Texas Supreme Court Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee (SCAC)

From: TRE Subcommittee

CC: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: May 22, 2023

Re: TRE 509

The SCAC Evidence Subcommittee has reviewed AREC's recommendations for Rules 509 and 510 (Exhibit A). In addition, we have conferred with three members of AREC and have separately conferred with Professor Steven Goode. A copy of Professor Goode's response to AREC's proposal is attached as Exhibit B. Roger Hughes wrote a memo for our committee on the impact of the changes on administrative proceedings (Exhibit C).

509(e)(1), 509(e)(2), and 509(e)(5)

We agree with AREC that 509(e)(1)(b) and 501(e)(5) should be removed, the caption for 509(e)(2) be changed from "Consent" to "Authorization," and the text of 509(e)(2) should be revised as AREC suggests.

Professor Goode raised the issue of whether 509(e)(5)'s provision regarding disciplinary investigations of or proceedings against nurses should be left in place. AREC responded that nurses practice under a hospital's or physician's supervision so this provision should likewise be deleted. We agree with AREC.

509(f)

AREC recommended deleting the entirety of 509(f). We agree with deleting subparts 1 and 2. We have informed AREC that we believe there are some practical benefits to retaining—with some tweaks—subsections (3) and (4) but moving them up into for 509(e)(2). The three AREC members that we spoke with agreed with this change. They also agreed that many practitioners would benefit from providing the statutory references.

Thus, we recommend that 509(e)(2) include three slight revisions from AREC's recommendation. First, we think it should cover "health care information" rather than "medical information;" that change is reflected in the orange font below. Second, we think it would be

helpful to identify the two laws that most commonly apply to the question; this change is highlighted in green. Third, we recommend retaining former subparts (f)(3) and (f)(4), with the additional revision of the word consent to authorization; that change is highlighted in yellow. We believe it would be helpful to advise practitioners that an authorization may be revoked.

We also discussed with AREC Professor Goode's suggestion to delete all the references to consent/authorization. Under this proposal, Section (e)(2) and (f) would be deleted in their entirety. The AREC members with whom we spoke are not strongly opposed to this suggestion but slightly lean toward their original view that an authorization provision is helpful to practitioners who are in small firms, do not regularly handle personal injury litigation, or are new practitioners. They also believe that deleting the authorization provisions entirely could be misinterpret by some lawyers as meaning that an authorization is no longer available to obtain medical records from a physician. We were persuaded by this argument.

509(e)(6)

We agree, and so does Professor Goode, that 509(e)(6) should be revised to include a provision regarding civil commitment of sexually violent predators as follows:

> Involuntary Civil Commitment or Similar Proceeding. In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:
>
> (A) chapter 462 (Treatment of Persons with Chemical Dependencies);
> (B) title 7, subtitle C (Texas Mental Health Code);
> (C) title 7, subtitle D (Persons With an Intellectual Disability Act); or
> (D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

Conclusion

Here is how the Rule would read under out proposal.

> **(e) Exceptions in a Civil Case.** This privilege does not apply:
>
> **(A)** a proceeding the patient brings against a physician; or
> ~~**(B) a license revocation proceeding in which the patient is a complaining witness.**~~
> **(2) *Consent*.** If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).
> **(3) *Action to Collect*.** In an action to collect a claim for medical services rendered to the patient.
> **(4) *Party Relies on Patient's Condition*.** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.
> **(5)** ~~***Disciplinary Investigation or Proceeding*. In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code §~~

~~164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:~~

~~**(A)** the patient's records would be subject to disclosure under paragraph (e)(1); or~~

~~**(B)** the patient has consented in writing to the release of medical records, as provided in subdivision (f).~~

(6) ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With an Intellectual Disability Act).

(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

(7) ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

(f) ~~**Consent For Release of Privileged Information.**~~

~~Consent~~ *Authorization*. If a written authorization is executed that complies with applicable state or federal law governing the release or disclosure of otherwise privileged health care information ~~the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f)~~, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F. R. § 164.500, et seq., or the Texas Medical Records Privacy Act, Tex. Health & Safety Code § 181.001, et seq. ~~(3)~~ The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal. ~~(4)~~ Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

~~(1) Consent for the release of privileged information must be in writing and signed by:~~

~~(A) the patient;~~

~~(B) a parent or legal guardian if the patient is a minor;~~

~~(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;~~

~~(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;~~

~~(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;~~

(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G) a personal representative if the patient is deceased.

