

THAT’S PRIVILEGED! OR IS IT?: UNCOVERING LOST PRIVILEGES AND EXCEPTIONS IN TEXAS CODES

Comment

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* This Comment is dedicated to Judge Halbach and the Fightin’ 333rd, without whom this Comment would not exist.

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I. THE OVERSIGHT OF AVAILABLE PRIVILEGES AND THEIR INEVITABLE DISAPPEARANCE

Although many law students and practitioners understand the meaning of the term “privilege,” they rarely recognize those privileges that fall outside the typical attorney–client, physician–patient, or work-product realm.¹ Texas remains a jurisdiction determined to find the truth, preferring a non-adversarial discovery process.² Therefore, gathering evidence outweighs the importance of protecting privilege.³ As a result, privileges that exist as part of current Texas law have, in essence, “disappeared,” hiding, dusty and unused, in an attorney’s arsenal.⁴

Sadly, Texas statutes house an abundance of privileges that are either forgotten or unknown to the everyday lawyer.⁵ The privileges have become lost for a number of reasons: the recodification of statutes; the vast amount of Texas authority; and the researcher’s reliance on practice guides, whose focus centers on the Texas Rules of Evidence (TRE).⁶ Within the past fifty years, Texas statutes have gone through a total recodification process—now separated by subject matter.⁷ This process has caused some privileges that may be applicable to more than one subject matter to become even further lost within another subject matter’s code.⁸

Texas offers a vast amount of available authority that provides applicable privileges.⁹ Yet, to date, Texas does not provide a comprehensive source where one can look to determine whether a relevant privilege exists.¹⁰ Instead, privileges are scattered irregularly throughout the Texas Constitution, court

1. *See infra* Part I.

2. *See infra* Part II.

3. *See infra* Part II.

4. *See infra* Parts II, IV, V.

5. *See infra* Parts III, IV.C.

6. *See infra* Parts III–V.

7. *See infra* Part III.

8. *See infra* Part III. For example, when researching privileges regarding “medical peer review committees,” one must look not only to the Health and Safety Code, but also to the Occupations Code. *See infra* Part III.B.

9. *See infra* Part IV.

10. *See infra* Part IV.

rules, and statutes.¹¹ At times, these sources contradict one another regarding the same rule of privilege.¹²

In addition to the recodified statutes and extensive authority, scholars rely on the TRE, as well as the practice guides that cite to these rules, when faced with an issue of privilege.¹³ Frequently, if an attorney wishes to find a privilege, she looks to Article V of the TRE, which discusses *some* available privileges.¹⁴ The TRE does in fact provide a substantial amount of information regarding privilege, and as a result, many popular practice guides rely on the TRE as a leading source of authority.¹⁵ Therefore, the already limited exposure that practice guides give to the subject of privilege is skewed, forcing more and more legal researchers to limit their focus to the TRE when questioning the subject of privilege.¹⁶ Even if practice guides were to provide a fair representation of privileges, their prices make privileges unavailable to some Texas citizens.¹⁷

Available privileges are disappearing within our codified system because researchers are not searching for them.¹⁸ The ongoing recodification of various statutes makes it difficult to search for applicable privileges pertaining to one's specific endeavor.¹⁹ The vast amount of authority causes many practitioners to waste time combing through possible privileges.²⁰ The TRE and practice guides are an easy fallback because they reference many popular privileges but only reach a very small audience.²¹ Searching for *all* privileges has become too difficult, but this struggle is not a valid excuse for infringing on a person's right to privilege.²² To repair the problem of lost privileges and ensure that all litigants are allowed their right to privilege, searching for privileges must become less tedious and more efficient.²³ The implementation of a new "Texas Rules of Privilege" would achieve this goal.²⁴

Part I of this Comment briefly introduces the reasons why privileges have disappeared and explains that courts should create a Texas Rules of Privilege.²⁵ Part II discusses how Texas defines privilege.²⁶ Part III explains the recodification process and how it has affected the location of privileges

11. *See infra* Part IV.

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See infra* Part V.

15. *See infra* Part V.

16. *See infra* Part V.

17. *See infra* Part V.

18. *See infra* Part VI.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part VI.

23. *See infra* Part VI.

24. *See infra* Part VI.

25. *See infra* Part I.

26. *See infra* Part II.

within the statutes.²⁷ Part IV identifies the locations of various privileges within Texas authority.²⁸ Part V discusses how the TRE strongly influences what practice guides cover regarding privilege, and explains that even when practice guides do discuss other sources of authority, only a limited number of individuals have access.²⁹ Finally, Part VI discusses how the creation of a Texas Rules of Privilege would solve the problem of lost privileges.³⁰

II. WHAT DOES “PRIVILEGE” MEAN IN TEXAS?

A privilege is a “legal right, exemption, or immunity granted . . . ; an exception to a duty[;] . . . [a] legal freedom to do or not to do a given act . . . [immunizing] conduct that, under ordinary circumstances, would subject the actor to liability.”³¹ Texas has little literature regarding the importance of privilege generally in our legal system.³² One scholar, however, describes the federal view of privilege, stating:

The purpose of the ordinary rules of evidence is to promote the ascertainment of the truth. *Another group of rules*, however, is designed to permit the exclusion of evidence for reasons wholly unconnected with the quality of the evidence or the credibility of the witness. These reasons are found in the desire to protect an interest or relationship. The term “privilege” . . . is used broadly to describe these latter *rules of exclusion*. Since the effect of a privilege is to suppress the truth, a privilege should be recognized only if the interest or relationship is of outstanding importance and would undoubtedly be harmed by denying the protection of privilege.³³

Commonly, a claim of privilege is acceptable when the legal community decides to reject evidence because an extrinsic policy is more important than the information that the evidence could provide.³⁴ The creation of an extrinsic policy occurs when “the benefit to the party claiming the privilege outweighs the detrimental effect to the search for the truth.”³⁵ As a result, courts reject probative evidence, even when the evidence may aid the law in finding the

27. See *infra* Part III.

28. See *infra* Part IV.

29. See *infra* Part V.

30. See *infra* Part VI.

31. BLACK’S LAW DICTIONARY 1316 (9th ed. 2009).

32. See, e.g., Steven Goode & M. Michael Sharlot, *Article V: Privileges*, 20 HOUS. L. REV. 273, 273–74 (1983). Although it is difficult to find information regarding the importance of privilege in and of itself, much literature exists regarding privilege with regard to the TRE. *Id.*

33. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 176 (Ready Access Edition) (7th ed. 2013) (emphasis added).

34. GRAHAM C. LILLY, PRINCIPLES OF EVIDENCE 320–21 (4th ed. 2006). An extrinsic policy is one that protects the personal rights and secrets of some entity. 2 EPHRAIM NISSAN, COMPUTER APPLICATIONS FOR HANDLING LEGAL EVIDENCE, POLICE INVESTIGATION AND CASE ARGUMENTATION 1067–68 (2012).

35. Gus Douvanis & John Brown, *Privileged Communication in Educational Research: The Case for Statutory Protection*, EDUC. RESEARCHER, June–July 1995, at 27, 28.

truth.³⁶ In most cases, the disclosure of privileged communications would harm a governmental interest or a private relationship that the courts and legislature wish to preserve and foster.³⁷ Thus, the ability to assert privilege has a justifiable purpose because it encourages the concepts of independence and privacy—behavior that is socially desirable—such as candid discussions between an attorney and her client.³⁸

Jurisdictions are only required to adopt privileges guaranteed by the United States Constitution.³⁹ In addition, flexibility exists regarding how a jurisdiction applies privilege, such as the jurisdiction's particular exceptions and who may claim the privilege.⁴⁰

Privilege exists in two different realms of the legal world; one type exists in court—adverse testimony privilege—while the other protects communications—communications privilege.⁴¹ Adverse testimony privilege protects someone from taking the stand, while communications privilege protects people from testifying about conversations that are confidential and legally recognized as protected.⁴²

Texas recognizes quite a few privileges.⁴³ Unbeknownst to even some of the most experienced attorneys, many of these exist in our codified statutory system.⁴⁴ The reason many practitioners may have a difficult time finding those privileges could be due to the multiple statutory reforms that Texas has undergone.⁴⁵

III. THE CAUSE AND EFFECT OF RECODIFICATION REGARDING PRIVILEGE

Texas statutes have undergone categorical changes concerning the placement of certain laws.⁴⁶ They have been moved around and are now located in one of the available subject-matter codes, such as the Family Code.⁴⁷ As a result, if legal researchers wish to reach a particular topic, ideally they would search through that topic's code.⁴⁸ A problem exists, however, when pertinent information, such as an applicable privilege, is located in another, possibly less obvious category of the code.⁴⁹

36. LILLY, *supra* note 34.

37. *Id.*

38. *Id.*

39. DAVID A. SCHLUETER & JONATHAN D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL § 501.02(1) (9th ed. 2012).

40. *Id.*

41. *Id.*

42. *Id.*

43. *See infra* Part IV.

44. *See infra* Parts III, IV.C.

45. *See infra* Part III.

46. *See infra* Part III.A.

47. *See infra* Part III.A.

48. *See infra* Part III.A.

49. *See infra* Part III.A.

A. The History Behind Texas's Codified System

Texas has used a variety of unsystematic statutory designs throughout history.⁵⁰ The legislature has undergone many efforts to compile the laws of Texas.⁵¹ George Paschal, an outstanding Texas attorney and an asset to the Texas legal profession, was the first to compile a codified system during the second half of the nineteenth century; he called this compilation *Digest of the Laws of Texas*.⁵² The legislature used his comprehensive arrangement to create its official revision of the statutes, adopted in 1879 and revised in 1895, 1911, and 1925.⁵³ These arrangements positioned the statutes in alphabetical order, assembled by article number.⁵⁴ This became a problem, however, when the legislature exponentially increased the number of statutes and ignored the need for a revision of the code.⁵⁵

In 1963, the state legislature created the Texas Legislative Counsel (TLC) and asked it to construct a new code from the existing statutes by separating them by subject matter.⁵⁶ The legislature hoped that this codification would “clarify and simplify the statutes in order to make them more accessible, understandable, and usable but not to alter the sense, meaning, or effect of those statutes.”⁵⁷ The TLC had the authority to organize and simplify the law but not to substantively change it.⁵⁸ These subject-matter codes range from the Agriculture Code to the Water Code.⁵⁹

Currently, *Vernon's Texas Codes Annotated* (VTCA) houses the official, finalized version of Texas's codified statutes, while *Vernon's Civil Statutes of the State of Texas Annotated* (VCSSTA) contains the remaining uncoded statutes.⁶⁰ The statutes found within VCSSTA will eventually become part of the VTCA once their portion of the codification process is complete.⁶¹ The TLC has not yet codified three independent codes and incorporated them into

50. BRANDON D. QUARLES & MATTHEW C. CORDON, RESEARCHING TEXAS LAW 112–15 (3d ed. 2012).

51. *Id.* at 113.

52. *Id.*; James P. Hart, *George W. Paschal*, 28 TEX. L. REV. 23, 23 (1949) (George Paschal moved to Texas in 1846 where he was admitted to practice law, unsuccessfully ran for attorney general, and became editor of the Austin *Southern Intelligencer*); QUARLES & CORDON, *supra* note 50, at 25–28.

53. QUARLES & CORDON, *supra* note 50, at 113.

54. *Id.*

55. *Id.*

56. *Id.* at 114–15.

57. Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 356 (2012).

58. *Id.*

59. QUARLES & CORDON, *supra* note 50, at 115–16.

60. *Legal Research Process*, U. TEX. SCH. L. TARLTON L. LIBR., <http://tarltonguides.law.utexas.edu/content.php?pid=242166&sid=1999296> (last updated Oct. 8, 2014) [hereinafter *Legal Research Process*] (providing information on what Texas statutes are and how to use them); *Texas Legal Research*, AUSTIN PUB. LIBR., <http://library.austintexas.gov/new-information-guides/texas-legal-research> (last visited Oct. 8, 2014) [hereinafter *Texas Legal Research*] (providing an introduction to the basics of Texas statutory research).

61. *Legal Research Process*, *supra* note 60; *see Texas Legal Research*, *supra* note 60.

the VTCA: the Texas Business Corporations Act, the Texas Code of Criminal Procedure, and portions of the Texas Insurance Code.⁶² Revised versions will replace these independent codes, forming part of the present subject-matter codification system housed within the VTCA.⁶³ The Texas Estates Code, formerly known as the Texas Probate Code, was the most recent addition to the VTCA, becoming part of the codified system on January 1, 2014.⁶⁴ The completed VTCA will contain all categorized Texas statutes.⁶⁵ Although an improvement from the previous system, the newly renovated codification procedure has caused some statutes regarding privilege to become further lost within our codified system.⁶⁶

B. Lost Statutory Privileges

Although the subject-matter codes have made it easier to search for statutes regarding a certain topic, it is important to double check for forgotten, relevant statutes that exist in other codes.⁶⁷ When researching topics such as “medical committee” and “medical peer review committee,” many researchers look to the Health and Safety Code.⁶⁸ Sections 161.031 through 161.033 are part of Subdivision D of the Health and Safety Code entitled “Medical Committees, Medical Peer Review Committees, and Compliance Officers.”⁶⁹ Section 161.031, entitled “Medical Committee Defined,” states that a “‘medical committee’ includes any committee, including a joint committee, of: (1) a hospital; (2) a medical organization; (3) a university medical school or health science center; (4) a health maintenance organization . . . ; (5) an extended care facility; (6) a hospital district; or (7) a hospital authority.”⁷⁰ A medical peer review committee is a type of medical committee made of physicians who investigate “the medical care rendered by a colleague in order to determine whether accepted standards of care have been met.”⁷¹ With regard to privilege, § 161.032 explains that a medical committee’s records and proceedings are confidential, and therefore, not subject to a court subpoena.⁷² In addition, the section mentions that the “[r]ecords, information, or reports of

62. *Legal Research Process*, *supra* note 60; *see Texas Legal Research*, *supra* note 60.

63. *Legal Research Process*, *supra* note 60.

64. Glenn M. Karisch, *2013 Texas Legislative Update*, KARISCH L. FIRM (Aug. 7, 2013), <http://texasprobate.com/download-cle-articles/legislative%20update%20Karisch%202013-08-07.pdf>.

65. LYDIA M. V. BRANDT, TEXAS LEGAL RESEARCH: AN ESSENTIAL LAWYERING SKILL 354 (1995); *Legal Research Process*, *supra* note 60.

66. *See infra* Part III.B.

67. *See supra* Part III.A.

68. TEX. HEALTH & SAFETY CODE ANN. §§ 161.031–.033 (West 2010 & Supp. 2014).

69. *Id.*

70. HEALTH & SAFETY CODE § 161.031.

71. Scott E. Segall & William Pearl, *Should “Due Process Rights” Be Part of Hospital Peer Review?*, CENTER FOR PEER REV. JUST., http://www.peerreview.org/articles/should_due_process.htm (last visited Sept. 2, 2014).

72. HEALTH & SAFETY CODE § 161.032.

a *medical committee*, [or] *medical peer review committee* . . . are not subject to disclosure.”⁷³

Although § 161.032 refers to the Government Code and the Occupations Code, these are very general references.⁷⁴ Section 161.032 cites the Government Code to indicate which procedures may be held in a closed meeting and also cites the Occupations Code to indicate that Subchapter A, Chapter 160 of the Occupations Code does not allow this privilege to apply to “records made or maintained in the regular course of business.”⁷⁵

When looking at the Health and Safety Code, it appears that no exceptions to privilege exist for medical peer review committees—their records are confidential.⁷⁶ A further look at the Occupations Code, however, reveals a different story.⁷⁷ The Occupations Code, not the Health and Safety Code, determines the scope of privilege regarding medical peer review committees.⁷⁸ It states, “[i]f a judge makes a preliminary finding that a proceeding or record of a *medical peer review committee* or a communication made to the committee is relevant to an anticompetitive action . . . the proceeding, record, or communication is not confidential to the extent it is considered relevant.”⁷⁹ Furthermore, the Government Code states that if a “conflict between the general provision and the special . . . provision is irreconcilable, the special . . . provision prevails as an exception to the general provision.”⁸⁰ Additionally, in enacting a statute, one is to presume that “the entire statute is intended to be effective.”⁸¹

When applying both the Health and Safety Code and the Occupations Code, the Health and Safety Code would nullify any anticompetitive action arguments, causing discoverable information under the Occupations Code to remain privileged.⁸² Because all statutes are effective and the Occupations Code creates a special provision regulating solely peer review committees, the Occupations Code prevails.⁸³ Therefore, if the judge makes a preliminary finding that information within a medical peer review committee is relevant to an anticompetitive action, the court will not consider it privileged.⁸⁴

73. *Id.* (emphasis added).

74. *Id.*

75. *Id.*

76. *See id.*

77. *See generally* TEX. OCC. CODE ANN. (West 2012 & Supp. 2014) (showing that an exception to privilege does exist for medical peer review committees upon a finding that it is related to anticompetitive action).

78. TEX. OCC. CODE ANN. § 160.007 (West 2012).

79. *Id.* (emphasis added).

80. TEX. GOV'T CODE ANN. § 311.026 (West 2013).

81. TEX. GOV'T CODE ANN. § 311.021 (West 2013).

82. TEX. HEALTH & SAFETY CODE ANN. § 161.032 (West 2010 & Supp. 2014); OCC. CODE § 160.007.

83. GOV'T CODE §§ 311.021, 311.026; OCC. CODE § 160.007.

84. OCC. CODE § 160.007.

The recodification of Texas statutes has caused some privileges and their exceptions to become lost within the codes.⁸⁵ Privileges have become lost not only as a result of recodification, but also because of the abundance of Texas law available regarding privilege.⁸⁶ An easy search is impossible with the Texas Constitution, Texas court rules, and the many Texas statutes, all discussing available privileges.⁸⁷

IV. THE AUTHORITY: TEXAS PRIVILEGES AND WHERE TO FIND THEM

Recodification and the vast amount of available sources of authority for privileges have made it difficult for attorneys to effectively use all privileges.⁸⁸ Privileges and their exceptions exist in multiple channels of Texas legal authority.⁸⁹ The Texas Constitution contains privileges that protect one's right to privacy and one's right against self-incrimination.⁹⁰ Similarly, some of the Texas court rules—the Texas Rules of Civil Procedure (TRCP) and the TRE—provide information regarding privilege.⁹¹ The TRCP covers certain investigative privileges—evidentiary privileges—including attorney work product and witness statements.⁹² The TRE, popularly referred to when questions arise regarding privilege, discusses privileged communications between attorneys and clients, husbands and wives, doctors and patients, and clergymen and congregations.⁹³ It also offers other privileges that protect one's right not to reveal certain information.⁹⁴ Lastly, as previously discussed, available privileges live within the Texas codes, if one is lucky enough to find them.⁹⁵

A. Privileges That Exist Within the Texas Constitution

The Texas Constitution provides the state's citizens with some privileges, many of which exist in other networks of authority.⁹⁶ The current constitution dates back to 1876 and is the sixth constitution that has governed Texas since its independence from Mexico in 1836.⁹⁷ The constitution “declare[s] that

85. *See supra* Part III.

86. *See infra* Part IV.

87. *See infra* Part IV.

88. *See infra* Part IV.A.

89. *See infra* Part IV.A–B.

90. DAVID E. KELTNER, TEXAS PRACTICE GUIDE: DISCOVERY (FIRST) §§ 3:4–8 (West 2013).

91. *See infra* Part IV.B.

92. KELTNER, *supra* note 90, § 3:8.

93. *Id.*

94. *Id.*

95. *See infra* Part IV.C.

96. *See infra* Part IV.B; *see, e.g.*, TEX. CONST. art. I, § 9.

97. Joe E. Ericson & Ernest Wallace, *Constitution of 1876*, HANDBOOK TEX. ONLINE, <https://www.tshaonline.org/handbook/online/articles/mhc07> (last visited Oct. 8, 2014).

Texas [is] a free and independent state, subject only to the Constitution of the United States.”⁹⁸

One of the more popular constitutional privileges involves the right to remain free from searches and seizures.⁹⁹ Article 1, § 9 states, “[t]he people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches.”¹⁰⁰ This privilege has been codified in Article 1.06 of Texas’s Code of Criminal Procedure, entitled “Searches and [S]eizures.”¹⁰¹ Another popular constitutional privilege in Texas is the privilege against compelled self-incrimination.¹⁰² Article 1, § 10 states, “[the accused] shall not be compelled to give evidence against himself.”¹⁰³ A codified version of this privilege is within Article 1.05 of Texas’s Code of Criminal Procedure, entitled “Rights of [A]ccused.”¹⁰⁴

Unbeknownst to many legal professionals, the constitution also houses other lesser-known privileges.¹⁰⁵ One of these privileges provides absolute immunity for words spoken on the floor of the Texas House of Representatives and the Texas Senate; a privilege granted for “words spoken in debate.”¹⁰⁶ Article 3, § 21 of the Texas Constitution states, “[n]o member shall be questioned in any other place for words spoken in debate in either House.”¹⁰⁷ This privilege “contains a traditional and basic constitutional shield for legislative speech and debate,” promoting separation of powers and encouraging unrestricted debate, which results in better policy decisions.¹⁰⁸ An older case, *Canfield v. Gresham*, discusses this privilege.¹⁰⁹ In *Canfield*, the appellant sought to recover damages for his unlawful and malicious arrest during a legislative session.¹¹⁰ Each house had the power to imprison a person who was not a member of the respective house for obstructing proceedings.¹¹¹ Since no member “shall be questioned in any other place for words spoken in debate in either house,” the members did not have to discuss what had happened and the court affirmed the judgment.¹¹²

Another version of this similar privilege can be found in § 73.002 of the Civil Practice and Remedies Code, entitled “Privileged Matters.”¹¹³ Generally,

98. *Id.*

99. TEX. CONST. art. I, § 9; *see infra* text accompanying note 101.

100. TEX. CONST. art. I, § 9.

101. TEX. CODE CRIM. PROC. ANN. art. 1.06 (West 2005).

102. TEX. CONST. art. I, § 10.

103. *Id.*

104. TEX. CODE CRIM. PROC. ANN. art. 1.05 (West 2005).

105. *See, e.g.*, TEX. CONST. art. III, § 21.

106. *Id.*; JANICE C. MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE 92 (1996).

107. TEX. CONST. art. III, § 21.

108. MAY, *supra* note 106, at 92.

109. *Canfield v. Gresham*, 17 S.W. 390, 393 (Tex. 1891).

110. *Id.* at 390.

