients, spouses, clergy, and health professionals on legal confidentiality and privilege rights and obligations prepared by the Texas Young Lawyers Association.

PRIVILEGE 101

UNDERSTANDING PRIVILEGED
CONVERSATIONS UNDER THE LAW

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ATTORNEY-CLIENT PRIVILEGE FOR ATTORNEYS

The attorney-client privilege is one of the oldest and most sacred legal privileges recognized in the law. This guide is a product of the hard work and dedication of Texas Young Lawyer Association directors and members. It is meant solely as a guide and is not to be taken as legal advice. The content and views expressed in this guide are for reference purposes only.

The attorney-client privilege is memorialized in Texas Rule of Evidence 503 and Federal Rule of Evidence 501 and promotes free discussion between the lawyer and client.

When does the attorney-client privilege apply?

There are a few factors which must be met for the attorney-client privilege to apply. First, the communication or information transmitted to one's attorney must be related to legal services. For example, communication about the circumstances surrounding a client's DWI arrest is privileged, but a communication about public relations may not be. Second, the communication must be in confidence. This means that the communication must be between the lawyer and the client only. If someone else is present when the communication is made, that person could be forced to testify about what they heard. An exception to this rule is that the lawyer and/or client must be aware of the third party's presence such that the communication can still be considered confidential if they were not aware that the third party could hear their conversation. The attorney-client privilege even protects communication between a lawyer and a potential client so long as the communication is made when a client is deciding whether to hire a lawyer.

When could otherwise privileged communication be disclosed?

As protective as the attorney-client privilege is, sometimes, especially in criminal cases, an attorney must decide whether he/she has an obligation to disclose communication or facts that are otherwise privileged. Specifically, if a lawyer learns of or receives information from a client that is in furtherance of fraud or a criminal act that will likely result in death or substantial bodily harm, then the lawyer *must* disclose the information if disclosure will prevent the fraud or criminal act from happening. Moreover, a lawyer *may* reveal otherwise confidential information about a past fraud or criminal act if the lawyer's legal advice or work were used in committing the act.

The attorney-client privilege belongs to the client. *See In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (citing *West v. Solito*, 563 S.W.2d 240, 244 n.2 (Tex. 1978)). This means that the client can decide to disclose what he told his lawyer. Very few situations exist where a client should disclose attorney-client communication, but one example may be when a client told his lawyer to answer discovery or plead a case a certain way and the lawyer answers or pleads differently. The purpose of the disclosure in this situation would be to make sure the jury knows the client did not intentionally lie.

How does an attorney claim privilege?

In order to protect what one considers information protected by the attorney-client privilege, a party must generally do a few different things. First, the party must plead that privileged information is being withheld. Then if the opposing party wants to know what is being withheld, it must request a privilege log. The withholding party must produce a privilege log and the requesting party should seek an in-camera review of the withheld information. The judge will then decide whether the evidence is protected by the attorney-client privilege.

What happens if a lawyer knows his client intends to testify falsely?

Sections 3.03(a)(2) and (5) of the Texas Disciplinary Rules of Professional Conduct state, among other things, that a lawyer may not knowingly offer evidence or testimony that he knows is false. *See also Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 347–48 (Tex. App.—El Paso 1993, no writ) (holding that attorney-client privilege does not prevent attorney from making disclosures of intended fraud required or allowed by disciplinary rules).

If a lawyer reasonably concludes that a client is going to testify falsely, he should do a few things. First, he should attempt to persuade the client to testify truthfully or exclude the false testimony. If the client refuses, the lawyer should possibly alert the judge about the false testimony. TEX. DISCIPLINARY R. PROF'L CONDUCT § 3.03(b). A lawyer is also allowed to withdraw from representation if the client insists on offering false testimony. If the lawyer seeks to withdraw, he does not necessarily have to disclose what the false testimony would be.

How does the attorney-client privilege apply to business entities?

