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- Disclosure of client identity and fee arrangements. In re Osterhoudt. Phaksuan, under investigation for drug trafficking, seeks to quash grand jury subpoena to his lawyer, asking for information on Phaksuan's payment of legal fees to lawyer. Client claims that disclosure of his fees paid will necessarily implicate him in the crime, therefore privileged? Is he right?
- No. Under Baird Rule, if disclosure of identity of client will necessarily invade privileged communication, cannot be compelled. Here, though, disclosure would not involve inappropriate disclosure of confidential communications.

2 

- U.S. v. Zolin. L. Ron Hubbard was prosecuted in a tax case. Filed attorney-client privileged communications under seal with the court, then died. Government claimed privilege did not apply because of crime-fraud exception, and sought to have trial court listen to tapes to determine if discoverable. Did the privilege survive Hubbard's death?
- Yes.
- Can the trial court require in camera disclosure of privileged communications to determine whether an exception applies?
- Yes.

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- Is it necessary for the requesting lawyer to demonstrate a factual good faith basis to challenge the privilege in order to obtain in camera review?
- Yes.
- Can a client take up an interlocutory appeal on the trial court's ruling on privilege?
- Sometimes, particularly if the privilege claim is overruled since there often is no effective way to retrieve the information or undo the effect of the disclosure. In Texas, called a petition for writ of mandamus. Considered "extraordinary" relief. Must show:
- Abuse of trial court's discretion; and
- Irreparable harm; and
- No adequate remedy on appeal.
- Same rule in federal court. See [In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 804 \(Fed. Cir. 2000\)](#) (observing that "mandamus is appropriate 'because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy.'")
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- What about the voluntary partial disclosure? See TRE 511. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE
- A person upon whom these rules confer a privilege against disclosure waives the privilege if:
  - 1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
  - 2) 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 or character trait insofar as such communications are relevant to such character or character trait
- What about inadvertent disclosures?

- Snap-back rules.

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5 

- Government lawyers. *In re Grand Jury Supoena Duces Tecum*, 8th Cir. 1997, *cert. denied*, 1997. Hilary Rodham Clinton seeks to protect notes of discussions by White House counsel with Ms. Clinton and her personal counsel regarding records surrounding death of Vince Foster. Gov't lawyers resist, claiming attorney-client and work-product privileges. Court rejects.

- The government was the client, not Ms. Clinton
- Insufficient common interest between Ms. Clinton and the government to extend privilege to these conversations
- Work product does not apply because not made in “anticipation of litigation.”

6 

- Bank president, acting in that capacity, consults with bank lawyer about transaction. Later, bank goes under. Grand jury, investigating the bank president, seeks to learn what president said to lawyer. Privileged?

- No, privilege belongs to the client - the bank.
- Former bank president has no standing to invoke privilege.

7 

- Joint Clients. Two clients hire the same lawyer and discuss confidential matters with the lawyer.

- Privileged as to outside world. But,
- not privileged as between those clients. Risk of accepting joint representation.

8 

- *Gov't of Virgin islands v. Joseph*, 3d Cir. 1982). Def. gives statement to lawyer for co-defendant, exculpating co-defendant and inculcating speaker. Court admits, reasoning that the joint defense privilege does not apply when the defendants are “antagonistic.”

- Compare TRE 503(b)(1)(C). Would the same rule apply in Texas?
  - *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:

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

- Answer is no. But contrast this to TRE 503(d)(5): Attorney-client privilege does not apply 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. What is the difference?

- The parties seeking disclosure. As to action between joint clients, no privilege applies. But as to third party actions against one or more joint client, either can still invoke the privilege, so long as the communication was made for the purpose of a common defense (or prosecution if plaintiffs).

9 

- Scope of attorney-client privilege. *In re Grand Jury Proceedings (Matter of Jeffrey Fine)*,

5th Cir. 1981. Attorney Fine was hired to incorporate Labol Investments. Short time later, Labol bought a ship, which was used to smuggle marijuana. Gov't wants Fine to disclose identity of the person who incorporated Labol.

