ETHICS AND EXCULPATORY EVIDENCE IN CHILD ABUSE ACCUSATIONS

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# TABLE OF CONTENTS

I. **THE REQUIREMENT TO REPORT CHILD ABUSE.** ................................................................. 1  
   A. § 261.101. Persons Required to Report; Time to Report ............................................. 1  
   B. § 261.102. Matters to Be Reported .................................................................................. 1  
   C. § 261.103. Report Made to Appropriate Agency.............................................................. 1  
   D. § 261.109. Failure to Report; Penalty ............................................................................... 1  
   F. Obviously, there are intervening sections omitted here. ............................................... 2  
   G. Case Law......................................................................................................................... 2  

II. **ETHICAL DUTIES, THE RULES OF PROFESSIONAL CONDUCT, TEX. GOV’T CODE ANN., ART. 10, § 9** ........................................................................................................................................ 2  
   A. Rule 1.05 Confidentiality of Information ......................................................................... 2  
   B. Rule 1.02 Scope and Objectives of Representation ......................................................... 3  
   C. Rule 1.06 Conflict of Interest: General Rule ................................................................. 4  
   D. Rule 3.03 Candor Toward the Tribunal ........................................................................... 5  
   E. The Waco Court of Appeals has upheld disclosure by counsel in a case where the defense attorney became aware that his client had paid several jurors to vote his way. ........................................ 5  
   F. Rule 4.01 Truthfulness in Statements to Others............................................................... 5  
   G. There is a distinction to be drawn at the conclusion of this recitation of the rules governing communications and confidentiality. ............................................................................... 5  

III. **THE ATTORNEY-CLIENT PRIVILEGE:** ........................................................................... 6  
   A. Rule 503 Lawyer-Client Privilege .................................................................................. 6  
   B. The United States Supreme Court on the Attorney-client privilege. ............................ 7  
   C. The Fifth Circuit on the attorney-client privilege. ....................................................... 9  

IV. **SEEKING PROTECTION UNDER THE UMBRELLA OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION** ......................................................................................................................... 10  

V. **PRE-INDICTMENT RELIEF UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION** ......................................................................................................................... 11  

VI. **THE TEXAS CONSTITUTION** ............................................................................................ 12  

VII. **THE COURT OF CRIMINAL APPEALS** ........................................................................ 12  

VIII. **OTHER RELATED HOLDINGS** ..................................................................................... 13  

INDEX OF AUTHORITIES........................................................................................................... 15  

BRADY NOTICE .......................................................................................................................... 17  

VIDEO TAPE DISCOVERY ORDER ............................................................................................. 19
ETHICS AND EXCULPATORY EVIDENCE IN CHILD ABUSE ACCUSATIONS

I. THE REQUIREMENT TO REPORT CHILD ABUSE.


(a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.

(b) If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has cause to believe that the child has been abused as defined by Section 261.001 or 261.401, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

(c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services.

(d) Unless waived in writing by the person making the report, the identity of an individual making a report under this chapter is confidential and may be disclosed only:

(1) as provided by Section 261.201; or
(2) to a law enforcement officer for the purposes of conducting a criminal investigation of the report.

Tex. Fam. Code § 261.101

B. § 261.102. Matters to Be Reported

A report should reflect the reporter's belief that a child has been or may be abused or neglected or has died of abuse or neglect.


C. § 261.103. Report Made to Appropriate Agency

(a) Except as provided by Subsections (b) and (c) and Section 261.405, a report shall be made to:

(1) any local or state law enforcement agency;
(2) the department;
(3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred; or
(4) the agency designated by the court to be responsible for the protection of children.

(b) A report may be made to the Texas Youth Commission instead of the entities listed under Subsection (a) if the report is based on information provided by a child while under the supervision of the commission concerning the child's alleged abuse of another child.

(c) Notwithstanding Subsection (a), a report, other than a report under Subsection (a)(3) or Section 261.405, must be made to the department if the alleged or suspected abuse or neglect involves a person responsible for the care, custody, or welfare of the child.

Tex. Fam. Code § 261.103

D. § 261.109. Failure to Report; Penalty

(a) A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report as provided in this chapter.