111. *See id.* at 393.

112. *Id.* (quoting TEX. CONST. art. III, § 21).

113. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 73.002 (West 2011).

the section states that certain publications remain privileged, with the exception of publication by malice.¹¹⁴ The section applies to, among other things, “an executive or legislative proceeding (including a proceeding of a legislative committee).”¹¹⁵ This codified version of the constitutional privilege provides a limitation that the constitution does not—malicious comments will not have protection.¹¹⁶ Although a limitation to this privilege exists, it is not housed within the constitutional authority.¹¹⁷

Another privilege found in the Texas Constitution is a voter’s privilege from arrest.¹¹⁸ Article 6, § 5 states, “[v]oters shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.”¹¹⁹ The interpretive commentary available in *Vernon’s Annotated Texas Constitution*, provided within the editor’s note, states that the present Election Code restates this constitutional section.¹²⁰ The commentary provides a citation to “V.A.T.S. Election Code, art. 8.26.”¹²¹ The current Election Code, however, contains titles, chapters, and sections—not articles.¹²² Another available section exists, however, that correctly mirrors this constitutional privilege.¹²³ Section 276.005 of the Election Code, entitled “Voter’s Privilege from Arrest,” states, “[a] voter may not be arrested during the voter’s attendance at an election and while going to and returning from a polling place except for treason, a felony, or a breach of peace.”¹²⁴

The Texas Constitution offers another privilege from arrest.¹²⁵ Article 3, § 14 states, “Senators and Representatives shall, except in cases of treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same.”¹²⁶ The interpretive commentary available in *Vernon’s Annotated Texas Constitution*, which is provided in the editor’s notes, states that the words “treason, felony, or breach of the peace” signify all indictable crimes, citing a United States Supreme Court case, *Williamson v. United States*, as its authority.¹²⁷ This limitation not only makes this exemption from arrest very

114. *Id.*

115. *Id.*

116. TEX. CONST. art. III, § 21; CIV. PRAC. & REM. CODE § 73.002.

117. TEX. CONST. art. III, § 21; CIV. PRAC. & REM. CODE § 73.002.

118. TEX. CONST. art. VI, § 5.

119. *Id.*

120. *Id.*

121. *Id.* V.A.T.S. stands for *Vernon’s Annotated Texas Statutes. Finding a Statute*, U. TEX. SCH. L. TARLTON L. LIBR., <http://tarltonguides.law.utexas.edu/find-statute> (last visited Oct. 8, 2014) (stating that citations to Texas statutes are abbreviated by “VTCA” and “VATS”).

122. See generally TEX. ELEC. CODE ANN. (West 2010 & Supp. 2014) (outlining the contents as organized by sections within titles and chapters, not by articles).

123. TEX. ELEC. CODE ANN. § 276.005 (West 2010).

124. *Id.*

125. TEX. CONST. art. III, § 14.

126. *Id.*

127. *Id.*

weak, but also raises the question that if “treason, felony, or breach of the peace” refer to all indictable crimes, does this limitation apply to all privileges from arrest, including a voter’s privilege from arrest, even though the limitation was not stated?¹²⁸

In *Williamson*, the Court indicted Williamson, a member of the United States House of Representatives, for allegedly committing the crime of conspiracy.¹²⁹ Williamson protested on the grounds that he was deprived of his constitutional right of privilege from arrest.¹³⁰ By reviewing the origins of the privilege, the Court determined that the meaning of the privilege was to provide security to members from arrest in *civil* suits.¹³¹ Therefore, the Court affirmed the judgment.¹³²

Strangely enough, another version of the constitutional privilege from arrest occurs in Texas’s Code of Criminal Procedure, entitled “Privilege of [L]egislators.”¹³³ Once again, it confuses the meaning of “treason, felony, or breach of the peace.”¹³⁴ The statute states, “Senators and Representatives shall, except in cases of treason, felony or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same.”¹³⁵ As previously seen, however, the constitutional version of this privilege has limitations protecting senators and representatives from civil liability, but not criminal indictments.¹³⁶ Therefore, why would this privilege be located in the Code of *Criminal* Procedure?¹³⁷

The public views the Texas Constitution as a document that protects their interests, including privileges.¹³⁸ Although the constitution does house some privileges, researchers can find many more within other sources of authority, including Texas court rules.¹³⁹

B. Privileges That Exist Within the Texas Court Rules

In addition to the Texas Constitution, the Texas court rules, specifically the TRCP and the TRE, also contain numerous privileges.¹⁴⁰ The TRCP

128. *See id.*

129. *Williamson v. United States*, 207 U.S. 425, 432 (1908).

130. *Id.* at 432–33.

131. *Id.*

132. *Id.*

133. TEX. CODE CRIM. PROC. ANN. art. 1.21 (West 2005).

134. *Id.*

135. *Id.*

136. *Id.*; TEX. CONST. art. III, § 14; *Williamson*, 207 U.S. at 432–33.

137. TEX. CONST. art. III, § 14; CODE CRIM. PROC. art. 1.21; *Williamson*, 207 U.S. at 432–33.

138. THOMAS R. DYE, *POLITICS IN AMERICA* (9th ed. 2010).

139. *See infra* Part IV.B.

140. *See infra* Part IV.B.2–3.

primarily governs civil practice, while the TRE governs whether attorneys may admit evidence at trial.¹⁴¹

1. *The History Behind the Rules of Texas*

Texas court proceedings use and follow various rules created by the Texas Supreme Court.¹⁴² Some rules are essential, especially to the operation of the judiciary.¹⁴³ Because of the rules' importance, the Texas Supreme Court "adopted a few [rules] before it had any constitutional or statutory authority to do so."¹⁴⁴ The court stated that it relied on its inherent power, in the absence of legislated rules, to create a few rules of procedure.¹⁴⁵ Article 5, § 25 of the 1876 Texas Constitution eventually authorized the court to make administrative and procedural rules and regulations.¹⁴⁶ This later-amended power limited the court's power so that it could only "establish rules . . . not inconsistent with the laws of the State."¹⁴⁷ In 1985, Article 5, § 31, entitled "Court Administration and Rule-Making Authority," repealed the constitutional provision.¹⁴⁸ It states:

The Supreme Court [of Texas] is responsible for the efficient administration of the judicial branch and shall promulgate *rules of administration* not inconsistent with the laws of the state [The court] shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state [T]he legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such *other rules* as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.¹⁴⁹

The Texas Constitution gives the Texas Supreme Court the power to create and adopt rules of administration and procedure.¹⁵⁰ The constitution also gives the legislature the ability to delegate other rulemaking powers to the courts.¹⁵¹

141. ALEX WILSON ALBRIGHT, TEXAS COURTS: A SURVEY 1–2 (2014–2015 ed. 2014), available at <http://imprimaturpress.com/imgs/1-75.pdf>.

142. *Texas Court Rules*, TEX. ST. L. LIBR., <http://www.sll.texas.gov/the-courts/texas-court-rules/> (last visited Jan. 17, 2014).

143. *Texas Court Rules: History and Process*, SUPREME CT. TEX., <http://www.supreme.courts.state.tx.us/rules/history.asp> (last visited Jan. 17, 2014).

144. *Id.*

145. *Id.*

146. TEX. CONST. art. V, § 25 (repealed 1985); *Texas Court Rules: History and Process*, *supra* note 143.

147. TEX. CONST. art. V, § 25 (repealed 1985); *Texas Court Rules: History and Process*, *supra* note 143 (emphasis omitted).

148. TEX. CONST. art. V, § 31; *Texas Court Rules: History and Process*, *supra* note 143.

149. TEX. CONST. art. V, § 31; *Texas Court Rules: History and Process*, *supra* note 143 (emphasis added).

150. *Texas Court Rules: History and Process*, *supra* note 143.

151. *Id.*

The Rules of Practice Act, enacted in 1939 by the Texas Legislature, gave the supreme court the power to make rules regarding civil practice and procedure.¹⁵² The legislature believed that the court should retain this power because the civil rules of practice and procedure, when arranged by the legislature, resulted in unnecessary delay and expense.¹⁵³ Whatever rules the court adopted repealed any other conflicting laws on civil procedure.¹⁵⁴ The legislature codified this power in § 22.004 of the Government Code, entitled “Rules of Civil Procedure.”¹⁵⁵ It states that the “supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.”¹⁵⁶ The legislature may enact, and has previously enacted, some statutes that forbid procedure and prohibit the court from interfering procedurally through its power under the Rules of Practice Act.¹⁵⁷ The legislature also authorized the adoption of rules of administration, and effective September 1, 1983, the court created the TRE.¹⁵⁸

The supreme court’s rulemaking process creates the rules of Texas, including the TRCP, the Texas Rules of Appellate Procedure, and the TRE.¹⁵⁹ Section 74.024 of the Government Code states that the court may “adopt rules of administration setting policies and guidelines necessary or desirable for the operation and management of the court system and for the efficient administration of justice.”¹⁶⁰ The rulemaking process follows that of the United States Supreme Court.¹⁶¹ The Texas Supreme Court, after the passing of the Rules of Practice Act, created the Supreme Court Advisory Committee (SCAC) to recommend rules.¹⁶² The SCAC, when revising rules, considers suggestions by members of the SCAC, as well as proposals received by the court, executive and legislative departments, interested bar groups, individual judges and lawyers, and the public.¹⁶³ Although other groups offer suggestions for the TRCP, the court refers to the SCAC for preliminary consideration.¹⁶⁴ The supreme court first published the Texas Rules of Civil Evidence in 1982, followed shortly by the Texas Rules of Criminal Evidence, which was adopted

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. TEX. GOV’T CODE ANN. § 22.004 (West 2004 & Supp. 2014).

157. *Texas Court Rules: History and Procedure*, *supra* note 143.

158. William V. Dorsaneo III, *Evolution of Texas Procedure from 1836 to 2000*, S. METHODIST U., <http://faculty.smu.edu/wdorsane/EVOLART.htm> (last visited Oct. 12, 2014); *Texas Court Rules: History and Procedure*, *supra* note 143.

159. *Texas Court Rules: History and Procedure*, *supra* note 143.

160. TEX. GOV’T CODE ANN. § 74.024 (West 2013); *Texas Court Rules: History and Procedure*, *supra* note 143.

161. *Texas Court Rules: History and Procedure*, *supra* note 143.

162. *Id.*

163. *Id.*

164. *Id.*

by the Court of Criminal Appeals.¹⁶⁵ By March of 1998, a uniform set of rules—the TRE—replaced the previously divided sets.¹⁶⁶

2. *The Texas Rules of Civil Procedure and Privileges Within*

The first rule of the TRCP states that the purpose of the rules “is to obtain a just, fair, equitable[,] and impartial adjudication of the rights of litigants under established principles of substantive law.”¹⁶⁷ The TRCP are the rules that Texas courts follow in civil proceedings.¹⁶⁸ The TRCP affects privilege in two ways: it determines how the courts procedurally handle the rights of privilege, and it provides authority for some available privileges.¹⁶⁹ Part 2, § 9 of the TRCP, consisting of Rules 176 through 215(c), provides guidance regarding aspects of evidence and discovery.¹⁷⁰

The TRCP, explaining how the courts handle the rights of privilege procedurally, discusses not only the type of information required from witnesses or other parties, but also the type of information protected by privilege.¹⁷¹ Rule 180, entitled “Refusal to Testify,” states that “[a]ny witness refusing to give evidence may be committed to jail, there to remain without bail until such witness shall consent to give evidence.”¹⁷² Under this rule, no exceptions exist.¹⁷³ Rule 176.6, entitled “Response,” similarly addresses a witness’s requirement to provide evidence.¹⁷⁴ It states “[e]xcept as provided in this subdivision, a person served with a subpoena must comply with the command stated therein.”¹⁷⁵ This rule does mention an exception to the requirement.¹⁷⁶ It explains, “[a] person may withhold material or information claimed to be privileged but must comply with Rule 193.3.”¹⁷⁷

The TRCP also creates privileges within its rules.¹⁷⁸ One of the privileges found within the TRCP is the “work-product privilege.”¹⁷⁹ Rule 192.5, entitled “Work Product,” defines the work-product privilege and the protection it

165. Michael Ariens, *Appealing Evidentiary Rulings*, MICHAELARIENS.COM, <http://www.michaelariens.com/evidence/commentary/appealing.pdf> (last visited Nov. 20, 2014).

