

CONFIDENTIAL AND PRIVATE

Evidentiary Privileges in the American Legal System

By: Houston Criminal Lawyer John Floyd and Paralegal Billy Sinclair

Writing in the [Pittsburgh Law Review](#), University of California Law Professor Edward J. Inwinkelried discussed in detail the history and legal parameters of evidentiary privileges. He opened his treatise with this observation: "From society's perspective, the rules governing privileged communications, such as those between a client and his or her attorney are arguably the most important doctrines in evidence law."

The importance of these doctrines can be measured by the fact that since the adoption of the Federal Rules of Evidence, the U.S. Supreme Court has dealt with evidentiary privilege law more than any other part of the Federal Rules of Evidence, as pointed out by Professor Inwinkelreid.

The [sources](#) for Texas evidentiary privileges are grounded in the state's Constitution, statutes, rules of evidence, or other rules established pursuant to statute. [Rule 501](#) of the Texas Rules of Evidence defines an evidentiary privilege as a limitation on the admissibility of evidence. It is apparent that the Texas Rules of Evidence (Rules) do not favor privileges. They are viewed as harmful to evidence admissibility and therefore inhibit full disclosure of evidence; therefore, the Rules instruct trial courts to view claimed privileges with "close scrutiny."

"Unlike almost all other rules of evidence, the rules creating privileges are not designed to enhance the truth-finding function of court proceedings...They acknowledge that other societal values such as privacy, the desire to encourage effective medical care or legal counsel, and governmental efficiency sometimes take precedent over the goal of ascertaining the truth in legal proceedings." [Texas Rules of Evidence Handbook, Jones McClure Publishing](#), 7th edition, Cochran).

Two significant considerations when dealing with privileges, as discussed in the Roach Commentary for Rule 501:1 found in [Roach's Texas Rules of Evidence Annotated, 2005 ed.](#) ("The Roach Commentary") are 1) Asserting and proving a privilege; and 2) waiver of the privilege.

Timeliness is a key factor in asserting a privilege. It must be asserted “before or at the time” claimed privileged evidence is “offered or produced.” The mere assertion of a privilege, standing alone, does not bar the admission of evidence. The party making the assertion must “prove the elements of the privilege.” Most claims of privilege do not prevail because the party asserting it does not prove it.

As the Court of Appeals in *Turner v. Montgomery* said of the lawyer-client privilege, it “applies only to ‘confidential’ communication, which is communication meant to be secret and which is made ‘for the purpose of facilitating the rendition of legal services to the client.’ An attorney cannot claim the privilege to protect himself; he may do so ‘only on behalf of the client.’”

The *Turner* court said that an attorney asserting a privilege against the discovery of evidence must offer some evidence supporting the claimed privilege, or, at a minimum, request an *in camera* hearing. The court added that the “mere possibility” that documentary evidence may be “partly privileged” does not justify its “total exclusion.

Quite naturally, the fact that the Rules do not favor privilege over admissibility instructs that a privilege cannot be casually asserted.

Timeliness is also important in a waiver of a privilege. For example, the Roach Commentary to Rule 501 states that the failure to make a timely claim of privilege or the failure to prove the privilege waives the privilege. Roach lists **five other ways the privilege may be waived**. One, “disclosing the privileged material or communication;” two, by calling a character witness to whom a privileged communication was given; three, “by using a claim of privilege offensively in a civil case;” four, by engaging in conduct listed in one of the exceptions against the application of the privilege; and, five, “in the case of a claim of privilege in response to a proper discovery request in a civil case” by failing to comply with the civil discovery rules.