(b) An offense under this section is a Class Amisdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense
that the child was a person with mental retardation who resided in a state supported living center, the ICF-MR component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the child had suffered serious bodily injury as a result of the abuse or neglect.

Tex. Fam. Code § 261.109


In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client.

Tex. Fam. Code § 261.202

F. Obviously, there are intervening sections omitted here. They are not directly relevant to this paper, but if you have an issue involving this law, review them to see if they affect your case.

G. CASE LAW.

1. There are no appellate cases yet on the applicability of the aforementioned statute to attorneys.

2. Clergy:


II. ETHICAL DUTIES, THE RULES OF PROFESSIONAL CONDUCT, TEX. GOV'T CODE ANN., ART. 10, § 9

A. Rule 1.05 Confidentiality of Information

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

   (i) a person that the client has instructed is not to receive the information; or
   (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

(c) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer also may reveal unprivileged client information:

(1) When impliedly authorized to do so in order to carry out the representation.

(2) When the lawyer has reason to believe it is necessary to do so in order to:

   (i) carry out the representation effectively;
   (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
   (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
   (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

Tex. R. Prof Conduct 1.05

B. Rule 1.02 Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions:
(1) concerning the objectives and general methods of representation;
(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

C. Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

   (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
   (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firms' own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

   (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
   (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Tex. R. Prof Conduct 1.02
Tex. R. Prof Conduct 1.06
1. The Family Code duty to turn in your client or face criminal prosecution certainly seems to create a conflict of interest. The lawyer has a duty, on pain of criminal prosecution, to turn in his or her client. The client has an interest in minimizing the damage she or he may suffer in the process of the government's prosecution.

2. Consider the following language from the commentary to Rule 1.06.

"Loyalty to a Client"

"Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. . . . " Perhaps we should add, but not if he is messing with a child.

D. Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
(4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Tex. R. Prof Conduct 3.03

1. The candor required of an attorney goes somewhat beyond what one might expect.

   a. "Attorney is required under Rules 1.05 and 3.03 to make good faith effort to persuade former client to authorize the attorney to reveal to bankruptcy court evidence which was not known to the attorney during bankruptcy proceeding and which might have affected the court's decision; if that effort was unsuccessful, attorney was required to disclose evidence to the court without the former client's consent." Ethics Committee Opinion 480 (June 1991).

E. The Waco Court of Appeals has upheld disclosure by counsel in a case where the defense attorney became aware that his client had paid several jurors to vote his way. Plunkett v. State, 883 S.W.2d 349, 355 (Tex.App.-Waco 1994). There is a distinction here, however, since the attorney became aware of an ongoing fraud that effected the judicial process rather than learning of an offense that had previously occurred.

F. Rule 4.01 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Tex. R. Prof Conduct 4.01

If you are representing a divorce client and you learn of molestation that may occur during visitations, do you have a duty to inform the other spouse?

G. There is a distinction to be drawn at the conclusion of this recitation of the rules governing communications and confidentiality. When the lawyer learns of a crime that the client is contemplating or actively trying to carry out, it seems obvious that there is a
different dynamic involved than when the lawyer learns that the client has committed an additional crime or crimes in the past. In the former case, the lawyer can serve a prophylactic function. He or she can seek to dissuade the client, and failing that, report the imminent crime to prevent it. When the crime is an historic fact, the disclosure can serve no such purpose. Arguably, the importance of the role of counsel in an adversarial system should then out weigh the need to punish the offender.

III. THE ATTORNEY-CLIENT PRIVILEGE:

A. Rule 503 Lawyer-Client Privilege

(a) Definitions. --As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A "representative of the client" is:

(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or

(B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) Rules of Privilege.