(2) The consent must specify:

(A) the information or medical records covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

EXHIBIT
A

MEMORANDUM

To: Texas State Bar Board of Directors

From: Angie Olalde, Chair of State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's recommendation to amend TRE 509

Date: December 5, 2022

Summary

At its final meeting for the 2020-2021 bar year, AREC voted to recommend 3 changes to TRE 509:

1. to remove references to administrative proceedings in 509(e)(1)(b) and 509(e)(5),
2. to remove (f)'s consent requirements, and
3. to add the sexually violent predator statutory exception to 509(e)(6)).

AREC decided not to recommend adding any redaction requirement to records under TRE 509, or to add a privilege exception if the patient's condition is relevant to the execution of a will.

Background and AREC's Work

AREC continues its years-long review of TRE 509 and 510 to update them and make them consistent with current statutory provisions regarding the confidentiality of personal health and mental health information.

Rules 509 and 510 are peculiar among the Texas Rules of Evidence because their roots lie largely in statutory privileges afforded to patients and their doctors, nurses, physicians' assistants, dentists, podiatrists, pharmacists, and several other types of healthcare providers. There is even a statute protecting communications between a veterinarian and a pet owner. These statutes and protections are tied to the provision of health care.

AREC has been tasked with reviewing current statutes to ensure that the Rules of Evidence do not conflict with, and accurately reflect the current scope of the law concerning, a patient's medical and mental health privileges.

As part of that work, preliminary review shows that three changes should be recommended without additional delay:

I. Removing references to administrative proceedings in 509(e)(1)(b) and 509(e)(5)

In 2015's restyling, the committee noted that the former rule's reference to administrative proceedings was deleted because the Texas Rules of Evidence only govern proceedings in Texas courts.

The TRE apply only to proceedings in Texas courts, unless a statute or constitutional provision requires otherwise. Tex. R. Evid. 101(b), (d). The TRE does not apply to certain criminal proceedings set out in Rule 101(e).

To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code § 2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases."

Based on this note, and the fact that a physician's duty to keep medical information confidential outside the courtroom derives from statutory and professional obligations, AREC has voted to remove language in Rule 509 that applies specifically to administrative proceedings.

TRE 509(e)(1)(B), (5) both exclusively relate to occupational licensing investigations and proceedings brought by the Texas Medical Board (TMB) against physicians. These are administrative proceedings that take place before TMB and at the State Office of Administrative Hearings (SOAH). There are a separate set of laws and rules relating to these proceedings, including the physician-patient privilege contained in the Texas Occupation Code Chapter 159, so removing references to administrative proceedings in the TRE will have no actual impact.

The current version of Rule 509 includes an exception for disciplinary investigations or proceedings against a physician or nurse under the Medical Practice Act. These are administrative proceedings that should be governed according to administrative rules and the applicable statutory privileges and confidentiality provisions, not the Texas Rules of Evidence.

AREC therefore voted to recommend the following change to Rule 509, to remove subsection 509(e)(1)(b) and 509(e)(5):

> (e) Exceptions in a Civil Case. This privilege does not apply:
> (1) Proceeding Against Physician. If the communication or record is relevant to a claim or defense in:
> ~~(A)~~ a proceeding the patient brings against a physician~~; or~~.
> ~~(B) a license revocation proceeding in which the patient is a complaining witness.~~
> …
>
> ~~**(5) Disciplinary Investigation or Proceeding.** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code § 164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board~~

~~conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:~~
~~**(A)** the patient's records would be subject to disclosure under paragraph (e)(1); or~~
~~**(B)** the patient has consented in writing to the release of medical records, as provided in subdivision (f).~~

These recommended changes are not meant to in any way limit any statutory or existing privileges, but to clarify that administrative proceedings are governed by statutory confidentiality and privilege protections. Nothing in this recommended change would prohibit an administrative proceeding from choosing to abide by TRE provisions.

II. Removing subsection (f)'s consent requirements and changing "consent" to "authorization."

Extensive federal and state laws govern the release of protected health information. The TRE, on the other hand, relate to the admission of certain evidence during proceedings before Texas courts, and do not govern whether a third-party health provider should, or can, release information to a third party. Because regulations such as the Health Insurance Portability and Accountability Act, or HIPAA, govern whether and when protected health information can be *released* to someone who is not the patient, there is no need for the Texas Rules of Evidence to duplicate, or possibly conflict with, such requirements.