- Lower court holds that the information is not privileged because, in light of the short time between formation of corp. and purchase of vessel, perpetration of crime or fraud exception applied.
- 5th Cir. says only temporal evid. of crime or fraud in connection with incorporation relative to purchase of vessel. No *prima facie* case that incorporation was for purpose of perpetrating a crime or fraud.
- However, client identity not privileged, *unless disclosure of client identity would implicate the client in the very criminal activity for which legal advice was sought.*
- Since Fine testified that the incorporation was legitimate, no basis to conclude that identity of client would fit into this exception.
- However, note that, if Fine had admitted that client sought out his services to further criminal activities, then crime or fraud perpetration exception would have applied. Catch-22 situation.

10

- "Get Rid of the Weapon." 1952 case. Telephone operator listens in on phone conversation where killer confesses to lawyer and lawyer says to get rid of the weapon.
- Issue is whether eavesdropper's testimony admissible.
  - Generally, eavesdropper cannot testify unless lawyer and client took insufficient steps to protect confidentiality.
  - In this instance, though, destruction of evidence is criminal act. Could have held privilege did not apply to communications intended to perpetrate criminal act.
    - Note, though, would this work to admit the client's words or the lawyer's? Which was designed to perpetrate a crime?

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- The Divorce Client. Wife bought a gun because she moved to a higher crime district, and tells lawyer: "I hate my husband... and I'd like to see him dead." Can the lawyer disclose it? Must the lawyer disclose it?
  - California statute provides that there is no privilege for a lawyer to refuse to disclose confidential information that would prevent the client from committing a criminal act that is likely to result in death or substantial bodily harm.
  - Attorney could have *Tarasoff* liability for failure to disclose.

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- In Texas, note that there is no such exception in the atty-client privilege rule. However, see Texas Rule of Prof. Conduct 1.05(c)(7), below. What's the rule in Texas?
- Texas Rules. Atty-client evidentiary privilege extends only to "confidential communications." TRE 503(b)(1). However, under Texas Rules of Professional Conduct, lawyer's duty not to disclose client "confidential information" is much broader:
- 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.... 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 clients representatives, or the members, associates, or employees of the lawyers law firm.

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- (c) A lawyer may reveal confidential information:
  - 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.
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  - (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.
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  - (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 lawyers services had been used.\*
- (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.

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- Does Rule 1.05, Tex. R. Prof. Conduct, create a separate privilege not to disclose client identity as client "confidential information."
  - Not usually. *See Landry v. Burge*, 2000 WL 1456471 (Tex. App. - Dallas 2000) (unpublished). Asbestos defendant hires PI's to contact employees of Baron & Budd to determine how that law firm finds asbestos plaintiffs. Baron & Budd sue for an injunction, take PI's depositions.
  - PI's contend they have a PI privilege, by their non-disclosure ethics rules. Rejected because of exception to requirement of court order.
  - PI's contend atty work-product privilege. Rejected, because client's identity does not disclose mental thought processes or trial strategies.
  - PI's contend atty-client protected. Rejected, because could not fit into narrow exception where disclosure of client's identity would by implication reveal the confidential purpose for which the attorney was consulted. Here, already knew why the PI's retained. Must disclose.

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- In what instances is the mere disclosure of the identity of the client privileged because disclosure would necessarily reveal the privileged communication? *See Simpson v. Tennant*, 871 S.W.2d 301 (Tex. App. - Houston [14th Dist.] 1994).