(1) General Rule of Privilege. --A client has a 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:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) Special Rule of Privilege in Criminal Cases. --In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) Who May Claim the Privilege. --The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.
(d) Exceptions. --There is no privilege under this rule:

1. Furtherance of Crime or Fraud. --If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

2. Claimants Through Same Deceased Client. --As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;

3. Breach of Duty by a Lawyer or Client. --As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

4. Document Attested by a Lawyer. --As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

5. Joint Clients. --As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Tex. Evid. R. 503

B. The United States Supreme Court on the Attorney-client privilege.

1. Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 2849 (U.S.Dist.Col. 1977): "Many states have recognized a common-law 'right of privacy' first publicized in the famous Warren and Brandeis article, The Right to Privacy, 4 Harv.L.Rev. 193 (1890). Privileges, such as the executive privilege embodied in the Constitution as a result of the separation of powers, United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), and the attorney-client privilege, recognized under case and statutory law in most jurisdictions, protect still a different form of privacy. The invocation of such privileges has the effect of protecting the privacy of a communication made confidentially to the President or by a client to an attorney; the purpose of the privilege, in each case, is to assure free communication on the part of the confidant and of the client, respectively."

2. Upjohn Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677, 682 (U.S.Mich. 1981): "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence Sec. 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."


4. In Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 850 (U.S.S.C. 1977) Bursey and Weatherford, along with two confederates vandalized a Selective Service Office. Weatherford, unbeknownst to Bursey was an undercover government agent. To protect his cover, he was arrested with Bursey, made bond, and hired an attorney. Subsequently, Both men participated in joint defense conferences with their respective attorneys. Bursey sued after his conviction under 42 U.S.C. §1983 for violation of his constitutional rights because of this invasion of the confidentiality of these conversations he maintains were privileged under the Sixth Amendment and the attorney client privilege. The Court ruled that there was no per se violation of the constitution when the government overheard such information but did not use it in trial, nor derive any use of the information at trial. In dicta, however, they did link the right to attorney client confidentiality and the Sixth Amendment:


. . . the United States conceded, . . . , that the Sixth Amendment would be violated "if the government places an informant in the defense camp during a criminal trial and receives from that informant privileged information pertaining to the defense of the criminal charges . . . because the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding."


Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. 8 J. Wigmore, Evidence, § 2292 (McNaughton rev. 1961) (hereinafter Wigmore); McCormick § 87, p. 175. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. 8 Wigmore s 2291, and § 2306, p. 590; McCormick § 87, p. 175, § 92, p. 192; *Baird v. Koerner*, 279 F.2d 623 (CA9 1960); *Modern Woodmen of America v. Watkins*, 132 F.2d 352 (CA5 1942); *Prichard v. United States*, 181 F.2d 326 (CA6) aff'd, Per curiam, 339 U.S. 974, 70 S.Ct. 1029, 94 L.Ed. 1380 (1950); *Schwimmer v. United States*, 232 F.2d 855 (CA8 1956); *United States v. Goldfarb*, 328 F.2d 280 (CA6 1964). As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. According to it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.

*Id.* 96 S.Ct. at 1577.

6. The following statement stresses the importance and rationale of the attorney-client privilege:

The attorney-client privilege is not without its costs. Cf. *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher*, 425 U.S., at 403, 96 S.Ct., at 1577. The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—"ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but [491 U.S. 563] to future wrongdoing." 8 Wigmore, § 2298, p. 573 (emphasis in original); see also *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933).


7. The Supreme Court affirmed that the attorney-client privilege does not protect communications that are used to carry out an unlawful course of conduct, such as the racially based exercise of peremptory challenges in *Georgia v. McCollum*, 505 US 92, 112 S.Ct. 2348, 2350 (U.S.Ga. 1992).

8. In 1996 the Supreme Court addressed the issue of whether the federal courts should recognize the existence of a psychotherapist-patient privilege. In referring to the purposes of the attorney-client privilege they said:

Our cases make clear that an asserted privilege must also "s[er]ve[e] public ends." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Thus, the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote
broader public interests in the observance of law and administration of justice."

Jaffee v. Redmond, 518 US 1, 116 S.Ct. 1923, 1929, 64 USLW 4490, (U.S.Ill. 1996). Under the federal rules, privileges are recognized under the global language of Rule 501, the only rule of privilege in the federal rules, when "reason and experience" suggest they are necessary, FED. R. EVID., R. 501. Citing the benefits to the state of the public health to be gained by people seeking the benefit of psychological therapy, the Supreme Court recognized the privilege.