The Rules have painted privilege into a small corner. It protects only confidential “information or communication”—and this evidentiary protection is considered waived when voluntary actions by the holder of the privilege breaches the confidentiality of the information or communication involved, regardless of whether the breach was intentional or inadvertent. As the Texas Supreme Court in *Granada Corp. v. Honorable First Court of Appeals* in 1992 put it:

“Inadvertent production is distinguishable from involuntary production. A party who permits access to unscreened documents may, due to inattention, unwittingly—but nonetheless voluntarily—disclose a privileged document. Disclosure is involuntary only if efforts reasonably calculated to prevent the disclosure were unavailing. Thus, although disclosure does not necessarily waive privileges, a party claiming involuntary disclosure has the burden of showing, with specificity, that the circumstances confirm the involuntariness of the disclosure. In addition to precautionary measures, other factors to be examined in determining involuntariness include the delay in rectifying the error, the extent of any inadvertent disclosure, and the scope of discovery.”

Essentially there are three kinds of privileges: constitutional privileges, privileges promulgated by the Texas Supreme Court in the Rules of Evidence and those found in various legislative statutes. The most recognizable of these privileges is the constitutional “privilege against self-incrimination” guaranteed by the Sixth Amendment to the United States. Significantly, as pointed out in the Roach Commentary, although the Texas Constitution through its Bill of Rights (Art. I) is sometimes “more expansive than the U.S. Constitution, Texas courts dealing with constitutional privileges “usually rely on the provisions of the United States Constitution, and rarely on the provisions of the Texas Constitution.”

There is a long list of privileges, especially privileges from pre-trial discovery in civil cases, ingrained in statutes. The Texas Rules of Civil Procedure set out not only what may be claimed as privilege but the manner in which the privilege must be established. These procedures have continuously evolved over the years. For example, the Roach Commentary to Rule 501 pointed to a 2005 amendment to these rules by the Texas Supreme Court who extended privilege to communications between the guardian ad litem and the party represented by a next friend or guardian “as if the guardian ad litem were the attorney for the party.” The following is a list of “examples of statutory privileges:”

- Chiropractor-client;**
- Communications by a deaf person;**
- Communications by a sexual assault victim;**
- Counselors in suits for divorce;**
- Crime Stoppers Advisory Council;**
- Dentistry peer review committees;**
- Identity of blood donors;**

Information privileged from discovery by inmate;
Inmate grievance reports;
Medical peer review committees;
Nursing home reports;
Trade secrets or commercial or financial information;
Patient-emergency medical services personnel communications;
Physician-patient communications;
Podiatry peer review committees;
Privileges in contested cases before State administrative agencies;
Records and proceedings of a medical committee;
Reports and reportable diseases;
Reports of child abuse or neglect;
Sexual exploitation of a patient by a mental health services provider
Studies of mental disorders and disabilities; and
Title IV-D child support information.

There are also a significant number of privileges derived from the laws of other states, even other countries, which are applicable in a Texas case. These include: material protected by privilege in foreign countries which may be excluded from discovery in Texas; communications recognized as privileged in other states apply in Texas, if the communication was made in those states; and qualified privilege to protect the identity of informants or confidential sources recognized in Texas law.

Virtually all of the above-cited privileges were either formulated or recognized in civil law. The following privileges, as provided by the Rules, relate primarily to the admissibility of evidence in both civil and criminal cases:

Rule 503: Lawyer-client privilege;
Rule 504: Husband-wife privileges;
Rule 505: Communications to members of the clergy;
Rule 506: Political Vote;
Rule 507: Trade secrets;
Rule 508: Identity of informer;
Rule 509: Physician-patient privilege;
Rule 510: Confidentiality of mental health information in civil cases
Rule 511: Waiver of privilege by voluntary disclosure;
Rule 512: Privileged matter disclosed under compulsion or without

opportunity to claim privilege;

Rule 513: Comment upon or inference from claim of privilege.

Privileges are critical to the integrity of our legal and political systems and crucial for the smooth functioning of society's most important institutions. For example, the oldest of these privileges—the lawyer/client privilege—ensures that all communications with, and information provided to, an attorney in confidence remain confidential. And then there is the “confession” to a priest, or other members of clergy, which is considered sacred and instrumental to the demands of religious freedom.

In our next several posts, we will discuss the lawyer-client, husband-wife, clergy, and informant privileges which often crop up in criminal evidence issues.

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