166. *Id.*

167. TEX. R. CIV. P. 1.

168. *Texas Rules of Civil Procedure*, US LEGAL, <http://civilprocedure.uslegal.com/rules-of-civil-procedure/state-rules-of-civil-procedure/texas-rules-of-civil-procedure/> (last visited Oct. 14, 2014).

169. *See* TEX. R. CIV. P. 193.3–4.

170. TEX. R. CIV. P. 176–215(c).

171. *See generally* TEX. R. CIV. P. (discussing the TRCP’s coverage of both the type of information required by witnesses and the type of information protected by privilege).

172. TEX. R. CIV. P. 180.

173. *Id.*

174. TEX. R. CIV. P. 176.6.

175. *Id.*

176. *Id.*

177. *Id.*

178. *See, e.g.*, TEX. R. CIV. P. 192.5 (creating the work-product privilege).

179. *Id.*

guarantees.¹⁸⁰ The term work product refers to all “documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories prepared and assembled in actual anticipation of litigation or in preparation of trial.”¹⁸¹ Work product has two categories: “Core Work Product” and “Other Work Product.”¹⁸² Core work product encompasses an attorney’s actual mental processes, while other work product relates to work that an attorney has prepared that does not contain an attorney’s mental impressions.¹⁸³ Core work product is not discoverable, ergo it is privileged, while other work product is discoverable only upon the showing of a substantial need by the other party—privileged with an exception.¹⁸⁴ The Texas Supreme Court ruled that the purpose of the core-work-product privilege, often referred to as a rule or an exception, is to “shelter the mental processes, conclusions and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case.”¹⁸⁵

Another privilege found within the TRCP is the “Consulting Expert” privilege.¹⁸⁶ Rule 192.7, entitled “Definitions,” provides the definitions of discovery terms, including the terms “Testifying Expert” and “Consulting Expert.”¹⁸⁷ A testifying expert is defined as “an expert who may be called to testify as an expert witness at trial.”¹⁸⁸ The statute defines a consulting expert as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is *not* a testifying expert.”¹⁸⁹ While rule 192.7 defines consulting expert, rule 192.3 discusses the actual consulting expert privilege.¹⁹⁰ Rule 192.3 states that the “identity, mental impressions, and opinions of a *consulting expert* whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.”¹⁹¹ Therefore, information obtained from a consulting expert that a testifying expert has not reviewed is privileged.¹⁹² Although some privileges are within the TRCP, most are present within another set of court rules: the TRE.¹⁹³

180. *Id.*

181. *Id.*; Andrea M. Johnson & Kelly Payne, *Work Product Privilege: Texas Work Product Rule Extended*, 55 TEX. B. J. 1128, 1128–29 (1992).

182. TEX. R. CIV. P. 192.5.

183. *Id.*

184. *Id.*

185. Johnson & Payne, *supra* note 181.

186. TEX. R. CIV. P. 192.7.

187. *Id.*

188. *Id.* 192.7(c).

189. *Id.* 192.7(d) (emphasis added).

190. TEX. R. CIV. P. 192.3.

191. *Id.* 192.3(d) (emphasis added).

192. *Id.*

193. *See infra* Part IV.B.3.

3. *The Texas Rules of Evidence and Privileges Within*

Prior to the enactment of the TRE, many of the rules regarding privileges originated as laws in statutes.¹⁹⁴ Those privileges included the husband–wife privilege, clergyman privilege, and physician–patient privilege.¹⁹⁵ Following the implementation of the TRE, however, those privileges no longer exist statutorily.¹⁹⁶ Article V of the TRE houses evidentiary privileges and is the most cited authority with regard to privilege.¹⁹⁷

Rule 102 of the TRE states, “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹⁹⁸ These evidentiary rules resolve disputes and manage facts presented by the parties.¹⁹⁹ Article V of the TRE houses more privileges in one location than any of the other forms of authority.²⁰⁰ These rules not only provide available privileges within the rules themselves, but also refer to other sources of authority.²⁰¹ The rules in Article V, ranging from 501 to 513, provide the most familiar privileges in Texas.²⁰²

Rule 501: This rule, entitled “Privileges Recognized Only as Provided,” states that unless otherwise provided by the constitution, statute, rules of evidence, or other rules with statutory authority, no person has a right to privilege.²⁰³ This rule attempts to encompass all privileges available by generally referring to the other locations where privileges exist.²⁰⁴ Although the rule helps researchers by identifying other sources of authority regarding privilege outside the TRE, it provides little guidance as to *where* in those sources privileges can be found.²⁰⁵

Rule 502: This rule, entitled “Required Reports Privileged by Statute,” protects those who create reports required by law from having to disclose the report if the law that requires the report allows for this privilege.²⁰⁶ The privilege becomes inaccessible if “perjury, false statements, fraud in the return or report,” or any other incompletion with the law occurs with regard to the report.²⁰⁷

194. SCHLUETER & SCHLUETER, *supra* note 39, § 501.02(5).

195. *Id.*

196. *Id.*

197. *See* TEX. R. EVID. 501–13.

198. TEX. R. EVID. 102.

199. *See* SCHLUETER & SCHLUETER, *supra* note 39, § 501.02(1).

200. *See* TEX. R. EVID. 501–13.

201. *Id.*

202. *See id.*

203. TEX. R. EVID. 501.

204. *Id.*

205. *Id.*

206. TEX. R. EVID. 502.

207. *Id.*

Rule 503: This rule, entitled “Lawyer–Client Privilege,” provides a client with the privilege to “refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.”²⁰⁸ The rule provides definitions, identifying terms such as “client” and “lawyer.”²⁰⁹ In addition, it further explains the use of this privilege by discussing who may claim the privilege and provides exceptions to the privilege.²¹⁰

Rule 504: This rule, entitled “Husband–Wife Privileges,” protects spouses from having to disclose confidential communications made to one another while married.²¹¹ The rule further describes the confidential communication privilege, including who may claim the privilege and exceptions to the privilege.²¹² In the event of a criminal case, “the spouse of the accused has a privilege not to be called as a witness for the state.”²¹³ The privilege from testifying against a spouse has its own set of requirements as to who may claim the privilege as well as exceptions to the privilege.²¹⁴

Rule 505: This rule, entitled “Communications to Members of the Clergy,” states that a person may refrain from disclosing, or prevent another from disclosing, a confidential communication made to a member of the clergy.²¹⁵ A member of the clergy includes “a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or an individual reasonably believed so to be by the person consulting with such individual.”²¹⁶ The rule defines confidential communication and discusses who may claim the privilege.²¹⁷

Rule 506: This rule, entitled “Political Vote,” is a very short rule.²¹⁸ The entire rule states: “Every person has a privilege to refuse to disclose the tenor of the person’s vote at a political election conducted by secret ballot unless the vote was cast illegally.”²¹⁹ In other words, one does not need to disclose whom she votes for in a political election.²²⁰

Rule 507: This rule, entitled “Trade Secrets,” is another short rule.²²¹ It grants a person the privilege to refuse to disclose, or to prevent another from disclosing, a trade secret.²²² The individual must own the trade secret and the

208. TEX. R. EVID. 503(b)(1).

209. *Id.* 503.

210. *Id.*

211. TEX. R. EVID. 504(a)(2).

212. *Id.* 504(a)(3), (4).

213. *Id.* 504(b)(1).

214. *Id.* 504(b)(3), (4).

215. TEX. R. EVID. 505(b).

216. *Id.* 505(a)(1).

217. *Id.* 505(a)(2), (c).

218. TEX. R. EVID. 506.

219. *Id.*

220. *Id.*

221. TEX. R. EVID. 507.

222. *Id.*

individual may not use the privilege to conceal fraud or another injustice.²²³ If a judge directs disclosure, she will take protective measures as to the interests of the holder of the privilege.²²⁴

Rule 508: This rule, entitled “Identity of Informer,” explains that the United States, a state, or a subdivision, may refuse to disclose the identity of an informer who provides information when assisting in an investigation regarding a violation of the law.²²⁵ The informer must give the information to a law enforcement officer or legislative committee member conducting the investigation.²²⁶ The rule explains who may claim the privilege and provides exceptions to the privilege.²²⁷

Rule 509: This rule, entitled “Physician–Patient Privilege,” provides physician–patient privileges in both criminal and civil proceedings.²²⁸ Physician–patient privilege is not available in criminal proceedings unless the patient participates in voluntary treatment or is admitted for treatment of alcohol or drug abuse.²²⁹ If the patient undergoes voluntary treatment or treatment for alcohol or drug abuse, communications made to any of the individuals involved in the treatment is privileged.²³⁰ In civil proceedings, communications made to a physician by a patient are privileged.²³¹ Rule 509 is a relatively large rule, providing definitions for terms like “patient” and “physician,” while explaining the privilege with regard to both criminal and civil proceedings.²³² Additionally, the rule discusses who may claim the privilege and exceptions to the privilege.²³³ Unlike some of the other privilege rules, this rule discusses the concept of “consent” with regard to privilege.²³⁴

Rule 510: This rule, entitled “Confidentiality of Mental Health Information in Civil Cases,” protects the disclosure of records created or maintained by a professional that contain a person’s identity, diagnosis, evaluation, or treatment.²³⁵ This rule defines terms such as “[p]rofessional,” “[p]atient,” “representative of the patient,” and “confidential.”²³⁶ Along with a general explanation of the privilege itself, the rule also discusses who may claim the privilege and exceptions to the privilege.²³⁷

223. *Id.*

224. *Id.*

225. TEX. R. EVID. 508(a).

226. *Id.*

227. *Id.* 508(b), (c).

228. TEX. R. EVID. 509(b), (c).

229. *Id.* 509(b).

230. *Id.*

231. *Id.* 509(c)(1).

232. *Id.* 509(a).

233. *Id.* 509(d), (e).

234. *Id.* 509(f).

235. TEX. R. EVID. 510.

236. *Id.* 510(a).

237. *Id.* 510(c), (d).