For example, an "authorization" has a specific meaning in the HIPAA Privacy Rule., which is the document that must be signed by the patient or their representative. Authorizations must comply with the certain requirements before the release of protected health information to a third party can occur. The TMRPA,[1] the TMRPA, Texas Civil Practice & Remedies Code,[2] and Office of the Attorney General model[3] authorization forms use the term "authorization" in reference to the release of protected health information. The TRE, however, uses the term "consent," while substantively referring to what federal and Texas law deem an "authorization."

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[1] Tex. Health & Safety Code § 181.154(d) (Texas Medical Records Privacy Act or TMRPA, adopting HIPAA's requirements for an authorization to release medical information); *see also* Tex. Health & Safety Code § 181.154(b) (a separate authorization is required for each disclosure and that "[a]n authorization for disclosure under this subsection may be made in written or electronic form or in oral form if it is documented in writing by the covered entity.")

[2] For medical liability claims brought against health care providers, a patient-litigant in Texas must provide complete a statutory "Authorization Form for Release of Protected Health Information." Tex. Civ. Prac. Rem. Code § 74.052(b).

[3] The OAG model authorization form states that:

> As indicated on the form, specific authorization is required for the release of information about certain sensitive conditions, including:
>
> - Mental health records (excluding "psychotherapy notes" as defined in HIPAA at 45 CFR 164.501).
> - Drug, alcohol, or substance abuse records.
> - Records or tests relating to HIV/AIDS.
> - Genetic (inherited) diseases or tests (except as may be prohibited by 45 C.F.R. § 164.502).

Therefore, to eliminate any duplication of, or conflict with, state and federal statutory protections regarding the release of protected health information, AREC has voted to amend TRE 509(f) as follows:

(e) Exceptions in a Civil Case. This privilege does not apply:

…

(2) ~~**Consent**~~**Authorization.** If a written authorization is executed that complies with Texas or federal law governing the disclosure of medical information ~~the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f)~~.

…

~~**(f) Consent For Release of Privileged Information.**~~

~~**(1)** Consent for the release of privileged information must be in writing and signed by:~~

~~**(A)** the patient;~~

~~**(B)** a parent or legal guardian if the patient is a minor;~~

~~**(C)** a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;~~

~~**(D)** an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;~~

~~**(E)** an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;~~

~~**(F)** an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or~~

~~**(G)** a personal representative if the patient is deceased.~~

~~**(2)** The consent must specify:~~

~~**(A)** the information or medical records covered by the release;~~

~~**(B)** the reasons or purposes for the release; and~~

~~**(C)** the person to whom the information is to be released.~~

~~**(3)** The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.~~

~~**(4)** Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.~~

III. Adding the sexually violent predator statutory exception to TRE 509(e)(6)

The program for the civil commitment of sexually violent predators not exist when TRE 509(e)(6) was originally written. As a subsequently created program that meets the criteria listed in this rule, AREC has voted that TRE 509 should be amended to include this program.

Accordingly, AREC recommends the following change to TRE 509(e)(6):

Involuntary Civil Commitment or Similar Proceeding. In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); ~~or~~
(C) title 7, subtitle D (Persons With an Intellectual Disability Act); or
(D) title 11, chapter 841 (Civil Commitment of Sexually Violent Predators).

EXHIBIT

B

Misty N. Croshaw

From: Goode, Steven <SGoode@law.utexas.edu>
Sent: Tuesday, March 21, 2023 5:46 PM
To: Misty N. Croshaw
Subject: RE: SCAC - Referral of Rules Issues

[EXTERNAL SENDER]

Buddy,

It was good to chat with you today. You are a goldmine of information.

Here's my quick take on the AREC proposals.

Rule 509:

1. I absolutely agree with the AREC's premise that the TRE are not the place for rules regarding the applicability of privilege to administrative proceedings. As the AREC report aptly states, the TRE apply to court proceedings. The extent to which administrative agencies should apply them is a matter of administrative law, not the rules of evidence. And with perhaps one exception, I agree that deleting the exceptions currently listed in Rule 509(e)(1)(B) and (e) would have no effect on the law because the Texas Occ. Code sec. 159.003(a)(1)(B) and (5) respectively provide statutory exceptions for license revocation proceedings and disciplinary investigations of physicians. The one possible exception – where the AREC proposal might change the status quo – concerns disciplinary investigations or proceedings against a nurse. The cited Occ. Code provisions refer only to physicians; they don't cover nurses. I'm not aware of any other statutory exception regarding nurses, although there may be one of which I'm simply not aware. In any event, this is something that should be dealt with statutorily. The TRE should not be setting rules for administrative proceedings.
2. Rather than substitute for the Rule 509(e)(2) and (f) consent provisions the AREC proposed "authorization" language, my inclination would be to simply delete Rule 509(e)(2) and (f). Rules of privilege are designed to allow the privilege holder to resist being compelled to disclose and to prevent others from disclosing privileged information. A privilege holder, however, may voluntarily choose to disclose privileged information. As I understand it, the written authorization language in HIPAA and the Texas statutes cited in the AREC memo set forth for health providers the conditions under which they may release a patient's health information. That has nothing to do with privilege. To the contrary, as I understand it (and I may be wrong) HIPAA provides in 45 CFR 164.512(a) and (e)(1) that a health provider may disclose a patient's health information (without the patient's written authorization) in response to a court order or subpoena.

   In other words, if a patient asserts the physician-patient privilege and the court finds that the privilege doesn't apply – either because an exception applies or the patient has waived the privilege – the court may compel production. And a court can find under Rule 511 that a patient has waived the privilege in the absence of any written authorization of the type contemplated in the AREC proposed language. So, to my thinking, there's simply no need – and, in fact, no place – in Rule 509 for either the current Rule 509(e)(2) and (f) or the language proposed as a substitute for the current provision.

3. I agree with the addition of the sexually violent predator exception to Rule 509(e)(6).

Rule 510

I'm afraid I just don't understand the landscape of the peer assistance programs well enough to have much of an opinion about this. I'm not sure exactly what putting this in TRE 510 accomplishes beyond what's already in the statute. The statute provides for confidentiality and seems by its terms to apply to court proceedings as well as other situations. I suppose one could argue it would privilege confidential communications made between the patient and profession, which arguably are not covered by the statutory language. But I'm not sure that such communications are not covered implicitly by the statutory provision. The only other observation I have concerns the proposed comment to the AREC proposal. It states:

> Such programs [peer assistance programs under Chapter 467] include, but are not limited to, programs assisting lawyers
> (the Texas Lawyers' Assistance Program or TLAP), and professions listed in the Texas Occupations Code such as nurses, doctors, veterinarians, and chemical dependency counselors.

But Health & S. Code section 467.002 says, "This chapter does not apply to a peer assistance program for licensed physicians or pharmacists or for any other profession that is authorized under other law to establish a peer assistance program." That seems at variance with the reference to doctors in the AREC comment. But again, I really am not familiar with the world of peer assistance programs and their statutory bases.

I hope this is helpful.

Regards,
Steve

From: Misty N. Croshaw <mcroshaw@obt.com>
Sent: Tuesday, March 21, 2023 2:34 PM
To: Goode, Steven <SGoode@law.utexas.edu>
Subject: SCAC - Referral of Rules Issues

Steve,

Thank you for talking to me about this and agreeing to review this and giving me your comments. Your opinion means so very much to me and I appreciate your help.

Thank you very much,
Buddy Low

ord of the in camera proceeding. The record of the in camera proceeding must not otherwise be revealed without the public entity's consent.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015.

Source: Proposed FRE 510 (1972) and Unif. R. Evid. 509 (1974).

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 508.

ANNOTATIONS

In re Bates, 555 S.W.2d 420, 430 (Tex.1977). When the "role of the informer was very minor and occurred quite early in the [bribery] investigation; and absent other evidence concerning the relevance of the identity of the informer; the disclosure [of the informer's identity] is not required."

Warford v. Childers, 642 S.W.2d 63, 66-67 (Tex.App.—Amarillo 1982, no writ). The rule-blocking disclosure "is a recognition of the fact that most informants relay rumor, gossip and street talk of no evidentiary value and the exceptions [to the rule] are designed for the rare case where the informant can give eyewitness testimony about the alleged crime or arrest."

TRE 509. PHYSICIAN-PATIENT PRIVILEGE

(a) Definitions. In this rule:

(1) A "patient" is a person who consults or is seen by a physician for medical care.

(2) A "physician" is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

(b) Limited Privilege in a Criminal Case. There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:

(1) to a person involved in the treatment of or examination for alcohol or drug abuse; and

(2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.