Courts have been clear that the attorney-client privilege applies to the corporate client. *United States v. Louisville & Nashville R.R.*, 236 U.S. 318 (1915). But, as we all know, businesses are comprised of a number of different people. The attorney-client privilege, in its simplest sense, relates to one lawyer and one client. When a business is involved, application of the privilege is not so clear. Questions that typically arise are: which person's communications are privileged?; who has the authority to assert the privilege?; who may waive the privilege?

Courts typically follow one of two tests in determining who within the organization may claim the privilege. The two tests are the "control group test" and the "subject matter test." In *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), the Texas Supreme Court adopted the "control group test." The "control group test" looks at the authority of the claimant. In order to claim the privilege in Texas, the claimant must be a person who has authority to obtain professional legal services or to act on the advice of counsel or any other person who makes or receives confidential communication, for the purpose of effectuating legal representation, while acting in the scope of his/her employment.

Thus, communications regarding legal matters in a corporation may be discoverable. For example, if a lawyer discusses legal matters with an employee without an appropriate corporate representative present, the communication may be discoverable.

Issues could arise between business partners, and a corporate lawyer who "represents" the business may have to disclose conversations he had with one business partner to the other since he technically represents the organization and not the partners, individually.

ATTORNEY WORK PRODUCT FOR ATTORNEYS

The attorney work product doctrine generally protects materials that are prepared in anticipation of litigation or trial either by a party or by a party's attorney or agent. If materials are protected as attorney work product, they do not have to be shared with an opposing party in litigation. Federal Rule of Civil Procedure 26(b)(3) provides the basis for the protection under the federal rules. The Texas counterpart is Texas Rule of Civil Procedure 192.5.¹

What is the attorney work product doctrine designed to protect?

Unlike the attorney-client privilege, which is designed to facilitate clients making full disclosure to their attorneys, the attorney work product doctrine is designed to protect an attorney's preparation for litigation and trial. The protection belongs to the attorney, although both the attorney and her client may assert the protection to avoid disclosure.

In one sense, work product protection is narrower than the attorney-client privilege because it applies only to materials prepared during litigation or in preparation for litigation that is reasonably anticipated. On the other hand, it is broader than the attorney-client privilege because it protects more than just attorney-client communications. It also protects attorneys' notes and other materials prepared in anticipation of litigation or trial.

Is attorney work product always protected?

Work product protection is not absolute. Texas Rule of Civil Procedure 192.5(c) enumerates several categories of material that are not protected as attorney work product in Texas courts.² More generally, a party may be compelled to disclose "factual" work product—e.g., notes of witness interviews or photos of an accident scene—if the party seeking the information can show that it has a substantial need for the information to prepare its case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. "Core" work product—e.g., an attorney's mental impressions, conclusions, opinions, or legal

¹ This is intended to be an overview of the attorney work product doctrine. Practicing lawyers should always consult the most recent case law and conduct their own analysis given the particular facts or circumstances at issue.

² These include certain information concerning experts, trial witnesses, witness statements, and contentions; certain trial exhibits; contact information of any potential party or any person with knowledge of relevant facts; any photograph or electronic image of underlying facts; and any work product created under circumstances within an exception to the attorney-client privilege in Texas Rule of Evidence 503(d). See TRCP 192.5(c) for more details.

theories—enjoys greater protection but may still be subject to discovery if the work product is at issue in the litigation and a court finds a compelling need for its discovery.

Can the attorney work product protection be waived through disclosure?

The attorney work product protection is not automatically waived by disclosure of protected materials to a third party. This is a major distinction between the work product doctrine and the attorney-client privilege. If the disclosing party and the party to whom work product is disclosed share a common interest the protection remains intact. For example, a corporation under government investigation may later be compelled to produce, in related private litigation, any work product that it shared with government investigators. *See, e.g., In re Initial Public Offering Securities Litigation*, 2008 WL 400933 (S.D.N.Y.). But the same corporation may not be compelled to produce work product that was shared with an investigator the corporation retained to assist with its defense of the government’s investigation-or even the corporation’s external auditors who have nothing to do with the investigation but instead perform the corporation’s annual financial audits. *See, e.g., Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448-49 (S.D.N.Y. 2004).