Rule 511: This rule, entitled “Waiver of Privilege by Voluntary Disclosure,” does not discuss a privilege per se, but explains how to waive privileges.²³⁸ The rule states, “[a] person upon whom *these rules* confer a privilege against disclosure waives the privilege” if certain conditions apply.²³⁹ Waiver applies to the privileges created by the rules of evidence and not other privileges found in other sources of authority.²⁴⁰ Privilege is waived if the privileged information is voluntarily disclosed or if “the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person’s character . . . insofar as such communications are relevant to such character or character trait.”²⁴¹

Rule 512: This rule, “Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege,” is another short rule.²⁴² The entire rule states: “A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.”²⁴³ In other words, privileges are not invalid if the disclosure of confidential information was a result of these two exceptions.²⁴⁴

Rule 513: This rule, entitled “Comment Upon or Inference From Claim of Privilege; Instruction,” discusses privilege and its relationship with inference.²⁴⁵ It explains that no one should make inferences regarding a claim of privilege and that individuals should make their claims without the knowledge of the jury.²⁴⁶ These limitations will not apply in civil proceedings if someone claims the privilege against self-incrimination.²⁴⁷ The judge may create jury instructions, however, that instruct the jury not to draw inferences from a party’s claim of privilege.²⁴⁸

Article V of the TRE provides the authority for nine available Texas privileges.²⁴⁹ Although one of its rules, Rule 501, points out that other authority concerning privilege exists, the TRE does not offer much help as to where those privileges can be located.²⁵⁰ In addition to the TRCP, the TRE, and the Texas Constitution, Texas statutes include privileges.²⁵¹

238. TEX. R. EVID. 511.

239. *Id.* (emphasis added).

240. *Id.*

241. *Id.*

242. TEX. R. EVID. 512.

243. *Id.*

244. *Id.*

245. TEX. R. EVID. 513.

246. *Id.* 513(a), (b).

247. *Id.* 513(c).

248. *Id.* 513(d).

249. *See supra* notes 206–37 and accompanying text.

250. TEX. R. EVID. 501.

251. *See infra* Part VI.C.

C. Privileges That Exist Within the Texas Codes

Lesser-known privileges exist within Texas statutes.²⁵² The recodification process, lumping statutes into subject-matter codes, has scattered privileges into illogical locations.²⁵³ Additionally, statutes encompass more information than just privileges; they house most of the state's laws.²⁵⁴ Therefore, finding any sort of privilege within the codes is as easy as finding a needle in a haystack. The following are some privileges that exist throughout the Texas codes.²⁵⁵

1. Privileges with Regard to the Abuse and Neglect of a Child

Under the Family Code, if an individual believes that abuse or neglect affects the physical health, mental health, or welfare of a child, that person must immediately report the observation.²⁵⁶ More specifically, if a person deemed a professional believes that someone is abusing or neglecting a child, that professional must report her suspicion no later than forty-eight hours after first suspecting the abuse or neglect.²⁵⁷ This reporting requirement does not excuse communications that may otherwise be considered privileged.²⁵⁸ The identity of the person making the report, however, is confidential and may not be disclosed unless the person waives the privilege, provides the information to an officer in order to conduct an investigation, or as otherwise provided in § 261.201 of the Family Code.²⁵⁹ Once someone reports the abuse and neglect of a child, only attorney–client communications are excludable.²⁶⁰ Once again, other forms of privileged communication may not receive protection in a case regarding child abuse and neglect.²⁶¹

An example of a Texas case that follows this exception to privileges occurs in *Bordman v. State*.²⁶² In *Bordman*, the appellant argued that his confession to a pastor and church officials regarding the sexual abuse of his three children was privileged under the clergy–communication privilege of rule 505 of the TRE.²⁶³ The State argued, and the court confirmed, that this privilege, along with other available privileges, was unavailable to exclude

252. See *infra* notes 256–322 and accompanying text.

253. See *supra* Part III.

254. See *Zimmerman's Research Guide*, LEXISNEXIS, <http://law.lexisnexis.com/infopro/zimmermans/dispatch.aspx?z=1967> (last visited Oct. 12, 2014).

255. See *infra* Part IV.C.1–8.

256. TEX. FAM. CODE ANN. § 261.101 (West 2014).

257. *Id.* § 261.101(b).

258. TEX. FAM. CODE ANN. § 261.10 (West 2014).

259. *Id.* § 261.10(d).

260. TEX. FAM. CODE ANN. § 261.202 (West 2014).

261. *Id.*

262. *Bordman v. State*, 56 S.W.3d 63, 68 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

263. *Id.* at 67.

evidence related to “child abuse cases under sections 261.101 and 261.202 of the Texas Family Code.”²⁶⁴

2. *Alternative Dispute Resolution Privilege*

Under the Civil Practice and Remedies Code, a participant’s communications during an alternative dispute resolution procedure are privileged.²⁶⁵ These communications are neither subject to disclosure nor available for use in a judicial or administrative proceeding as evidence against the participant.²⁶⁶ Any record made during the procedure is confidential and the court cannot require both the participants and the third-party facilitator to testify regarding the matter in dispute.²⁶⁷ Courts admit or allow discovery of oral or written communication if such communication is discoverable independent of the procedure.²⁶⁸ If the refusal to disclose information regarding an alternative dispute resolution procedure “conflicts with other legal requirements for disclosure,” the court may view the requested material in camera to determine whether the information sought warrants a protective order or is subject to disclosure.²⁶⁹

An example of a Texas case that utilizes this privilege is *In re Empire Pipeline Corp.*²⁷⁰ In this case, the claimant, Gunter, who had previously filed suit against multiple oil and gas exploration companies and then settled in mediation, sought discovery relating to the parties’ mediation in an attempt to vacate the agreement.²⁷¹ After finding that the trial court abused its discretion in granting the motion to compel discovery, the court held that the alternative dispute resolution privilege barred the discovery Gunter sought.²⁷²

3. *Convalescent and Nursing Home Privilege*

Under the Health and Safety Code, the collection, compilation, and analysis of evaluations of the care of nursing homes, designed to improve the quality of care, is privileged.²⁷³ This documentation is not subject to discovery, subpoena, or other legal compulsion and is not admissible in any civil, administrative, or criminal proceeding.²⁷⁴ This type of information is

264. *Id.* at 67–68.

265. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a), (b) (West 2011).

266. *Id.* § 154.073(a).

267. *Id.* § 154.073(b).

268. *Id.* § 154.073(c).

269. *Id.* § 154.073(e).

270. *In re Empire Pipeline Corp.*, 323 S.W.3d 308, 310 (Tex. App.—Dallas 2010, orig. proceeding [mand. denied]).

271. *Id.*

272. *Id.* at 313–14.

273. TEX. HEALTH & SAFETY CODE ANN. § 242.049(d) (West 2010).

274. *Id.*

gathered to evaluate and improve the quality of care provided in nursing homes.²⁷⁵

An example of a Texas case that utilizes this privilege is *Capital Senior Management 1, Inc. v. Texas Department of Human Services*.²⁷⁶ In this case, Capital Senior Management 1, Inc. (Capital), the operator of Parkway Place nursing home, sued the Texas Department of Human Resources (Department) to prevent them from disclosing privileged information regarding the nursing home to a Houston attorney requesting the documents.²⁷⁷ The privileged documents included annual surveys, licensing examinations, and investigations regarding complaints of abuse and neglect.²⁷⁸ The Department withheld from disclosure “various surveys, personal resident information, medical records, and ‘reports, records, and working papers used’ by the Department in an investigation of abuse or neglect.”²⁷⁹ The appellate court found the documents entitled “Facility Investigation Reports” and “Facility Abuse/Neglect Investigation Reports” privileged because of the nursing home privilege.²⁸⁰

4. Husband–Wife Counselor Privilege

Under the Family Code, a health care professional named by the court to counsel parties in a divorce suit may not admit reports of the counseling into evidence.²⁸¹ The counselor may not testify in any suit that involves the parties or their children and cannot admit the files, records, or any other work product of the counselor into evidence.²⁸²

An example of a Texas case that attempts, but fails, to assert this privilege correctly is *Brown v. Brown*.²⁸³ In *Brown*, divorced parents were fighting for custody of their two children.²⁸⁴ After hearing evidence regarding the application for change of custody, the court entered judgment changing the custody of the children from their mother to their father.²⁸⁵ The appellant, the mother in this case, argued that the testimony of the psychologist, who testified for the appellee, was inadmissible under the husband–wife counselor privilege.²⁸⁶ The psychologist testified, “material changes had occurred in the surroundings and home environment of the girls and in their personalities and attitudes, which rendered a change in custody imperative for their best interests

275. *Id.* § 242.049.

276. *Capital Senior Mgmt. 1, Inc. v. Tex. Dep’t of Human Servs.*, 132 S.W.3d 71, 73 (Tex. App.—Austin 2004, pet. denied).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 80.

281. TEX. FAM. CODE ANN. § 6.705 (West 2006).

282. *Id.*

283. *Brown v. Brown*, 500 S.W.2d 210, 213–14 (Tex. Civ. App.—Texarkana 1973, no writ).

284. *Id.* at 213.

285. *Id.*

286. *Id.*

and welfare.”²⁸⁷ The court determined that the psychologist’s testimony was valid because he had not counseled the appellant and appellee in connection with their *divorce*, but in connection with custody arrangements subsequent to the divorce.²⁸⁸ Therefore, since the counseling did not involve individuals who were parties in a divorce suit, no privilege existed.²⁸⁹

5. *Privilege from Prosecution*

Many Texas codes provide citizens with the privilege from prosecution.²⁹⁰ In these instances, if a person is unwilling to provide testimony or discovery, they can claim the privilege against self-incrimination, and courts will provide the individual with immunity from prosecution; this grant of immunity authorizes the court to require the person’s compliance with the request.²⁹¹ The court may grant immunity to an individual who first reports advantageous information and then agrees to testify to that information.²⁹² For example, if a person reports “a specific hazing incident involving a student in an educational institution to the dean of students or other appropriate official of the institution,” that person is immune from criminal and civil liability that may otherwise have been imposed or incurred as a result of the report.²⁹³

An example of a Texas case that explains this privilege from prosecution is *State v. Boyd*.²⁹⁴ In *Boyd*, the appellees obtained charges for failing to report a hazing incident, hazing, and assault on the campus of Texas A&M University.²⁹⁵ The appellees asked that their indictment be dismissed since there had been a risk of self-incrimination if they had complied with the statute to report hazing.²⁹⁶ Texas Court of Criminal Appeals held that there was no violation of the privilege against self-incrimination and reversed and remanded the dismissal.²⁹⁷ The court stated that the Education Code provides two possibilities for immunity.²⁹⁸ The first possibility for privilege is offered when “an individual is subpoenaed to testify for the prosecution and does so testify,” even though the individual would like to claim his privilege against self-

287. *Id.*

288. *Id.*

289. *Id.*

290. See TEX. BUS. & COM. CODE ANN. § 15.13 (West 2011); TEX. GOV’T CODE ANN. §§ 301.025 (West 2013); 33.026 (West 2004); TEX. HEALTH & SAFETY CODE ANN. § 433.089 (West 2010); TEX. INS. CODE ANN. § 541.007 (West 2009); TEX. PENAL CODE ANN. §§ 43.06, 47.08 (West 2011).

291. See BUS. & COM. CODE § 15.13; GOV’T CODE §§ 33.026, 301.025; HEALTH & SAFETY CODE § 433.089; INS. CODE § 541.007; PENAL CODE §§ 43.06, 47.08.

292. TEX. EDUC. CODE ANN. § 37.155 (West 2012).

293. *Id.*

294. *State v. Boyd*, 38 S.W.3d 155 (Tex. Crim. App. 2001).

295. *Id.* at 156.

296. *Id.*

297. *Id.* at 157.