9. When a court orders the release of information to which the resisting party claims attorney-client privilege, the order is not normally subject to interlocutory appeal. However:

[I]n extraordinary circumstances --i.e., when a disclosure order "amount[s] to a judicial usurpation of power or a clear abuse of discretion," or otherwise works a manifest injustice--a party may petition the court of appeals for a writ of mandamus. Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 390, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) (citation and internal quotation marks omitted); see also Firestone, 449 U.S., at 378-379, n. 13, 101 S. Ct. 669, 66 L. Ed. 2d 571.n3 While these discretionary review mechanisms do not provide relief in every case, they serve as useful "safety valve[s]" for promptly correcting serious errors. Digital Equipment, 511 U.S., at 883, 114 S. Ct. 1992, 128 L. Ed. 2d 842.


C. The Fifth Circuit on the attorney-client privilege.


The purpose of the attorney/client privilege is "to encourage clients to make full disclosure to their attorneys." Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976). An attorney could not expect a client to fully disclose the nature of his difficulties in such circumstances if the attorney may have to reveal the client's identity to a grand jury. At times, this privilege may prevent the Government from obtaining useful information, but "this is the price we pay for a system that encourages individuals to seek legal advice and to make full disclosure to the attorney so that the attorney can render informed advice." Matter of Grand Jury Proceeding, Cherney, 898 F.2d 565, 569 (7th Cir.1990). . . .

We acknowledge the importance of the Government's need to obtain information. Our precedent in this circuit, however, and apparently every other circuit, counterbalances the Government's legitimate need for information with the equally important need to encourage full and frank disclosure to attorneys.

Id. at 1431-1432. [emphasis added].

2. In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir.1975)

"(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar or a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." Id at 670 (quoting United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D.Mass.1950)); see also United States v. El Paso Co., 682 F.2d 530, 538 & n. 9 (5th Cir.1982), cert. denied, 466 U.S. 944, 104 S.Ct.
Ethics and Exculpatory Evidence in Child Abuse Accusations

Chapter 14.10


Id. at 670.


Our research has uncovered no decision, other than Gartner, rejecting a Sixth Amendment claim because of the absence of a confidential relationship; however, several of the intrusion cases do suggest that this type of Sixth Amendment violation occurs only where there is an intrusion into a confidential attorney-client relationship. See Weatherford v. Bursey, 429 U.S. 545, 554 n. 4, 97 S.Ct. 837, 843 n. 4, 51 L.Ed.2d 30 (1977); United States v. Kilrain, 566 F.2d 979, 983 (5th Cir.), cert. denied, 439 U.S. 819, 99 S.Ct. 80, 58 L.Ed.2d 109 (1978); United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978). Appellees complain that the government's argument would reduce the Sixth Amendment to little more than a restatement of the common-law attorney-client privilege; however, it seems that the traditional sanctity of the attorney-client relationship, characterized by the confidentiality of communications between the attorney and client, is precisely what the appellees in this case have sought to vindicate against government intrusions. The attorney-client privilege whether or not, and to what extent, it defines or limits the Sixth Amendment right to counsel in other contexts offers an appropriate framework of analysis in this case. A communication is protected by the attorney-client privilege and we hold today is protected from government intrusion under the Sixth Amendment if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential.

Id. at 645.

This is helpful language, but I doubt that it would hold up today in light of more restrictive Supreme Court language on the scope of the privilege.

4. There is a good discussion of when there is an implied waiver of the attorney-client privilege:

Resolving a claim of implied waiver of the attorney-client privilege depends on the affirmative answers to two questions. United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc). The first question is subjective: does the person holding the right to claim the privilege intend to waive it? Id. The second question is objective: is it fair and consistent with the assertion of the claim or defense being made to allow the privilege to be invoked? Id.

United States v. Seale, 600 F.3d 473, 492 (5th Cir. Miss. 2010).

IV. SEEKING PROTECTION UNDER THE UMBRELLA OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The U. S. Supreme Court has never declared that the attorney-client privilege is constitutionally mandated. However, much of their Sixth Amendment jurisprudence suggests that it would be difficult if not impossible to maintain the adversarial system mandated by the Sixth Amendment in the absence of the attorney-client privilege. Thus, the best defense to the Texas Family Code's reporting requirement, may be to acknowledge that the statute over trumps the rule of evidence, but that in doing so it treads impermissibly upon the Sixth Amendment.