Moreover, both the Federal Rules of Evidence and the Texas Rules of Civil Procedure protect attorney-client communications and work product from waiver through inadvertent disclosure. Under Federal Rule of Evidence 502 and Texas Rule of Civil Procedure 193.3(d), a party who inadvertently produces privileged communications or attorney work product may “snap back” those materials. In order to take advantage of the rule, the disclosure must have been inadvertent, the holder of the privilege must have taken reasonable steps to prevent disclosure, and the holder must promptly (within 10 days of discovery under Texas rules) take reasonable steps to assert the privilege.

ATTORNEY-CLIENT PRIVILEGE FOR CLIENTS

I'm in a lawsuit; is what I tell my attorney confidential?

The concepts of lawyer confidentiality and attorney-client privilege both concern information that the lawyer must keep private and are protective of the client's ability to confide freely in his or her lawyer, but the concepts are not synonymous. A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. On the other hand, the attorney-client privilege and "work product doctrine" apply in judicial and other legal proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

What is the attorney-client privilege?

The United States Supreme Court has declared that it is "one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U. S. 399, 403 (1998). The attorney-client privilege is a legal privilege that works to keep communications between an attorney and his or her client secret. Strictly speaking, it is a rule of evidence that prevents lawyers from testifying in court about, and from being forced to testify about, their clients' statements. By its very nature, the attorney-client relationship affords a distinct, invaluable right to have communications protected from compelled disclosure to any third party including business associates and competitors, government agencies, and even criminal justice authorities.

Is that different from keeping my information confidential?

Yes. Independent of the testimonial attorney-client privilege, lawyers also owe their clients a duty of confidentiality in accordance with the Texas Rules of Professional Responsibility. The duty of confidentiality prevents lawyers from even informally discussing information related to their clients' cases with others. They must keep private almost all information related to representation of the client even if that information didn't come from the client.

The ethical duty of client-lawyer confidentiality is quite extensive in terms of what information is protected. It applies not only to matters communicated in confidence by the client but also to all information relating to the representation regardless of whether it came from the client herself, or from another source.

“Confidential information” is to remain confidential throughout the representation and thereafter, even after the death of the client. Along with the basic principle of maintaining the privacy of client information, a key precept of ethically maintaining confidentiality is that the information not be used to the detriment of the client but rather only to advance the client’s interests.

Can I stop my lawyer from disclosing what I told him/her?

As with most things in the law, “it depends.” Generally, the attorney-client privilege applies when:

- a client (actual or prospective) communicates with a lawyer regarding legal advice;
- the lawyer is acting in a professional capacity (rather than, for example, as a friend); and
- the client intended the communications to be private and acted accordingly.

Generally, lawyers may not reveal communications they have with clients (oral or written) that clients reasonably expect to remain private. A lawyer who has received a client’s confidences cannot repeat them to anyone outside the legal team (*i.e.*, other people at the law firm) without the client’s consent. In that sense, the privilege is the client’s, not the lawyer’s; the client can decide to forfeit (or waive) the privilege, but the lawyer cannot.

However, a lawyer may be required to testify regarding client communications under compulsion of law. So, if a court determines that particular information is not covered by the attorney-client privilege, it still may be covered by the lawyer’s ethical duty of confidentiality. Exceptions to attorney-client privilege may arise when there is an overriding public policy, as enunciated by the court or a fiduciary responsibility to another party, such as a shareholder. A “crime-fraud” exception to the privilege, for example, allows disclosure of information communicated by the client in an attempt by the client to use the lawyer’s services to commit or cover up a crime or fraud.