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- The Marital Privilege - Actually three types
  - Communication - Confidential marital communications
  - Testimonial - Privilege of spouse not to testify against his or her spouse
  - Adverse - Privilege of person to prevent his or her spouse from testifying against person

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- *Trammell v. US*. USSCT 1980. Court rejects the adverse marital privilege.
- Court reasoned that adverse testimonial privilege:
  - Was a remnant of English common law in which it was presumed that the wife had no separate identity; and
  - Allowing adverse marital privilege allowed a criminal defendant to create a “safe accomplice.”
- If testimony by spouse is voluntary, def. cannot preclude it.
  - Applies even if testimony by spouse coerced by plea bargain or promise of no prosecution.
  - Is this ruling consistent with reasons behind marital privilege?

18 

- Psychotherapist Privilege. *Jaffe v. Redmond*. USSCT 1996. By Justice Stevens, for the majority. Officer Redmond kills a suspect, whose family sues under 42 USC § 1983. Redmond consulted with a social worker, and resists disclosure of communications. Questions whether: (1) federal courts, applying federal common law, will recognize psychotherapist-patient privilege; and (2) will be recognized for communications to a licensed social worker providing psychological counseling.
  - Court notes that, in recognizing a “new” privilege, courts should be restrictive, not inclusive, based on “reason and experience.”
  - True that recognition of privilege blocks access to relevant and important evidence.
  - Touchstone for whether privilege should be applied include importance of relationship and need for confidentiality and trust for relationship to succeed.
  - Public purposes are served by people obtaining mental health care.
  - Confidentiality is vital to success of psychotherapeutic counseling.
  - Extended to social workers because they provide same service, particularly to people too poor to afford a psychologist or psychiatrist.

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- Scalia dissents.
  - Believes that forced disclosure will have no effect on people seeking psychotherapeutic counseling.
  - Criticizes majority for relying on state court interpretations as “reverse pre-emption.”
  - Criticizes majority for going beyond scope of question presented - whether privilege should apply to social workers. Contends that should clearly be in the negative because social workers do more than provide psychotherapeutic counseling.

20 

- Authentication. FRE 901(b). Authentication sufficient if item proved by evidence sufficient to support a finding that the matter in question is what its proponent claims. Exemplar means of authentication:
  - Testimony of witness
  - Nonexpert opinion on handwriting
  - Comparison by jury or expert
  - Distinctive characteristics
  - Voice identification

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- Self-authenticating documents by rule:
  - (1) Domestic Public Documents Under Seal.
  - (2) Domestic Public Documents Not Under Seal.

- (3) Foreign Public Documents.
- (4) Certified Copies of Public Records.
- (5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.
- (6) Newspapers and Periodicals.
- (7) Trade Inscriptions and the Like.
- (8) Acknowledged Documents.
- (9) Commercial Paper and Related Documents.
- (10) Business Records Accompanied by Affidavit.
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- Also, by application of rules of civil procedure:
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- Documents produced by opponent in response to discovery
- Documents admitted authentic in response to R/A or answer to complaint in federal court

22 

- Four steps to getting a document (or other tangible item) admitted (Sometimes referred to as "laying the proper foundation"):
  - Mark it.
  - Have witness Identify it.
  - Have witness Authenticate it.
  - Offer it.
- Photographs
  - Same as above, but generally must also have witness prove that the photograph "truly and accurately" depicts whatever is being portrayed.
  - However, even with photographs where no witness can specifically state the above, such as unmonitored surveillance photos, sufficient if witness with personal knowledge explains:
    - how and when the photographs were taken
    - how they were retrieved, and
    - chain of custody

23 

- *US v. Johnson*. 9th Cir. 1980. Assault case, with an ax. Witness equivocally identifies the ax offered by the prosecution as the one used to assault the victim. Is this sufficient for admission?
- Yes. FRE 902(a) only requires a showing that document is what it purports to be.
- This is a criminal case. Is it necessary that the authenticating witness prove the ax was the one used beyond a reasonable doubt?
  - No. FRE 104(a) only requires for authentication evidence sufficient for a finding. A jury could find, by a preponderance of the evidence, that the ax was the one used in the assault.