298. *Id.* at 156.

incrimination.²⁹⁹ The second, applicable in this case, provides that a person who reports the hazing incident will be immune from liability they may otherwise be subject to because of the report.³⁰⁰ This privilege from prosecution removes any real risk of self-incrimination, and therefore, the appellees charge was accurate.³⁰¹

6. *Privilege from Arrest*

As previously discussed within the Texas constitutional privileges, privilege from arrest is available for voters and members of the Texas Senate and Texas House of Representatives.³⁰² This privilege also exists for witnesses via statutory implementation.³⁰³ A witness has privilege from arrest when attending, going to, or returning from court.³⁰⁴ The privilege allows, “one day of travel for each 150 miles of the distance from the courthouse to the witness’s residence.”³⁰⁵ This privilege does not take effect in cases of felony, treason, or breach of the peace, but does not explain what constitutes a felony, treason, or breach of the peace.³⁰⁶

An example of a Texas case that mentions this privilege from arrest is *Carter v. Clay*.³⁰⁷ Judge Clay issued an arrest warrant for Carter for failing to appear in court, speeding, driving without a license, having an expired license plate, and having no proof of insurance.³⁰⁸ Carter complained that the officers violated his privilege from arrest because they arrested him after the court summoned him to a court hearing.³⁰⁹ Because Clay was a party, however, and not a witness to the proceedings, this privilege did not apply.³¹⁰ Interestingly enough, the court mentioned “no Texas court has ever recognized a cause of action for a violation of [this] statute.”³¹¹

7. *Public Accountancy Board Privilege*

Under the Occupations Code, any statements, records, or opinions prepared or formed regarding a positive enforcement or a peer review of a public accountancy board are privileged.³¹² They are not subject to discovery,

299. *Id.*

300. *Id.*

301. *Id.* at 157.

302. *See supra* Part IV.A.

303. TEX. CIV. PRAC. & REM. CODE ANN. § 22.011 (West 2008).

304. *Id.*

305. *Id.*

306. *Id.*

307. *Carter v. Clay*, No. Civ. A. H97-4141, 2000 WL 1810961, at *9 (S.D. Tex. Mar. 29, 2000).

308. *Id.* at *1.

309. *Id.* at *9.

310. *Id.*

311. *Id.* (referring to TEX. CIV. PRAC. & REM. CODE § 22.011 (West 2008)).

312. TEX. OCC. CODE ANN. § 901.161 (West 2012).

subpoena, or other legal compulsion.³¹³ Release of this information to anyone other than the board is not permissible.³¹⁴ The information is not admissible as evidence in either a judicial or an administrative proceeding unless it is a board hearing.³¹⁵ This privilege does not apply, however, in a dispute between a reviewer and a person subject to the review.³¹⁶ There are no notes of decision available for this statute and no cases available on Westlaw.³¹⁷

8. *Privilege for the Victims of Sexually Violent Predators*

Under the Health and Safety Code, the identifiable personal information of a victim of a sexually violent predator is privileged.³¹⁸ Personal information includes a victim's home telephone number, social security account, and home address.³¹⁹ The Government Code, however, indicates that the Sexual Assault Prevention and Crises Service *may* disclose confidential communication, records, or evidence pertaining to the information of a sexual assault if particular circumstances apply.³²⁰ The service may not disclose material to a parent or legal guardian, even if special circumstances do apply, when the survivor is a minor and the advocate or program believes that the parent or legal guardian may be a suspect of the sexual assault.³²¹ There are no notes of decision available for these statutes and no cases available on Westlaw.³²²

Obviously, this is not an exhaustive list of all available statutes dealing with the issue of privilege.³²³ Information regarding privileges is hard to find within the statutes because there is no easy way to search for it. Although some of the Texas practice guides help lead researchers to privileges by pointing to some of the more obvious privileges within the codes, many privileges remain undiscovered.³²⁴ Practice guides reserve most of their allotted space for the topic of privilege to Article V of the TRE.³²⁵

V. RELIANCE ON THE RULES OF EVIDENCE AND THE PROBLEM WITH PRACTICE GUIDES

As previously discussed, Article V of the TRE contains a number of privileges applicable to all stages of action, covering oral testimony and the

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. TEX. HEALTH & SAFETY CODE ANN. § 841.1462 (West 2010).

319. *Id.*

320. TEX. GOV'T CODE ANN. § 420.072 (West 2012).

321. *Id.*

322. *Id.*; HEALTH & SAFETY CODE § 841.1462.

323. *See generally supra* Part IV.C (describing available statutes).

324. *See generally supra* Part IV.C (explaining the difficulty of finding privileges in practice guides).

325. *See generally supra* Part IV.B.3 (discussing Article V of the TRE).

production of evidence.³²⁶ Because the TRE remains the most popular source for Texas's privileges, it receives the most attention from Texas practice guides when discussing the topic of privilege.³²⁷ Therefore, some privileges that are already difficult to find become even further ignored.³²⁸ But, many practice guides do in fact provide their readers with many available privileges, including those found within the constitution, TRCP, and statutes.³²⁹ Nonetheless, practice guides—providing less than total coverage—do not provide their readers with *all* available privileges.³³⁰ Although practice guides are the best source researchers have when attempting to locate privileges, they are expensive, and therefore, not available to all Texas citizens equally.³³¹

A. What Are Practice Guides?

Attorneys use practice guides as an in-depth resource that provides “step-by-step procedures, interpretations[,] and analyses of the law, and sample pleadings and transaction forms.”³³² In addition, practice guides provide available sources of authority for different legal subjects.³³³ Privilege constitutes two separate practice guide subjects: discovery and evidence.³³⁴ Three of the most popular guides in Texas are *Dorsaneo's Texas Litigation Guide*, *Texas Jurisprudence*, and *Texas Practice Guide*.³³⁵

1. Dorsaneo's Texas Litigation Guide

Many commentators consider *Dorsaneo's Texas Litigation Guide* an “indispensable resource for Texas litigators.”³³⁶ The guide provides updates four times a year and is cited frequently by various Texas courts.³³⁷ Unit I, Division X of the guide, entitled “Discovery,” consists of nine chapters, 90

326. SCHLUETER & SCHLUETER, *supra* note 39.

327. *See infra* Part V.B.

328. *See infra* Part V.B.

329. *See infra* Part V.B.

330. *See infra* Part V.B.

331. *See infra* Part V.C.

332. *Secondary Sources: California Practice Guides*, SACRAMENTO COUNTY PUB. L. LIBR., <http://www.saclaw.org/pages/practice-guides.aspx> (last visited Sept. 25, 2014).

333. *Id.*

334. *See infra* Part V.A.1–3.

335. *See infra* Part V.A.1–3. *Texas Jurisprudence* is technically a legal encyclopedia, but for the purposes of this Comment, it serves as a guide that interprets Texas privilege. *Texas Jurisprudence*, 3d, THOMSON REUTERS: LEGAL SOLUTIONS, <http://legalsolutions.thomsonreuters.com/law-products/Legal-Encyclopedias/Texas-Jurisprudence-3d/p/100006910> (last visited Oct. 12, 2014) [hereinafter *Texas Jurisprudence*, 3d].

336. *Dorsaneo, Texas Litigation Guide*, LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/book-template/productdetail.jsp?pageName=relatedProducts&prodId=10519> (last visited Oct. 12, 2014).

337. *Id.*

through 99.³³⁸ Unlike other practice guides, the subject of evidence is within the subject of discovery.³³⁹ Chapter 90, entitled “Discovery: Scope and Limitations,” covers “the exemptions and privileges from discovery found in the Rules of Civil Procedure and the Rules of Evidence, as well as *the most important* constitutional and statutory privileges.”³⁴⁰ Another book, *Dorsaneo’s Texas Discovery*, is a separate, available publication that reprints Division X of the guide to provide for a more affordable version of this part of the practice guide.³⁴¹

2. Texas Jurisprudence

Texas Jurisprudence is a collection of current, comprehensive statements of Texas law.³⁴² This collection “contains more than 400 separate titles on a broad range of legal topics that systematically describe the entire field of Texas legal doctrine.”³⁴³ These topics range from “Abandoned Property” to “Zoning.”³⁴⁴ “Evidence” and “Discovery and Depositions” are two of the available topics that discuss privilege.³⁴⁵ The evidence portion discusses privileged communications and other testimonial privileges, while the discovery portion, as its name would suggest, shows exemptions and privileges related to discovery.³⁴⁶

3. Texas Practice Guide

The *Texas Practice Guide* cites leading and recent case law and provides an in-depth analysis of Texas law.³⁴⁷ The guide contains twenty-two categories, ranging from “Alternative Dispute Resolution” to “Wills, Trusts, & Estate Planning.”³⁴⁸ It provides an “extensive library[,] cross-referencing to forms, digest topics, case law, codes, statutes[,] and other analytical products.”³⁴⁹ The guide discusses privilege in both the discovery and evidence

338. 6 William V. Dorsaneo III, *Texas Litigation Guide* §§ 90.01–99.206 (2014) [hereinafter *Texas Litigation Guide*].

339. *Id.*

340. *Id.* (emphasis added).

341. *Dorsaneo’s Texas Discovery, 2014 Edition*, LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=prod1010866> (last visited Oct. 12, 2014).

342. *Texas Jurisprudence, 3d, supra* note 335.

343. *Id.*

344. *See, e.g.*, 1 TEX. JUR. 3d *Abandoned Property* §§ 1–16 (2014); 77 TEX. JUR. 3d *Zoning* §§ 7–11 (2014).

345. 31 TEX. JUR. 3d *Discovery and Depositions* §§ 30–42 (2013) [hereinafter TEX. JUR. *Discovery*]; 36 TEX. JUR. 3d *Evidence* §§ 503–64 (2010) [hereinafter TEX. JUR. *Evidence*].

346. TEX. JUR. *Discovery, supra* note 345; TEX. JUR. *Evidence, supra* note 345.

347. *Texas Practice Guide*, THOMSON REUTERS: LEGAL SOLUTIONS, <http://legalsolutions.thomson.com/law-products/Practice-Materials/Texas-Practice-Guide/p/100029729> (last visited Oct. 12, 2014).

348. *See generally id.* (listing various Practice Guide titles).

349. *Id.*

categories.³⁵⁰ *Texas Practice Guide: Evidence* has twelve chapters, and Chapter 5, entitled “Privileges,” discusses privilege.³⁵¹ *Texas Practice Guide: Discovery* has thirteen chapters, and the guide discusses privilege within Chapter 3, entitled “Scope of Discovery.”³⁵²

B. The Inability of Texas Practice Guides to Effectively Provide for All Available Privileges

Practice guides are the best available source for researchers looking for available Texas authority regarding privilege, but even the best guides fall short of providing all available privileges and instead simply state that some privileges exist elsewhere.³⁵³ Although all three mentioned guides discuss privilege, each has a different way of approaching the subject.³⁵⁴ Whether due to reliance on the popular TRE or the near impossibility of keeping up with all privileges, practice guides are unable to address all available privileges.³⁵⁵

I. Dorsaneo’s Texas Litigation Guide

Dorsaneo’s Texas Litigation Guide does a great job of outlining available privileges from all sources of authority.³⁵⁶ The guide’s section on privileges is divided into four categories: Work Product, Evidentiary Privileges, Constitutional Provisions from Which Privileges May be Derived, and Statutes from Which Privileges May be Derived.³⁵⁷

The section on evidentiary privileges discusses the privileges from the ever-popular TRE.³⁵⁸ These privileges include: (1) privilege for reports required by law; (2) attorney–client privilege; (3) husband–wife communications privilege; (4) privilege for communications to members of the clergy; (5) privilege to not disclose political vote; (6) trade secret privilege; (7) identity of informer privilege; (8) physician–patient privilege, and (9) mental health information privilege.³⁵⁹ The guide discusses these privileges in great depth, discussing their nature, definition, entitlements, and exceptions.³⁶⁰

350. LINDA L. ADDISON, *TEXAS PRACTICE GUIDE: EVIDENCE FIRST* Ch. 5 (West 2012); KELTNER, *supra* note 90, at 69–195.

351. ADDISON, *supra* note 350.

352. KELTNER, *supra* note 90.

353. *See infra* Part V.B.1–3.