The exceptions to the confidentiality rule vary somewhat from state to state and reflect different valuations of the societal goals at issue. Most jurisdictions make a specific exception in their ethics rules to permit disclosure that will prevent death or substantial bodily injury. Specifically, if a lawyer learns of or receives information from a client that is in furtherance of fraud or a criminal act that will likely result in death or substantial bodily harm, then the lawyer *must* disclose the information if

disclosure will prevent the fraud or criminal act from happening. Moreover, a lawyer *may* reveal otherwise confidential information about a past fraud or criminal act if the lawyer's legal advice or work were used in committing the act.

What if I fire my attorney?

The privilege applies even after the attorney-client relationship ends and even after the client dies. In other words, the lawyer cannot divulge the client's secrets without the client's permission, unless some kind of exception applies. *United States v. White*, 970 F.2d 328 (7th Cir. 1992). For example, consider the Chicago cases of Alton Logan and Andrew Wilson. In 1982, Andrew Wilson told his lawyers that he killed a security guard in the parking lot of a McDonald's restaurant in Chicago and that the police had incorrectly arrested and helped convict the wrong man—Alton Logan. Unfortunately for Mr. Logan, the attorneys for the real killer did not have permission to divulge the secret; they were bound by attorney-client privilege. Like Texas, attorneys in Illinois are only permitted to reveal confidence to prevent *future* death or bodily harm. See Texas Disciplinary Rule 1.05(c). In that case, the murder had *already* occurred. For 26 years, Mr. Logan sat in jail for a murder he did not commit even though two lawyers knew (and had proof) that Mr. Logan was innocent. Andrew Wilson only gave permission to reveal the secret after his own death. In 2009, Andrew Wilson died and his attorneys came forward with the secret leading to Alton Logan's release.

Upon being asked about keeping the secret, one of the lawyers for Andrew Wilson said: "If I had ratted him out . . . then I could not live with myself. I'm anguished and always have been over the sad injustice of Alton Logan's conviction. Should I do the right thing by Alton Logan and put my client's neck in the noose or not? It's clear where my responsibility lies and my responsibility lies with my client."

What if I complain to the State Bar of Texas and file a grievance against my lawyer?

If you are reporting the conduct of your current or former lawyer, it is important to know that signing the grievance (complaint) form waives the attorney-client privilege that would otherwise keep discussions between you and your lawyer confidential. Waiver of this privilege is necessary for the State Bar to review your complaint. The mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.

How do I know if I'm a "client" that is entitled to confidentiality?

The rules generally apply even if you are a prospective client, so preliminary communications between a potential client and a lawyer are subject to the attorney-client privilege. This means that lawyers cannot disclose what prospective clients reveal in confidence even if the lawyer never represents the client. To be sure, though, you should confirm with a prospective lawyer that the privilege applies before you reveal anything you want to keep secret.

Does it matter if we're talking about past or future behavior?

Discussions of past acts are generally subject to the attorney-client privilege and the rules of confidentiality. If, for example, a client tells his lawyer that he robbed a bank, killed someone, or lied about assets during a divorce, the lawyer probably cannot disclose the information.

However, if a client initiates a communication with a lawyer for the purpose of committing a crime or an act of fraud *in the future* (e.g., I am going to rob a bank and I ask my lawyer how to cover my tracks and get away with it), the attorney-client privilege probably does not apply. Likewise, Texas requires attorneys to disclose information learned from a client that will prevent future death or serious injury. Similarly, Texas lawyers are permitted (but not required) to disclose information where revealing otherwise confidential information would prevent or remedy financial injury due to a crime or fraud.

Example: In a civil suit regarding allegedly stolen funds, the judge orders the defense to turn over to the plaintiff documentation of conversations between the defendant and his attorney. The defense argues that the attorney-client privilege applies and that the documents are protected. But the documents relate to plans between the defendant and the attorney to misappropriate funds belonging to the plaintiff. Because the communications were for the purpose of committing fraud, they are not privileged.