(c) General Rule in a Civil Case. In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and

(2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

(d) Who May Claim in a Civil Case. The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The physician may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(e) Exceptions in a Civil Case. This privilege does not apply:

(1) ***Proceeding Against Physician.*** If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a physician; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) ***Consent.*** If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) ***Action to Collect.*** In an action to collect a claim for medical services rendered to the patient.

(4) ***Party Relies on Patient's Condition.*** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(5) ***Disciplinary Investigation or Proceeding.*** In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code §164.001 et seq., or a registered nurse under Tex. Occ. Code §301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:

(A) the patient's records would be subject to disclosure under paragraph (e)(1); or

(B) the patient has consented in writing to the release of medical records, as provided in subdivision (f).

(6) ***Involuntary Civil Commitment or Similar Proceeding.*** In a proceeding for involuntary civil commit-

ment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A) chapter 462 (Treatment of Persons With Chemical Dependencies);

(B) title 7, subtitle C (Texas Mental Health Code); or

(C) title 7, subtitle D (Persons With an Intellectual Disability Act).

(7) ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

(f) Consent for Release of Privileged Information.

(1) Consent for the release of privileged information must be in writing and signed by:

(A) the patient;

(B) a parent or legal guardian if the patient is a minor;

(C) a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;

(D) an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;

(E) an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;

(F) an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G) a personal representative if the patient is deceased.

(2) The consent must specify:

(A) the information or medical records covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015. Amended by order of Supreme Court June 14, 2016, eff. June 14, 2016.

Comment to 1998 change: This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by Tex.Rev.Civ.Stat.Ann. art. 4495b, §5.08. Former subparagraph (d)(5) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in **R.K. v. Ramirez**, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (c) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

Comment to 2015 Restyling: The physician-patient privilege in a civil case was first enacted in Texas in 1981 as part of the Medical Practice Act, formerly codified in Tex. Rev. Civ. Stat. art. 4495b. That statute provided that the privilege applied even if a patient had received a physician's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

The former rule's reference to "confidentiality or" and "administrative proceedings" in subdivision (e) [Exceptions in a Civil Case] has been deleted. First, this rule is a privilege rule only. Tex. Occ. Code §159.004 sets forth exceptions to a physician's duty to maintain confidentiality of patient information outside court and administrative proceedings. Second, by their own terms the rules of evidence govern only proceedings in Texas courts. See Rule 101(b). To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code §2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases.

Statutory references in the former rule that are no longer up-to-date have been revised. Finally, reconciling the provisions of Rule 509 with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project.

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; **O'Connor's Texas Rules**, "Medical Records," ch. 6-J, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 509; **O'Connor's Texas Forms**, FORM 5E:1.

ANNOTATIONS

R.K. v. Ramirez, 887 S.W.2d 836, 842 (Tex.1994). "[T]he patient-litigant exception to [TRE 509 and 510] privileges applies when a party's condition relates in a significant way to a party's claim or defense. *At 843 n.7:* Whether a condition is a part of a claim or defense should be determined on the face of the pleadings, without reference to the evidence that is allegedly privileged. *At 843:* [T]he exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance."

Groves v. Gabriel, 874 S.W.2d 660, 661 (Tex.1994). "[A] trial court's order compelling release of medical records should be restrictively drawn so as to maintain the privilege with respect to records or communications not relevant to the underlying suit. The global release in this case does not meet the **Mutter** standard." *See also* **In re Collins**, 286 S.W.3d 911, 916 (Tex.2009).

Mutter v. Wood, 744 S.W.2d 600, 600 (Tex.1988). "There are ... eight exceptions to the [physician-patient] privilege. *At 601:* In this case, the privilege was waived completely as to the defendant doctors and partially as to the treating doctors. To the extent, however, that the treating doctors had records or communications which were not relevant to the underlying suit, they remained privileged...."

In re Toyota Motor Corp., 191 S.W.3d 498, 502 (Tex.App.—Waco 2006, orig. proceeding). "A claim for mental anguish or emotional distress will not, standing alone, make a plaintiff's mental or emotional condition a part of the plaintiff's claim. [T]he allegation in [P's] petition that he suffered 'emotional shock' is not a sufficient basis to make his mental or emotional condition an issue on which the jury will be required to make a factual determination. [¶] Therefore, [P's] communications ... are protected by the physician-patient privilege."