B. In Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the government used a hidden radio transmitter in the car of a cooperating co-defendant to eavesdrop on the accused. The eavesdropping took place post indictment. These conversations were admitted at trial against the accused. The Court held that it violated the Sixth Amendment to use the fruits of a secret interrogation when the accused neither knew he was being interrogated nor had the opportunity to have his counsel present. See also in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

C. Perhaps more important for the purposes of this discussion, is the decision of the Supreme Court in Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). In Moulton the Court characterized
the role of counsel under the Sixth Amendment as follows:

The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.

Id. 474 U.S. 159, 176, 106 S.Ct. 477, 487. Requiring counsel to report his client's confidential communications to law enforcement authorities can hardly be described as providing the type of "medium" the Court had in mind.

A very reasonable, in fact probably compelling argument, may be made that TEX. FAM. CODE ANN. § 261.101 makes the attorney for the accused a state agent.

V. PRE-INDICTMENT RELIEF UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Of course, as we all know, the Sixth Amendment right to counsel only attaches upon indictment, and then only with respect to the criminal act that is the subject of the indictment. The question remains whether there is any respite in the Fifth Amendment for pre-indictment confidentiality.

B. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204 (U.S.Wis. 1991) all recognize that there is a type of right to assistance of counsel created to protect the right not to incriminate oneself. It should be argued that requiring the counsel provided for that purpose to report to the authorities any admission of criminal complicity would make this doctrine of law meaningless. It might well be that counsel's information itself would not be admissible, and counsel not competent as a witness, but learning of another instance of child abuse could allow the state to find and develop a case, hitherto unknown, off the information obtained from counsel.

C. A problem created by this dichotomy in the law is whether to question fully prior to indictment. In other words, do you want to learn of unreported child abuse if an indictment has not been returned? Does that even help since the client has not been indicted on the unreported case? Logically both the protection against self incrimination and the due process clause are implicated. Finally, how about the concept that the attorney is the agent for and thus stands in the place of the accused. Can he assert these rights, self incrimination and due process, on that basis?

D. The Court of Criminal Appeals has held that the attorney-client privilege is not of constitutional dimension.

While sometimes cloaked in basic notions of privacy, the aspirational purpose of the privilege is the promotion of communication between attorney and client unrestrained by fear that these confidences may later be revealed. Cruz v. State, 586 S.W.2d 861, 865 (Tex.Cr.App.1979); West v. Solito, 563 S.W.2d 240, 245 (Tex.1978). Critics maintain that the privilege "impedes [the] full and free discovery of the truth" and is "in derogation of the public's 'right to every man's evidence.' " Notwithstanding the tenor of current debate on the subject, it is important to bear in mind that the lawyer-client privilege is not a principle of constitutional proportions, but an exclusionary rule of evidence. OKC Corp. v. Williams, 461 F.Supp. 540, 546 (N.D.Tex.1978). [footnotes omitted].


Doesn't this beg the question. If the purpose is to encourage the free flow of information between lawyer and client, this narrow view of privilege defeats its purpose. What person in his right mind is going to tell his lawyer about extraneous acts if it means a new criminal prosecution?

E. "The purpose of the attorney-client privilege, TEX.CODE CRIM.PROC.ANN. art. 38.10 (Vernon Supp.1986), is the promotion of communication between attorney and client. The privilege protected is personal to the client. Cruz v. State, 586 S.W.2d 861,
865 (Tex.Crim.App.1979)."


F. Even if we concede the foregoing characterization of the privilege is the law, the pronouncements of the Supreme Court and the Fifth Circuit suggest that both the Fifth and Sixth Amendments seek to further the same interests as the attorney-client privilege, the proper functioning of the adversarial system. If we acknowledge the attorney-client privilege as being merely an evidentiary rule, we can still argue that the Sixth and Fifth Amendments require independently the same protection of the confidentiality of the attorney-client communications.