Example: A client calls his divorce lawyer and tells the lawyer that he plans to kill his wife's boyfriend. After getting off the phone, the lawyer calls the police and reports the client's statement. But before the police can find him, the client kills the boyfriend. Because the state ethics code permitted the lawyer to disclose the information in question, the lawyer was allowed to report the client's statements. In addition, the lawyer's report of the statements is admissible at the defendant's trial.

ATTORNEY WORK PRODUCT FOR CLIENTS

What is the work product doctrine?

The attorney work product doctrine generally protects materials that are prepared in anticipation of litigation or trial either by a party or by a party's attorney or agent. Federal Rule of Civil Procedure 26(b)(3) provides the basis for the protection under the federal rules. The Texas counterpart is Texas Rule of Civil Procedure 192.5.

As of the date of this publication, Texas Rule of Civil Procedure 192.5 states:

(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.

Similarly, as of the date of this publication, Federal Rule of Civil Procedure 26(b)(3) states:

(3) *Trial Preparation: Materials.*

(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.

What type of information does the work product doctrine include?

The term “work product” includes (1) materials prepared or mental impressions developed in anticipation of litigation or for trial, or (2) communications made in anticipation of litigation. The materials or communications covered by the work product privilege include materials or communications made by a party and a party’s representatives such as attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. The “anticipation of litigation” requirement is a critical element of the doctrine for in-house counsel because it determines whether documents produced in the general counsel’s office are immune to discovery as work product or are discoverable as mere business documents prepared in the ordinary course of business.

What is the purpose of the work product doctrine?

The work product doctrine is designed to protect from discovery a client’s and/or attorney’s preparation for litigation and trial. The primary purpose of the doctrine is to protect the mental processes, conclusions, and legal theories of the attorney and provide a privileged area so the attorney can analyze and prepare the case for trial. The work product privilege is an essential part of the attorney-client relationship. It allows for the free-flow of ideas and strategic communications made in preparation for litigation or trial.

What factors do courts consider to determine whether materials or communications constitute as work product?

To constitute work product, the materials or communications must have been made in anticipation of litigation. In Texas, if the work product privilege is challenged, courts must evaluate whether the party asserting the privilege had good cause to anticipate litigation under objective and subjective components. First, for the objective component, the court must determine whether a reasonable person would have anticipated litigation based on the facts and circumstances at the time of the investigation. Receipt of a demand letter threatening litigation or the date of a serious accident may satisfy this objective standard. Second, for the subjective component, the court must determine whether the party who is attempting to resist discovery did, in fact, believe in good faith that there was a substantial chance that litigation would follow and conducted the investigation for purposes of preparing for the anticipated litigation. It is important to keep in mind that different jurisdictions may apply different tests and standards for determining whether a specific document or communication constitutes as work product protected by the privilege.

How might the work product privilege impact other aspects of litigation?

If the work product privilege is asserted to resist producing certain information in the course of discovery, the date that the withheld information was created may also serve as the date the party had a duty to take reasonable steps to preserve all relevant evidence. Thus, the privilege can cut both ways. On the one hand, it may prevent discovery of pre-suit information covered by the work product doctrine. On the other hand, if a litigant reasonably anticipated litigation before a lawsuit is filed, then that party may also have a duty to take measures to preserve all relevant evidence or run the risk of being sanctioned by the court for failure to preserve all relevant evidence.

How long does the work product privilege last?

The work product privilege is perpetual, meaning the attorney's mental impressions and opinions from one lawsuit or trial are protected from discovery in subsequent litigation.

Are there any limits to the work product privilege?