In re Arriola, 159 S.W.3d 670, 675-76 (Tex.App.—Corpus Christi 2004, orig. proceeding). "[Ds] contend the abuse-and-neglect exceptions [to TRE 509 and 510] apply only to proceedings brought by appropriate law enforcement agencies. [¶] However, the abuse-and-neglect exceptions ... contain no such limitation. [R]ules 509 and 510 state that the exceptions apply in administrative proceedings and civil proceedings in court. [¶] [Ds] contend numerous state statutes and administrative rules protect the records and medical information from disclosure.... [¶] However, each of the confidentiality and privilege provisions [Ds cite] contains an exception to nondisclosure where release of the information is required by law or ordered by the court. *At 677:* Here, the rules of evidence are the 'law' that requires release of the information."

In re Whiteley, 79 S.W.3d 729, 732-34 (Tex.App.—Corpus Christi 2002, orig. proceeding). D-doctor in medical-malpractice case triggered the TRE 509(e)(4) exception to physician-patient privilege when he testified in deposition that he successfully performed the same surgical procedure on nonparty patients; thus, nonparty patients' medical records became discoverable by P.

James v. Kloos, 75 S.W.3d 153, 160 (Tex.App.—Fort Worth 2002, no pet.). "[A] party can be prejudiced when his doctor meets with opposing counsel, but ... such prejudice may not be severe enough to disallow the doctor's testimony. [P]rejudice due to an improper meeting does not necessarily mean prejudice at trial, and, therefore, does not mean that an improper verdict necessarily results when a doctor is allowed to testify after such a meeting. [T]here must be a showing that the ruling probably caused the rendition of an improper judgment." *See also* **Durst v. Hill Country Mem'l Hosp.**, 70 S.W.3d 233, 237 (Tex.App.—San Antonio 2001, no pet.).

TRE 510. MENTAL HEALTH INFORMATION PRIVILEGE IN CIVIL CASES

(a) Definitions. In this rule:

(1) A "professional" is a person:

(A) authorized to practice medicine in any state or nation;

(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

(C) involved in the treatment or examination of drug abusers; or

(D) who the patient reasonably believes to be a professional under this rule.

(2) A "patient" is a person who:

(A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3) A "patient's representative" is:

(A) any person who has the patient's written consent;

(B) the parent of a minor patient;

(C) the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or

(D) the personal representative of a deceased patient.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

(b) General Rule; Disclosure.

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A) a confidential communication between the patient and a professional; and

(B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person—other than a patient's representative acting on the patient's behalf—who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) **Who May Claim.** The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The professional may claim the privilege on the patient's behalf—and is presumed to have authority to do so.

(d) **Exceptions.** This privilege does not apply:

(1) ***Proceeding Against Professional.*** If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) ***Written Waiver.*** If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) ***Action to Collect.*** In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) ***Communication Made in Court-Ordered Examination.*** To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) ***Party Relies on Patient's Condition.*** If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) ***Abuse or Neglect of "Institution" Resident.*** In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code §242.002.

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015. Amended by Supreme Court order of June 14, 2016, eff. June 14, 2016.

Comment to 1998 change: This comment is intended to inform the construction and application of this rule. This rule governs disclosures of patient-professional communications only in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by Tex. Health & Safety Code Ann. §§611.001 to 611.008. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (d)(5), as construed in R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (d) does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

Comment to 2015 Restyling: The mental-health-information privilege in civil cases was enacted in Texas in 1979. Tex. Rev. Civ. Stat. art. 5561h (later codified at Tex. Health & Safety Code §611.001 et seq.) provided that the privilege applied even if the patient had received the professional's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

Tex. Health & Safety Code ch. 611 addresses confidentiality rules for communications between a patient and a mental-health professional and for the professional's treatment records. Many of these provisions apply in contexts other than court proceedings. Reconciling the provisions of Rule 510 with the parts of chapter 611 that address a mental-health-information privilege applicable to court proceedings is beyond the scope of the restyling project.

See also **O'Connor's Texas Rules**, "Asserting privileges," ch. 6-A, §18.2; **O'Connor's Texas Rules**, "Scope of Discovery," ch. 6-B, §1 et seq.; **O'Connor's Texas Rules**, "Medical Records," ch. 6-J, §1 et seq.; Brown & Rondon, **Texas Rules of Evidence Handbook**, Rule 510; **O'Connor's Texas Forms**, FORM 5E:1.