354. *See infra* Part V.B.1–3.

355. *See infra* Part V.B.1–3.

356. *Texas Litigation Guide*, *supra* note 338, § 90.06.

357. *Id.*

358. *Id.* § 90.06(2)(a)–(j).

359. *Id.*

360. *Id.*

The remaining portion of the division discusses the additional available authority.³⁶¹ When discussing the topic of work product, the guide explains the privilege's origin within the TRCP.³⁶² The guide references constitutional privileges very generally and includes only the privileges against self-incrimination, reporter's privilege, privacy right, right of association, and legislative privilege.³⁶³ The TRE discusses statutory privileges very generally and includes only accountant–client privilege, medical committee privileges, the Public Information Act, dental records and communications, records of law enforcement agencies, and journalist's privilege.³⁶⁴ The guide explains that, “[a]lthough most claims of privilege are based on rules, there are also a number of statutes creating additional privileges. This chapter does not attempt to discuss all the possible statutory privilege claims that may be asserted in the course of discovery proceedings.”³⁶⁵

2. Texas Jurisprudence

In *Texas Jurisprudence*, the topic of “Evidence” discusses privilege in a section entitled “Testimonial Privileges.”³⁶⁶ Unlike *Dorsaneo’s Texas Litigation Guide*, in which divisions consist of the type of privilege authority, *Texas Jurisprudence* simply lists the privileges themselves, supplying footnotes to decipher where that privilege garners its legal authority.³⁶⁷ Most footnotes cite relevant case law or one of the rules found within the TRE.³⁶⁸ The testimonial privileges chapter is divided into six subdivisions: (1) privilege generally, (2) attorney–client privilege, (3) family privileges, (4) physician–patient privilege, (5) mental health professional privilege, and (6) miscellaneous privileges.³⁶⁹

While the chapter directly cites to some Texas codes, it does not cite to either the Texas Constitution or the TRCP.³⁷⁰ Testimonial privileges generally states that no person is privileged from being a witness; from disclosing any matter; from producing evidence; or from preventing another from being a witness, or disclosing or producing evidence unless privilege has been provided.³⁷¹ The chapter cites the Family Code, stating that evidence loses privilege when a case involves the abuse and neglect of a child, except in the

361. *Id.* § 90.06(1)(a)–(f), (3)(a)–(4)(h).

362. *Id.* § 90.06(1)(a)–(f).

363. *Id.* § 90.06(3)(a)–(f).

364. *Id.* § 90.06(4)(a)–(h).

365. *Id.* § 90.06(4)(a).

366. TEX. JUR. *Evidence*, *supra* note 345, §§ 503–64.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* § 503.

case of attorney–client privilege.³⁷² The chapter cites the Finance Code, discussing how attorneys may use privilege in relation to compliance review documents of a financial institution.³⁷³ The physician–patient privilege subdivision cites the Health and Safety Code, discussing which records of a medical committee and their proceedings are considered privileged.³⁷⁴ The miscellaneous privileges subdivision cites the Occupations Code to discuss dentist–patient privilege and the Government Code to discuss both “[i]dentity of informer” and “[a]dvocates and survivors of sexual assault.”³⁷⁵ This chapter makes other references to the Texas codes, but they are not direct citations; rather, they cite case law or one of the TRE sections and state that they refer to an available statute.³⁷⁶

Within the *Texas Jurisprudence* topic of “Discovery,” Chapter 2, “Scope of Discovery,” discloses privileges.³⁷⁷ One of the subdivisions within the chapter, “Exemptions and Privileges,” discusses exemptions and privileges generally, presumptions and burdens, attorney–client privilege, consulting experts, witness statements, self-incrimination, income tax returns, work product, material prepared in anticipation of litigation, party communications, trade secrets, and procedure.³⁷⁸

Texas Jurisprudence continues to rely heavily on the TRE and case law when discussing privileges.³⁷⁹ The discovery subdivision, however, makes no citation to any Texas codes, but does refer to the TRCP and the Texas Constitution.³⁸⁰ It cites to Rule 192.3(a) of the TRCP when discussing the idea that “a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action.”³⁸¹ When discussing presumptions and burdens, the subchapter cites various subcategories of Rule 193 of the TRCP.³⁸² It cites Rule 192.7 when presenting the consulting expert privilege, Rule 192.3 for witness statements, and Rule 192.5 for attorney work product.³⁸³ The subdivision cites Rule 192.5 when determining “[w]hat constitutes material prepared in anticipation of litigation.”³⁸⁴ The subdivision cites both Rules 166b and 192.5 when discussing “[p]arty communications” and cites Rule 192.3 when discussing

372. *Id.*

373. *Id.* § 504.

374. *Id.* §§ 541–49.

375. *Id.* §§ 555, 562, 564.

376. *Id.* §§ 503–64.

377. TEX. JUR. *Discovery*, *supra* note 345, §§ 1–42.

378. *Id.* §§ 30–42.

379. *Id.*

380. *Id.*

381. *Id.* § 30.

382. *Id.* § 31.

383. *Id.* §§ 33–34, 37.

384. *Id.* § 38.

trade secrets.³⁸⁵ In addition, the aid cites to the Texas Constitution when discussing self-incrimination.³⁸⁶

Texas Jurisprudence addresses some privileges not addressed by *Dorsaneo's Texas Litigation Guide*, while *Dorsaneo's* mentions some privileges not addressed by *Texas Jurisprudence*.³⁸⁷ In any event, neither practice guide addresses the majority of privileges found in other sources of authority; they instead place their focus on the TRE.³⁸⁸ The *Texas Practice Guide* is one of the more thorough guides on the topic of privilege, and even it seems to fall short of addressing all the locations of the various privileges.³⁸⁹

3. Texas Practice Guide

The *Texas Practice Guide* discusses the concept of privilege in a similar way to that of *Texas Jurisprudence* in the sense that privilege lies within the topics of evidence and discovery.³⁹⁰ The first of two volumes of “Evidence” consists of seven chapters, including a chapter entitled “Privileges.”³⁹¹ Like *Dorsaneo's Texas Litigation Guide*, the *Texas Practice Guide* divides its privileges by authority, focusing primarily on the TRE.³⁹² The first portion is entitled “Rule 501—Privileges Recognized Only as Provided” and continues until the last section, entitled “Rule 513—Comment Upon or Inference from Claim of Privilege; Instruction,” mirroring the headings in Article V of the TRE.³⁹³

Part I, covering rule 501, under § 5:4 states that “Article V of Tex. R. Evid. does not contain a comprehensive list of all Texas privileges.”³⁹⁴ It continues by dividing the types of privileges by their authority; the privileges are either evidentiary, discovery, constitutional, or statutory.³⁹⁵ The guide explains that most evidentiary privileges are located within the TRE, while discovery privileges are located within the TRCP.³⁹⁶ When discussing constitutional privileges, the guide states, “[a]lthough the rules of evidence do not codify constitutional privileges, certain privileges are recognized,” and then cites to the TRE.³⁹⁷ The guide explains these certain privileges,

385. *Id.* §§ 39–40.

386. *Id.* § 35.

387. *See supra* Part V.B.1.

388. *See supra* Part V.B.1.

389. *See infra* Part V.B.3.

390. ADDISON, *supra* note 350; KELTNER, *supra* note 90.

391. ADDISON, *supra* note 350, at xvii.

392. *Id.* at § 5:5.

393. *Id.* at §§ 5:1–356.

394. *Id.* at § 5:4.

395. *Id.* at § 5:5.

396. *Id.* at §§ 5:6–7.

397. *Id.*

discussing the privilege against self-incrimination and journalist's qualified privilege.³⁹⁸

Finally, the guide references statutory privileges.³⁹⁹ It states that, "[l]egislatively enacted privileges exist which relate to specific documents and records within or under the control of state agencies and entities and which supersede or supplement evidentiary privileges established by the rules."⁴⁰⁰ As previously discussed, clearly other statutory privileges exist besides those that relate to documents and records.⁴⁰¹ The guide continues by stating that statutory privileges in the discovery context are available in the "Discovery" division of the *Texas Practice Guide*.⁴⁰² The statutory privileges discussed in this guide are: (1) the work-product privilege; (2) privileged banking department records; (3) privileged savings and loan association records and books; (4) privileged polygraph examination results; (5) physician-patient communication privilege; (6) medical peer review committees privilege; (7) State Board of Medical Examiners privileges; (8) Open Records Act privilege; (9) privileged accident reports; (10) privileged marriage counseling reports ordered in divorce proceedings; and (11) privileged medical committee records.⁴⁰³

The "Discovery" division of the *Texas Practice Guide* is structured slightly differently.⁴⁰⁴ The first volume consists of six chapters, with Chapter 3 entitled "Scope of Discovery."⁴⁰⁵ Part II of this chapter discusses privileges, exemptions, and immunities, focusing on six subtopics: (1) privileges, exemptions, and immunities generally; (2) procedural privileges and exemptions; (3) constitutional privileges, exemptions, and immunities; (4) statutory privileges, exemptions, and exceptions; (5) evidentiary privileges; and (6) common law privileges.⁴⁰⁶

"Privileges, exemptions, and immunities" generally discusses the different types of authority that create privileges.⁴⁰⁷ "Procedural Privileges and Exemptions" discusses that "investigative" privileges are used to "protect information gathered before suit is filed, or in the early stages of a lawsuit, for the purpose of investigating the claim."⁴⁰⁸ Referencing the TRCP, the guide discusses attorney work product and experts.⁴⁰⁹ "Constitutional Privileges, Exemptions, and Immunities" states that many privileges, their exemptions,

398. *Id.* at §§ 5:9–15.

399. *Id.* at §§ 5:16–37.

400. *Id.* at § 5:16.

401. *Id.* at §§ 5:9–15.

402. *Id.* at § 5:16.

403. *Id.* at §§ 5:17–37.

404. *See generally* KELTNER, *supra* note 90 (containing six subtopics on privilege).

405. KELTNER, *supra* note 90, at xv.

406. *Id.* at §§ 3:4–368.

407. *Id.* at §§ 3:6–10.

408. *Id.* at § 3:15.