The protection of work product is not absolute. For example, as demonstrated above, Texas Rule of Civil Procedure 192.5(c) enumerates several categories of material that *is not* protected as attorney work product. In general, a party may be compelled to disclose “factual” work product, such as notes of witness interviews or photos of an accident scene, if the party seeking the information can show that it has a substantial need for the information to prepare its case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. But “core” work product, such as an attorney’s mental impressions, conclusions, opinions, or legal theories, enjoys greater protection, but may still be subject to discovery if the work product is at issue in the litigation and a court finds a compelling need for its discovery.

What happens if work product is inadvertently disclosed?

Inadvertent disclosure of work product does not automatically waive the privilege. Generally, if the disclosing party and the party to whom work product is disclosed share a common interest, the protection remains intact. Moreover, both the Federal Rules of Evidence and the Texas Rules of Civil Procedure protect attorney-client communications and work product from waiver through inadvertent disclosure. Under Federal Rule of Evidence 502 and Texas Rule of Civil Procedure 193.3(d), a party who inadvertently produces privileged communications or attorney work product may “snap back” those materials. To take advantage of the “snap back” rule, the disclosure must have been inadvertent, the holder of the privilege must have taken reasonable steps to prevent disclosure, and the holder of the privilege must promptly (within 10 days of discovery under Texas rules) take reasonable steps to assert the privilege.

THE CLERGY PRIVILEGE

What is the clergy privilege?

The clergy privilege protects confidential communications made to a clergy member in that clergy member's professional capacity as a spiritual advisor subject to the exceptions below. TEX. R. EVID. 505. A communication is confidential if it is made privately and without intent for further disclosure to others.

Many members of the clergy are ethically prohibited from disclosing communications due to their religious beliefs. The clergy privilege is intended to prevent these types of confrontations and protect religious liberty. Additionally, the clergy privilege is intended to promote the therapeutic value of spiritual counseling and allow individuals the opportunity to seek spiritual counseling in confidence.

Who may use the clergy privilege?

A clergy member is a minister, priest, rabbi, accredited Christian Science practitioner, or other similarly situated functionary of a religious organization or an individual that a person reasonably believes to be a clergy member.

A person communicating with a clergy member in their professional capacity as a spiritual advisor is called a communicant. The communicant need only have a reasonable belief that the clergy member is acting in his or her professional or spiritual capacity for the privilege to attach.

The privilege may be asserted by the communicant, her guardian, her conservator, or if the communicant is deceased, her personal representative which includes her executor or administrator to prevent the disclosure of the confidential communication. The privilege may also be asserted by the clergy member on the communicant's behalf.

What is protected?

The privilege protects confidential communications made privately and not intended for further disclosure except to other people present in furtherance of the purpose of the communication. The privilege may protect the identity of the communicant.

The Texas Rules do not distinguish between the applicability of the clergy privilege in civil and criminal cases. As every state has recognized the clergy-communicant privilege and no federal court has rejected it, the privilege also applies in federal court through the Federal Rule of Evidence 501.

What is not protected?

Statements made to a member of the clergy during an administrative or disciplinary meeting are not communications made for the purpose of spiritual guidance or consolation and do not fall under the clergy privilege.

When child abuse or neglect cases are suspected, communications otherwise subject to the clergy privilege must be reported within 48 hours of the clergy member learning of the abuse or neglect. The Texas Family Code provides that evidence of child abuse or neglect may not be excluded because of any privilege, except for the attorney-client privilege. TEX. FAM. CODE ANN. § 216.202.

If the clergy member testifies as a character witness for the communicant, the communicant is deemed to have waived the privilege with respect to any communications relevant to the character trait about which the clergy member testifies.

There is no crime-fraud exception to the clergy privilege except when child abuse or neglect is suspected. If a person confessed to committing a crime in the past or wanting to commit a crime in the future, whether or not the statements were privileged would depend on whether the statements were made to a member of the clergy, were made for spiritual guidance or solace, were intended to be kept confidential, and whether the privilege had been waived.

The best course of action is to discuss the issue with an attorney.

MENTAL HEALTH PROVIDER/PATIENT PRIVILEGE

I'm in a lawsuit; is what I tell my mental healthcare provider confidential?