ANNOTATIONS

R.K. v. Ramirez, 887 S.W.2d 836, 843 (Tex.1994). "As a general rule, a mental condition will be a 'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination concerning the condition itself."

Groves v. Gabriel, 874 S.W.2d 660, 661 (Tex.1994). "Because [P] alleges severe emotional damages, including 'post-traumatic stress disorder,' [she] waived the privilege as to any medical records relevant to her claim for emotional damages." *See also* **Ginsberg v. Fifth Ct. of Appeals**, 686 S.W.2d 105, 107 (Tex.1985).

In re Arriola, 159 S.W.3d 670, 675-76 (Tex.App.—Corpus Christi 2004, orig. proceeding). See annotation under TRE 509.

TRE 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

EXHIBIT

C

To: SCAC Evidence Subcommittee
Fm: Roger W. Hughes
Date: May 8, 2023
Re: Effect of Proposed Changes to TRE 509 on Administrative Disciplinary Proceedings against Physicians and Nurse

1. I think the exceptions currently listed in Rule 509(e)(1)(B) and Rule 509(e)(5) are unnecessary and the proposed changes will have no adverse effect on current practices in administrative proceedings. First, they are probably holdover from the attempt to adopt former art. 4495(b) as a rule of evidence.

Second, the licensing proceedings are treated as "contested cases" under the Administrative Procedure Act (APA) held before an administrative law judge (ALJ) assigned by the State Office of Administrative Hearings (SOAH). For contested cases, the APA adopts the rules of evidence from district court and other privileges recognized by law. Appeals for the disciplinary proceedings go to the Travis County District Court which applies the "substantive evidence" rule of decision.

In short, Rule 509 and the statutory patient-physician communication privilege already apply in the administrative disciplinary proceedings. The proposed changes will not affect evidentiary practice before the licensing agency in contested case hearings or appeals into the district court.

2. TEX. R. EVID. 509(e)(1)(B) provides the privilege does not apply in a license revocation hearing against a physician in which the patient is the complaining witness. TEX. R. EVID. 509(e)(5) provides the privilege does not apply to a disciplinary proceeding against (i) a doctor under TEX. OCC. CODE §164.001, or (ii) a registered nurse under TEX. OCC. CODE §301.451. Note: this applies only to proceedings against medical doctors and registered nurses. There are a number of licensed healthcare providers (e.g., LPNs, physicians' assistants, medical technicians, chiropractors, etc.) that are not within the exception. I think the existing exceptions 509(e)(1)(B) and 509(e)(5) are vestiges of an earlier time.

3. TEX. GOV'T CODE §2001.081 provides the rules of evidence in district court apply to "contested cases" held under the APA, unless the evidence (a) is necessary to determine facts not "reasonably susceptible of proof" under the rules of evidence, and (b) not precluded by statute. Section 2001.083, states in contested cases, the agency will give effect to the rules of privilege "recognized by law." Section 2001.091 states that in contested cases the agency, subject to the "limitations of the kind provided for discovery under the Texas Rules of Civil Procedure," may order a party to produce relevant material that "is not privileged." TEX. OCC. CODE §159.002 provides a privilege for physician-

patient privileges. However, Section 159.003 provides exceptions for an administrative proceeding (1) in which the patient is the complaining witness for a license revocation and the disclosure is relevant, or (2) for discipline and the Medical Board protects the patient's identity.

Arguably the proposed changes will clarify that under section 2001.081 TRE 509 will apply to contested cases. The current TRE 509(e) says it does not apply to disciplinary proceedings against physicians/nurses, but section 2001.081 says the rules of evidence apply. This will reduce confusion about whether TRE 509 applies to disciplinary proceedings or not.

4. TEX. OCC. CODE §164.001 allows the Medical Board to refuse to issue/renew a medical license, revoke/suspend a license, or reprimand a license holder. Proceedings are treated as contested cases and held before an administrative law judge, who makes findings of fact and conclusions of law; however, sanctions are decided by the Board. TEX. OCC. CODE §164.007. Both sides may appeal to a Travis County District court. TEX. OCC. CODE §§164.0072, -.009. The appeal is decided under the 'substantive evidence' standard.

Similarly, a licensed nurse is entitled to "contested case" hearing by an ALJ before the Board of Nursing can refuse to issue or renew a license, or can revoke or suspend a license. TEX. OCC. CODE §301.454. The Board's decision is appealed to the Travis County district court and decided under the substantive evidence standard. TEX. GOV'T CODE §2001.176.