409. *Id.* at §§ 3:16–41.

and immunities exist under both the federal and state constitutions.⁴¹⁰ It also discusses privileges of religious immunity, freedom of association, right of privacy, privilege against self-incrimination, and journalist's qualified privilege.⁴¹¹

"Statutory Privileges, Exemptions, and Exceptions" states that federal and state statutes create privilege and exemptions for confidentiality, enforced by the courts when a party raises them.⁴¹² It continues to explain that although these privileges exist, "Texas courts traditionally have not favored statutory privileges and thus, strictly construe them so as to limit their protection."⁴¹³ Similarly, the guide suggests the evidence division of the *Texas Practice Guide* for further discussion of statutory evidentiary privileges.⁴¹⁴ It tells the reader that if one is interested in a further discussion of evidentiary privileges, see Chapter 5 of the *Texas Practice Guide: Evidence*.⁴¹⁵ The statutory privilege analysis covers: (1) required reports and returns; (2) traffic accident reports; (3) state banking department records; (4) discovery from person subject to subpoena; (5) medical committee documents and proceedings; (6) Attorney General's corporate investigations; (7) communications between citizens and elected officials; (8) reports required by the Family Code; (9) responses to civil investigative demands under the Texas Antitrust Act; (10) federal wiretap law and electronic communications; and (11) the Open Records Act.⁴¹⁶

"Evidentiary Privileges" centers on the TRE, providing information for every rule under Article V.⁴¹⁷ "Common-Law Privileges," a topic that hardly gains recognition by other practice guides, identifies that other privileges and immunities exist in common law.⁴¹⁸ The *only* example given, citing a federal case, is the idea of "[j]udicial mental processes" claiming that "[d]ecisions of judges are afforded strong protection by the 'mental processes' rule, which prevents judges from being subjected to discovery to explain the court's judicial reasoning."⁴¹⁹ This common-law privilege does not appear to represent a privilege at all, but rather a common understanding of procedure; judges are not subject to discovery to explain their reasoning because they, unlike parties, are not subject to discovery.⁴²⁰

410. *Id.* at § 3:42.

411. *Id.* at §§ 3:43–92.

412. *Id.* at § 3:93.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at §§ 3:94–173.

417. *See id.* at §§ 3:174–368.

418. *Id.* at § 3:366.

419. *Id.* at § 3:367.

420. *See* TEX. JUR. *Discovery*, *supra* note 345, § 1.

Dorsaneo's Texas Litigation Guide, *Texas Jurisprudence*, and the *Texas Practice Guide* provide ample information regarding Texas privilege.⁴²¹ In fact, they all cover the TRE, the authority that most practitioners and law students use when addressing the topic of privilege.⁴²² The problem remains, however, that available privileges remain uncovered, and therefore, hidden.⁴²³ Unless a practice guide commits to combing through all Texas authority, including the ever-dense statutes, all practice guides covering privilege will fall short.⁴²⁴ But would a guide that lists every possible privilege solve our problem of lost privilege and exceptions within the Texas codes? Although a comprehensive practice guide may solve the problem for the legal scholars, not all Texas citizens will have that same luxury.⁴²⁵

C. The Cost of Guides and Its Impact on Privilege

Even if practice guides were to undergo extensive research and provide all available privileges to *their* readers, those readers may be few and far between since the price of practice guides makes them unattainable to the average Texas citizen.⁴²⁶ *Dorsaneo's Texas Litigation Guide* costs a little less than \$6,000, with an electronic edition selling for around \$5,000.⁴²⁷ In an effort to create a “convenient, affordable, and portable” source, the authors have collected portions of the litigation guide and created *Dorsaneo's Texas Discovery*, covering the discovery portion of the original guide.⁴²⁸ Even this “affordable” version costs roughly \$300, for both the book and the electronic edition.⁴²⁹ The *Texas Jurisprudence* collection costs around \$12,500, with separate volumes costing around \$550.⁴³⁰ A monthly subscription is also available, at the cost of \$850 per month.⁴³¹ The price for the *Texas Practice Guide* was not listed, and instead stated, “[s]pecial pricing applies” and to “contact your representative.”⁴³²

For most Texans, purchasing these guides is entirely out of the realm of possibility.⁴³³ Understandably so, most subjects covered by practice guides are not something the everyday Texan needs to access. For the most part, only practitioners and law students are interested in the systematic information the

421. See KELTNER *supra* note 90, at 70–71; TEX. JUR. *Discovery*, *supra* note 345, §§ 30–42; *Texas Litigation Guide*, *supra* note 338, §§ 90.01–99.206.

422. See *supra* note 421.

423. See *supra* note 421.

424. See *supra* text accompanying notes 421–23.

425. See *infra* Part V.C.

426. See *infra* text accompanying notes 427–31.

427. *Dorsaneo, Texas Litigation Guide*, *supra* note 338.

428. *Id.*

429. *Id.*

430. *Texas Jurisprudence*, 3d, *supra* note 335.

431. *Id.*

432. *Texas Practice Guide*, *supra* note 347.

433. See *supra* text accompanying notes 426–30.

guides provide. Privileges are different. As previously stated, privileges protect relationships, privacy, and independence.⁴³⁴ Therefore, information regarding privilege must be accessible to all citizens affected by them, not simply the affluent.⁴³⁵

VI. THE IMPLEMENTATION OF THE RULES OF PRIVILEGE

To uncover lost privileges and exceptions in the Texas codes, Texas must make all privileges easily accessible to its citizens.⁴³⁶ Although having practice guides that thoroughly cover all aspects of privilege would be extremely helpful to practitioners and law students, the privileges would remain lost to those without that access.⁴³⁷ In order for these privileges to be readily accessible to *all* Texas citizens, Texas should implement the Texas Rules of Privilege (TRP).⁴³⁸

As quoted when explaining privilege above:

The purpose of the ordinary rules of evidence is to promote the ascertainment of the truth. *Another group of rules*, however, is designed to permit the exclusion of evidence for reasons wholly unconnected with the quality of the evidence or the credibility of the witness. These reasons are found in the desire to protect an interest or relationship.⁴³⁹

Privileges are rules and Texas should treat them as such.⁴⁴⁰ With the TRP, researchers would not need to comb through the statutes in search of relevant privileges or their exceptions.⁴⁴¹ The recodification process did not have the authority to substantively change the law.⁴⁴² By hiding privileges that are unknown to even the best practice guides, the codes are essentially killing the privilege, substantively changing the law, by making it inactive.⁴⁴³

Texas already has the authority to create the TRP, making this an easy transition for the state.⁴⁴⁴ The Texas Supreme Court “is responsible for the efficient administration of the judicial branch and shall promulgate *rules of administration*. . . . [The court has] the power to promulgate such *other rules*.”⁴⁴⁵ In addition, § 74.024 of the Government Code states that the court may “adopt rules of administration setting policies and guidelines necessary or

434. See *supra* text accompanying notes 37–38.

435. See *supra* text accompanying note 434.

436. See *supra* Part V.C.

437. See *supra* Part V.C.

438. See *supra* Part V.C.

439. GRAHAM, *supra* note 33 (emphasis added).

440. See *id.*

441. See *supra* Part III.

442. See *supra* Part III.A.

443. See *supra* Part III.A–B.

444. See *supra* Part IV.B.1.

445. *Texas Court Rules: History and Process*, *supra* note 143 (emphasis added).

desirable for the operation and management of the court system and for the efficient administration of justice.⁴⁴⁶ If the court were to create the TRP, it would repeal any conflicting law, resulting in a unified system of privileges.⁴⁴⁷

Finding the truth and ensuring a fair proceeding are the goals of trial.⁴⁴⁸ The courts created the TRE to assist them in determining which evidence juries will hear, which will assist them in finding the truth while ensuring a fair and equitable trial.⁴⁴⁹ The courts need to create the TRP to assist the *parties* in determining which evidence juries will not hear.⁴⁵⁰ The implementation of the TRP would assist the courts in achieving their goal of ensuring a fair and equitable trial.⁴⁵¹ Like the TRCP and the TRE, the TRP would be available to everyone.⁴⁵² Unlike expensive practice guides, court rules are free, and they are easy to find.⁴⁵³ For example, a quick internet search for the TRE pulls up the rules verbatim.⁴⁵⁴

The TRP would make the whole process of handling privilege much easier; one would only need to look to a single authority to know that only one form of that privilege and its possible exceptions exists.⁴⁵⁵ Since dealing with privileges would be much easier, the court may feel more inclined to create more privileges.⁴⁵⁶ Texas would be a leader as the first jurisdiction to create this set of rules, with other jurisdictions soon to follow.⁴⁵⁷

Privileges describe the “rules of exclusion.”⁴⁵⁸ They give litigants a chance to recognize their own rights and let them decide what moves they would like to make.⁴⁵⁹ Privileges have a purpose in our society: they protect a government interest or private relationship that Texas wishes to preserve.⁴⁶⁰ If Texas privileges remain lost within the codes, these interests will go unprotected.⁴⁶¹ The implementation of the TRP can solve the problem.⁴⁶²

446. *Id.*

447. *See supra* Part IV.B.1.

448. Ariens, *supra* note 165, at 1.

449. *Id.*

450. *See supra* Part V.C.

451. *See supra* Part V.C.

452. *See supra* Part IV.B.2–3.

453. *See supra* Part V.C.

454. *Texas Rules of Evidence*, TEX. CTS. ONLINE, <http://www.courts.state.tx.us/rules/tre-toc.asp> (last updated Sept. 1, 2014).

455. *See supra* Part III.

456. *See supra* Part II.

457. *See supra* Parts I–II.

458. GRAHAM, *supra* note 33, at 175.

459. *See supra* Part II.

460. LILLY, *supra* note 34, at 320–21.

461. *See supra* Parts II–III.

462. *See supra* text accompanying notes 436–61.

VII. PUTTING IT ALL—AND THE PRIVILEGES—TOGETHER

Texas provides many available privileges, each having a strong policy reason for its implementation.⁴⁶³ But are those implementations enforced? Many privileges, hidden within the Texas codes, have lost their ability to protect important relationships and interests.⁴⁶⁴ Practitioners are unable to locate these privileges due to a hectic recodification process, a substantial amount of Texas authority, and a lack of statutory presence in practice guides.⁴⁶⁵

The Texas statutes have undergone a complicated cleaning out process, placing all statutes into subject-matter codes.⁴⁶⁶ As a result, one code may mention an available privilege, while another, less obvious code may mention an exception to that very same privilege.⁴⁶⁷ The statutes are not the only place where privileges exist.⁴⁶⁸ In addition to the Texas statutes, researchers can find privileges within the Texas Constitution and the Texas court rules, which house the TRCP and the TRE.⁴⁶⁹ Uniformity between privileges and exceptions to privileges are not a guarantee.⁴⁷⁰ The TRE houses most of the popular privileges.⁴⁷¹ As a result, Texas practice guides refer to the TRE when discussing privileges, keeping lost statutory privileges in the dark.⁴⁷² Privileges remain lost even when they receive attention from practice guides since only the affluent have access to them.⁴⁷³

The implementation of the TRP would solve the problem of lost statutes.⁴⁷⁴ One location would house privileges without any other contradictory authority.⁴⁷⁵ Texas already has the permission to construct the TRP through the court's power to create and promulgate rules of administration.⁴⁷⁶ These official rules will finally protect the important relationships and interests that privileges were meant to protect, ultimately unearthing lost privileges.⁴⁷⁷

463. *See supra* Parts II, IV.

464. *See supra* Parts I–II.

465. *See supra* Part I.

466. *See supra* Part III.

467. *See supra* Part III.

468. *See supra* Part IV.

469. *See supra* Part IV.

470. *See supra* Part IV.

471. *See supra* Parts IV.B.3, V.

472. *See supra* Part V.

473. *See supra* Part V.

474. *See supra* Part VI.

475. *See supra* Part VI.

476. *See supra* Part IV.B.1.

477. *See supra* Parts II, VI.