Like most things in the law, the answer is, “it depends.” The best course of action is to discuss your communications and any concerns you have about their confidentiality with an attorney. For general information, ask yourself the following questions:

Am I in Texas state court, or am I in federal court?

Texas Rule of Evidence 510 protects confidential communications made by a patient to their mental health professional related to or made in connection with any professional services rendered by the mental health professional to the patient. This is called the Mental Health Information Privilege.

This rule only applies in civil cases. Texas Rule of Evidence 510(b). Also, Texas Rule of Evidence 510 only applies in Texas state courts. If you are in Federal Court, unless the Court is applying Texas law, Texas Rule of Evidence 510 does not apply. FED. R. EVID. 501. But, Federal Courts do recognize a “Psychotherapist-Patient privilege” which is similar to Texas Rule of Evidence 510. *Jaffee v. Redmond*, 518 U.S. 1. 8–9, 15 (1996). However, this privilege is not as extensive of Texas Rule of Evidence 510. One example of the difference, in Federal Court a record of your identity, date of treatment, billing records, or even what medication was prescribed may not be protected. *See, e.g., In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983). However, in Texas, that information would be protected. Tex. R. Evid. 510(b)(1).

Who am I talking to?

Under Texas Rule of Evidence 510 the following is generally true:

In most cases, you are the patient. You can claim the privilege. Your representative, *e.g.* your lawyer or your guardian, can also claim the privilege. Your mental health professional can as well.

A mental health professional is defined as:

- a) Anyone licensed to practice medicine in any state or nation;
- b) Anyone licensed or certified by the State of Texas to diagnosis, evaluate, or treat mental or emotional disorders;

- c) Anyone involved in the treatment or examination of drug abusers; or
- d) Anyone you reasonably believe to be a mental health professional.

While the full scope is not clear, the U.S. Supreme Court in *Jaffee v. Redmond* held that a privilege existed between patients and their psychiatrist, psychologist, or social worker who performs psychotherapy.

What type of lawsuit am I in?

The Mental Health Information Privilege only applies to court proceedings. If you have a question about whether a particular situation exposes you to disclosure, consult an attorney.

In most civil lawsuits, whether the Mental Health Information Privilege applies depends on whether exceptions apply. The privilege does not apply when:

- a) You bring a lawsuit or board action against the mental health professional;
- b) You consent to the release of information;
- c) Your mental health professional sues you for fees;
- d) You or another party to the action relies on your mental health condition as part of a claim or defense; (more on that below)
- e) You're being involuntarily committed;
- f) The statement was made during a court-ordered examination; or
- g) You are an institutional resident who has been abused or neglected.

TEX. R. EVID. 510(d).

Generally, your mental health professional must comply with HIPAA and all relevant Texas statutes if they need to disclose your confidential medical information.

What if I'm in a lawsuit because I've been emotionally traumatized?

If you're in a lawsuit for damages because you've been emotionally traumatized, then Mental Health Information privilege generally will not apply because your mental health condition is the subject of the lawsuit. TEX. R. EVID. 510(d)(5); *see also R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994). The court will determine how much of your mental health history may be disclosed and from what time period in your life.

However, a routine allegation of mental anguish or emotional distress in response to a physical injury does not place your mental condition in controversy. *Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988).

Your attorney can best advise you about the scope of disclosure.

Does this apply to only things I say or all of my medical records?

Subject to Texas Rule of Evidence 501's exceptions, the Mental Health Information privilege applies to written documents, notes, diagnoses, and what you tell your professional and what he or she tells you.

SPOUSAL PRIVILEGE

The spousal privilege was intended by the legislature to protect that most sacred bond of marriage from the legal system's interference. The spousal privilege is memorialized in Texas Rule of Evidence 504 and promotes free discussion between married peoples.

When does it apply?