G. See West v. Solito, 563 S.W.2d 240, 245, 21 Tex. Sup. Ct. J. 251 (Tex. 1978, orig. proceeding). The Texas Supreme Court explained that

[T]he purpose of the attorney-client privilege is to promote the unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding.Id.;

see also Austin v. State, 934 S.W.2d 672, 673 (Tex. Crim. App. 1996)(stating that the purpose of the privilege is to promote communications by protecting against the fear that confidences will later be revealed)


VI. THE TEXAS CONSTITUTION.

A. Generally, despite the brief ray of hope generated in Heitman v. State, 815 S.W.2d 681 (Tex.Cr.App. 1991) the Court of Criminal Appeals continues to construe the Texas Constitution, as much as possible, as being no broader than the U. S. Constitution.

B. Article 1, § 10 is construed as being broader than the Sixth Amendment, in that it creates a right to ask questions in voir dire calculated to allow intelligent use on peremptory challenges, Ex Parte McKay, 819 S.W.2d 478, 488-9 (Tex.Cr.App.1990).

C. Presently, I have not been able to find any interpretation of Article 1, § 10 of the Texas Constitution that would support an argument against the application of TEX. FAM. CODE ANN. §261.101. This does not suggest abandoning the attempt. However, bear in mind that you must argue application of the Texas Constitution separately from your argument on the federal constitution, or the court will hold nothing is presented for review, e.g. Dominique Jerome Green v. State, 934 S.W.2d 92 (Tex.Cr.App. 1996).

VII. THE COURT OF CRIMINAL APPEALS.

A. Henderson v. State, 962 S.W.2d 544 (Tex.Crim.App. 1997), rehearing denied Mar. 4, 1998. This is a very important case on attorney client privilege in Texas. Judge Keller does a thorough and well reasoned analysis of the resolution of the conflict between the confidentiality purposes of the privilege and the exception that allows for disclosure if the confidential matter could lead to a continuing or resulting harm from criminal activity. It would be particularly pertinent to our discussion if a client revealed past molestation of a child, and continued to have ready access to that child.

1. Facts: A woman charged with caring for a small child in Austin disappeared with the child. When finally arrested out of state she made several claims about the child's condition and whereabouts including that the child was dead. After questioning by the FBI, she received the assistance of a public defender who obtained from her the location on a map of the child's grave near Waco. The public defender sent the map to Henderson's attorney in Austin. The Grand Jury subpoenaed her and the map. Over a claim of privilege, the District Court ordered her to turn over the map. The child's body was discovered in the grave located on the map.

2. Issues:

a. Did the continuing crime exception to the lawyer client privilege
b. If it does not, does the violation of the lawyer client privilege constitute an illegal act within the meaning of Article 38.23 CCP?

c. Does Article 38.23 CCP require suppression of the evidence (the child's body) recovered as a result of the illegal conduct?

3. **Holding:**

a. The continuing crime exception requires that the communication be in *furtherance* of a crime or continuing criminal conduct. In this instance the exception did not apply because the crime was not furthered by the communications with the attorney that resulted in the location of the grave on the map. Therefore, the forced breach of the privilege was not justified.

b. "Whether that evidence must be suppressed under Article 38.23 depends upon whether the privileged communication leading to that evidence was validly disclosed or compelled pursuant to strong public policy interests requiring the privilege to yield. If the privilege was legitimately required to yield then no law violation exists, and fruits of the privileged communication are not barred from evidence by Article 38.23." *Id.*

c. The Court ultimately decided that the breach of the privilege did not require the suppression of the fruits of the breach. There was enough ambiguity in the stories told by Henderson, that the policy interests that required the breach to locate the child justified the breach as reasonable since there was at least a small chance he might have been alive.

d. In 2006, the 5th Circuit denied relief in Henderson’s federal habeas. The attorney-client privilege is only obliquely involved and the opinion focuses more on whether there was a right to effective assistance of counsel. *Henderson v. Quarterman*, 460 F.3d 654 (5th Cir. Tex. 2006).

VIII. **OTHER RELATED HOLDINGS.**

A. While the Court of Criminal Appeals has not directly addressed this issue, the following holdings by other courts on related issues is worth reading if you are confronted with this issue.

