



The Supreme Court of Texas

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February 27, 2023

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Evidence 509. In the attached memorandum, the State Bar of Texas Administration of Rules of Evidence Committee ("AREC") proposes amending Texas Rule of Evidence 509 to reflect more accurately the current scope of statutory medical privileges. The Committee should review and make recommendations.

Texas Rule of Evidence 510. In the attached memorandum, AREC proposes amending Texas Rule of Evidence 510 to add a peer-assistance privilege. The Committee should review and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan L. Hecht".

Nathan L. Hecht
Chief Justice

Attachments

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 model³ 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."

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).

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 510 to add a peer-assistance privilege

Date: December 5, 2022

Summary

At its final meeting for the 2020-2021 bar year, AREC voted to modify Texas Rule of Evidence or "TRE" 510 to add a "peer assistance program" privilege.

Background and AREC's Work

It was recommended by Andrew Tolchin, and supported by others in the Bar, including Chris Ritter and prior State Bar President Sylvia Borunda Firth, that AREC review whether an evidentiary privilege could be added to ensure the privacy of communications for lawyers seeking assistance through the Texas Lawyers' Assistance Program, or "TLAP."

AREC already had a Subcommittee formed to review whether Rules 509 and 510 should be amended to comport with current statutory physician-patient and mental health privileges. By way of brief background, while most privileges in the TRE are based in the common law, Rules 509 and 510 were adopted to reflect statutory privileges. As the statutes have changed through the years, AREC has been tasked to review these rules to ensure they comport with current statutory privileges.

AREC, through its subcommittee, researched this issue and requested a presentation from TLAP personnel regarding the practical implications of the requested privilege. On September 10, 2021, TLAP gave a presentation to the full AREC committee to discuss its work and the potential implications of a peer assistance privilege under the TRE.

It is clear that Texas has a strong public policy in preventing and treating chemical dependency. As established in the Texas Health and Safety Code,

Chemical dependency is a preventable and treatable illness and public health problem affecting the general welfare and the economy of this state. The legislature recognizes the need for proper and sufficient facilities, programs, and procedures for prevention, intervention, treatment, and rehabilitation. It is the policy of this state that a person with a chemical dependency shall be offered a continuum of services that will enable the person to lead a normal life as a productive member of society.

Tex. Health & Safety Code § 461A.001. The Executive Commissioner of the Health and Human Services Commission has the authority to “establish minimum criteria that peer assistance programs must meet to be governed by and entitled to the benefits of a law that authorizes licensing and disciplinary authorities to establish or approve peer assistance programs for impaired professionals.” *Id.* §461A.051(2).

Chapter 467 of the Health and Safety Code governs certain approved peer assistance programs in Texas. They must be established or approved by a licensing or disciplinary authority. Under Section 467.007, information, reports or records that an approved peer assistance program receives under Chapter 467 is confidential, and may not be disclosed without written approval of the impaired professional or other interested person in many circumstances. Disclosure is allowed at disciplinary hearings before a licensing or disciplinary authority, or to health care personnel to whom the impaired professional has been referred or to meet a health care emergency.

Several statutes address whether communications among licensed Texas professionals seeking help through a peer assistance program (as defined by statute) will be treated as confidential, or receive other protections from disclosure. For example,

- Tex. Occ. Code § 504.057 establishes a peer assistance program for chemical dependency counselors
- Tex. Health & Safety Code § 773.013 provides authority to establish a peer assistance program for emergency medical services or EMS personnel
- Tex. Occ. Code § 254.0065 provides that records and information about a dentist’s participation in a peer assistance program are confidential
- Tex. Occ. Code § 301.4106 provides that a peer assistance program be established for nurses, and Chapters 301 and 303 of that code offer confidentiality protections to nurses
- Tex. Occ. Code § 564.052 authorizes a peer assistance program for pharmacists and pharmacy students
- Tex. Occ. Code §§ 602, 603, 604 and 801, 603, 604, and 801 mention peer assistance programs for medical physicists, perfusionists, respiratory care practitioners, and veterinarians.

TLAP is a peer assistance program.

The subcommittee discussed the request to add a privilege to TRE 510 for only TLAP communications. While such a privilege would solidify protections for impaired professionals’ communications with the TLAP peer assistance program, it would not do so for other impaired professionals who seek help through their peer assistance programs. The Subcommittee recommended that any recognition of an impaired professional privilege apply to all such programs, and not just to TLAP.

In addition, the TRE applies only to proceedings in Texas courts, with limited exceptions noted in TRE 101 (d)-(f). A TRE-recognized privilege would not apply beyond such proceedings, unless the proceedings are otherwise governed under the TRE.

Additionally, a TRE privilege would not interfere with or otherwise invalidate any statutory confidentiality provisions or privileges. *See* _____.

Therefore, on June 10, 2022, AREC voted to recommend that TRE 510 be amended to add a peer assistance privilege.

AREC'S Recommendation

We recommend Texas Rule of Evidence 510, governing the Mental Health Information Privilege in Civil Cases, be amended as follows:

(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;

(D) [acting as an employee, member, or agent of an approved peer assistance program under Chapter 467 of the Texas Health and Safety Code](#); or

(E) 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, [referral](#), 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.

...

(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, [referral](#), 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.

We additionally recommend that a comment to this amendment be added, as follows:

This rule is a privilege rule only. Statutory protections exist to provide for the confidentiality of mental health and chemical dependency information that is in the possession of an approved peer assistance program under Chapter 467 of the Texas Health and Safety Code. Such programs 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.