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June 7, 2005

Mr. Gilbert I. Low  
Orgain, Bell & Tucker LLP  
470 Orleans Street, 4<sup>th</sup> Floor  
Beaumont, Texas 77706

Re: Administration of Rules of Evidence Committee  
Proposed Rule 514

Dear Buddy:

I have reviewed Jack London's letter to you dated May 26, 2005. The Administration of the Rules of Evidence Committee's suggested revisions to the SCAC draft are acceptable to me if the SCAC decides to adopt a rule addressing this topic, with one exception. I think someone might try to argue that proposed Rule 514(b)(3) means that other attorney-client communications besides those in TRE 503(b)(1)(C) are not subject to the exception. Therefore, I think Rule 514(b)(3) should state "Communications pursuant to TRE 503(b)(1)" instead of "Communications pursuant to TRE 503(b)(1)(C)." I have changed the draft accordingly.

I still am not convinced that a rule of evidence on this topic is necessary or advisable. However, if the Supreme Court decides to adopt a rule, I think the SCAC Evidence Subcommittee's draft containing the AREC suggestions (as modified above) is preferable to the AREC version.

To facilitate discussion of these issues, I have attached a draft labeled "SCAC Evidence Subcommittee Draft Containing AREC Suggestions - June 7, 2005," and a copy of what I understand to be the AREC version.

Sincerely,

John H. Martin

JHM/ckh  
Enclosure

cc: Mr. Jack London

TEXAS RULES OF EVIDENCE – RULE 514

(a) In a civil proceeding, a party or party's representative shall not obtain a person's protected health information from or communicate about that information with that person's health care provider outside of formal discovery except:

- (1) By written authorization of the person or the person's representative; or
- (2) Pursuant to a court order that specifies the scope and subject matters that may be disclosed and that states the health care provider is under no obligation to discuss those matters outside of formal discovery. A copy of the order must be provided to the health care provider before any protected health information is disclosed.

(b) Exceptions. This rule does not preclude a party or party's representative from obtaining a person's protected health information from or communicating about that information with a person's health care provider outside of formal discovery under circumstances where the communication would be privileged or disclosure would otherwise be permitted by state or federal law. This exception includes, but is not limited to:

- (1) Communications among health care providers to carry out treatment, payment, and health care operations activities.
- (2) Information protected by the peer review privilege, hospital committee privilege, and other privileges applicable to communications by health care providers.
- (3) Communications pursuant to TRE 503(b)(1).

(c) Sanctions. A person who obtains protected health information in violation of this rule may be subject to sanctions as provided in Texas Rule of Civil Procedure 215.2.

**Comment to 2004 change:** This comment is intended to inform the construction and application of this rule. The U.S. Congress enacted the Health Insurance Portability & Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (2003) on August 21, 1996. Pursuant to HIPAA, the U.S. Department of Health & Human Services developed the Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule"), 45 C.F.R. Parts 160 and 164, to define administrative steps, policies, and procedures to safeguard individuals' personal private health information (known as "protected health information" or "PHI"). The purpose of this rule is to assure that parties and their representatives act consistently with the requirements of HIPAA and the Privacy Rule. It is not intended to make access to health information more restrictive than permitted by HIPAA and the Privacy Rule.

**AREC VERSION**

**Version Control: November 19, 2004**

**Texas Rules of Evidence Rule 514**

In a civil proceeding, a party or party's representative shall not obtain a patient's protected health information from or communicate about such information with that patient's health care provider outside of formal discovery except (1) by written authorization of the patient or the patient's representative, or (2) pursuant to a court order that specifies the scope and subject matters that may be disclosed and that states that the health care provider is under no obligation to discuss such matters outside of formal discovery. A copy of such order must be provided to the health care provider prior to any such communication or disclosure. A party who obtains evidence in violation of this rule may be subject to sanctions as provided in Rule of Civil Procedure 215.2. However, this rule does not prohibit a party, party's representative, or health care provider from communicating protected health information to another person or party where such communication would be privileged.

November 19, 2004 Action of the Committee: Approved and recommended to SCAC and Supreme Court as written