B. Duty to report child abuse.

1. Several civil cases have either concluded or assumed that TEX. FAM. CODE §261.101 creates a duty to report child abuse.


2. The Texas Supreme Court has found that the statute does create a duty to report child abuse, but declined to find that a failure to report was *negligence per se*. *Perry v. S.N*, 973 S.W.2d 301, 41 Tex. Sup. J. 1162, 1168 (1998).
INDEX OF AUTHORITIES

General Rules:

TEX.CODE. CRIM. PROC. ANN. Art. 2.01
TEX. DISCIPLINARY R. PROF’L CONDUCT 3.09(d)


Prior Sexual Abuse of Victim:

Hughes v. State, 850 S.W.2d 260 (Tex. App.-Fort Worth 1993, pet. ref’d)


Sexual Activity of Victim:

TEX.R.EVID. 412
Todd v. State, 242 S.W.3d 126 (Tex.App.—Texarkana 2007, pet. ref’d)
Hale v. State, 140 S.W.3d 381, 397 (Tex.App.-Fort Worth 2004, pet. ref’d)
Matz v. State, 989 S.W.2d 419 (Tex.App.—Fort Worth 1999)

Conduct of Other Persons:

Lape v. State 893 S.W. 2d 949 (Tex.App.—[Houston 14 th Dist.] 1994)
Lackey v. State 777 S.W. 2d 199 ( Tex.App.—Fort Worth 1989)

Mental Illness:


Inconsistent Statements:

Crutcher v. State, 481 S.W.2d 113 (Tex.Crim.App. 1972)
Keith v. State, 916 S.W.2d 602 (Tex.App.—Amarillo,1996.)

Practical Tips:

Vegas v. State, 898 S.W.2d 359 (Tex.App.— San Antonio 1995, pet. ref’d)
STATE’S DISCLOSURE

Comes now the STATE OF TEXAS, by and through its Assistant District Attorney, and gives to the accused, by and through his attorney, notice of potentially exculpatory information and evidence. By so notifying the STATE does not concede that the information and evidence are either in the exclusive possession of the state or in fact exculpatory. The STATE also does not represent that such information and evidence is credible, reliable, or accurate. The STATE is simply giving notice.

Such information and evidence are of the following:

On 4/21/11, ADA’s Eric Nickols and Rainey Webb interviewed the victim in the above case, Avery Fisher. Fisher said that every time the Defendant touched her genitals, he always did so outside of her underwear. Fisher stated several times that the Defendant’s hand never went inside her underwear.

Respectfully submitted,

JOE SHANNON, JR.
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

J. Eric Nickols
Assistant Criminal District Attorney
Tarrant County
S.B.O.T. #24041594
CERTIFICATE OF SERVICE

I, J. Eric Nickols, do hereby certify that on the 28th day of April, 2011 a true and correct copy of the foregoing STATE’S DISCLOSURE, was delivered via hand delivery to the attorney of record for the Defendant, Jeff Stewart.

___________________________________
J. Eric Nickols
Assistant Criminal District Attorney
Tarrant County
S.B.O.T. #24041594
NO. _______________

THE STATE OF TEXAS § IN THE 297th
§ V. § DISTRICT COURT
§ __________________________ § TARRANT COUNTY, TEXAS

VIDEO TAPE DISCOVERY ORDER

It is hereby ORDERED that the State of Texas shall make a copy of the video tape(s) of the child victim in this cause of action if the Defendant supplies the State with a blank video tape. The State is further ORDERED to release said copy to __________________________, attorney of record for the Defendant.

_____________________________, attorney of record for the Defendant, is hereby ordered to:

1. Maintain custody of the copy of the tape and not let anyone else, including the Defendant, possess the copy;

2. Not make any additional copies of the tape;

3. Not let anyone view the copy of the tape except for the Attorney of Record for the Defendant, the Defendant, or an expert witness whose opinion requires viewing of the tape; and

4. Return the copy of the tape to the State immediately upon the disposition of this cause.

SIGNED AND ENTERED on this the _____ day of ________________________, 2011.

______________________________
JUDGE PRESIDING