The confidential communication privilege between spouses applies only when a person tells something to his or her spouse with the intent that it stays private between the two of them. Once that has happened, neither spouse can disclose that information even if the marriage ends. This is a privilege that can be claimed in both civil proceedings and criminal proceedings. If the lawsuit is a criminal charge, however, the privilege does not apply to anything that occurred before the marriage.

Who can claim it?

Both the speaker and the speaker's spouse can claim this privilege, so neither one of them is compelled disclose the confidential communication. This holds true for the guardian or representative of either of the speakers if that person has become incompetent or has died.

What are the exceptions?

The communication is not privileged if:

- a) The communication was part of committing a crime;
- b) The lawsuit at hand is between the two spouses;
- c) One of the two is accused of a crime against his or her spouse, any other member of the household, or any minor child;
- d) In a commitment proceeding due to the spouse's mental or physical condition; or
- e) In a proceeding to establish the competence of either spouse.

Criminal cases

In criminal cases, an accused's spouse may claim a privilege to not testify, but that spouse can also voluntarily waive the privilege and choose to testify. If the spouse voluntarily waives the privilege the accused can do nothing to stop them from testifying. Also, as noted earlier, this privilege does not apply if the alleged crime is

against the accused's spouse, against any other member of their household, or against any minor child regardless of whether that child is a family member or relative.

DOCTOR/PATIENT PRIVILEGE

I'm in a lawsuit; is what I tell my physician confidential?

Like most issues in the law, the answer is, "it depends." The best course of action is to discuss this with an attorney. For general information, ask yourself the following questions:

Am I in Texas state court, or am I in federal court?

Texas Rule of Evidence 509 protects confidential communications made by a patient to their physician related to or made in connection with any professional services rendered by the physician to the patient.

This only applies in civil cases. There is no general physician-patient privilege in a criminal case. (TEX. R. EVID. 509(b)). Also, Texas Rule of Evidence 509 only applies in courts of the State of Texas. If you are in Federal Court, unless the court is applying Texas law, Texas Rule of Evidence 509 does not apply. (Fed. R. Evid. 501). Consult a lawyer to determine whether your communication is protected in Federal Court.

Who am I talking to?

Under Texas Rule of Evidence 509 the following is generally true:

In most cases, you are the patient. Your representative, e.g. your lawyer or your guardian, can also claim the privilege. Your physician can as well.

A physician is anyone licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation. If you have a specific concern as to whether the person you are talking to fits this description, consult an attorney.

What type of lawsuit am I in?

Remember, the physician-patient privilege only applies to court proceedings. If you have a question about whether a particular situation exposes you to disclosure, consult an attorney.

In most civil lawsuits, whether the physician-patient privilege applies depends on several exceptions in Texas Rule of Evidence 509. The privilege does not apply when

- a) You bring a lawsuit or board action against the physician;
- b) You consent to the release of information;

- c) Your physician sues you for fees;
- d) You or another party to the action relies on your medical condition as part of the a claim or defense; (more on that below)
- e) You're involved in a Texas Medical Board investigation;
- f) You're being involuntarily committed; or
- g) You're a an institutional resident who has been abused or neglected.

TEX. R. EVID. 509(e), (f).

Generally, your physician must comply with HIPAA and all relevant Texas statutes if they need to disclose your confidential medical information.

What if I'm in a lawsuit because I've been physically hurt?

If you're in a lawsuit for personal injuries, the physician-patient privilege generally will not apply because your physical condition—the nature of your injury, whether you've hurt that part of your body before, etc.—is the subject of the lawsuit. TEX. R. EVID. 509(e)(4); *see also R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994). However, the Court will determine how much of your medical history may be disclosed and from what time period in your life. Your attorney can best advise you about the scope of disclosure.

Does this apply to only things I say or all of my medical records?

The physician-patient privilege applies to written documents, x-rays, and information told to your doctor. However, all of this is subject to the exceptions in Rule 509 and the specific facts of your case.

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