24 

- Tangible exhibits offered for demonstrative or illustrative purposes only. Medical illustrations, guns of the type used in the event, etc. How authenticated?
- Witness, usually expert, testimony.
- Once authenticated, are they admissible in evidence as jury exhibits?
- Within the trial court's discretion. Many courts let them in for witness examination and/or argument, but not as jury exhibits.

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- Prob. 13-A. Cocaine case. Does prosecution have to call every witness in chain of custody?
- U.S. v. Arias. Marijuana seized in vessel. While being towed in, vessel sinks. Charges proceed on salvaged bales of marijuana.
- Good idea to prove every link in chain of custody. However, Strict chain of custody proof is not required. Judge finds no realistic probability of adulteration or misidentification. Minor breaks in chain of custody only affect weight, not admissibility. Most courts will require at least testimony of person who can link the seized item with the defendant, but more lenient on other breaks in chain.

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- U.S. v. Bagaric 2d Cir. 1983. Racketeering case. Government offers letter found during consent search of house of one defendant, in which admissions are found implicating other defendants. However, made reference to nicknames and various code. Are the contents of the letter sufficient to authenticate it?
- Yes. Chain of custody proved, and sufficient indicia of reliability within letter to satisfy requirements of FRE 901(b)(4), from “appearance of contents, substance, and other distinctive characteristics.
- What of letterheads? Does current technology alter standards for admission?
- No, but remember that admission is within trial court’s discretion. May be less likely today to accept letterhead as self-authenticating.

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- Prob. 13-B. Suit to quiet title. Plaintiff wants to offer original of land sale contract for the property. Original was obtained from real property records of county clerk’s office. How might it be authenticated under FRE 901(b)?
- Witness who saw it executed. 901(b)(1)
- Nonexpert opinion on handwriting 901(b)(2)
- Expert on handwriting 901(b)(3)
- Comparison by jury with specimen 901(b)(3)
- Distinctive characteristics 901(b)(4)
- Evidence showing it was obtained from public office where such items regularly filed 901(b)(7)
- Showing it is an ancient document 901(b)(8)

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- Prob. 13-C. Email solicitation of minor case. How does prosecution authenticate incriminating emails?
- Child’s testimony
- Real problem is in proving identity of defendant as sender “the Wizard” of the soliciting emails. How to do:
  - Demonstrate defendant has an internet account with name of “the Wizard”
  - Proof that defendant met child at time and location suggested in email. (Sort of a

Hillmon Rule).

- IP address.

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29 

- Prob. 13-C. Authentication of tape recording. Undercover drug deal, recorded digitally and remotely. Officer who set up recording was not listening when recorded conversation occurred, but made flash drive of the entire conversation. He has had continuous possession of the flash drive since then. Can he authenticate the recording at trial?

- Yes. Generally, must prove the following, all of which this witness can do:

- Device capable of making a true recording and was in good working order

- Operator was qualified and set up equipment properly

- No changes made to recording

- Identification of speakers

- Chain of custody

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30 

- Prob. 13-E. How to authenticate a photograph.

- Testimony of any witness that photograph is a true and accurate depiction of what it purports to portray

- If any changes, changes (season, new lights, grown foliage, etc.), explain them so that jury can put the photo into context

- Judge can still exclude under 403 if too different from scene at time

- Prob. 13-F. How to authenticate an x-ray.

- Essentially the same as a photograph

- Virtually all x-rays have self-identifying marks (patient addressographs, date inscriptions, etc.)

- Prob. 13-G. How to authenticate a computer printout

- Generally, computer printouts are today proven simply by the testimony of records custodian, and often fall under summary of voluminous records rule (discussed *infra*).

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31 

- Prob. 13-H. Law school grad calls hiring partner, O'Rourke, at country club.

O'Rourke offers job, student accepts, declines other offers. Law firm reneges on offer and student sues. Student needs to authenticate that voice on other end was of O'Rourke, but had never heard his voice before and did not call him at his office or house. How to authenticate?

- Can authenticate under the "reply doctrine." Essentially, if the speaker is replying to a phone call that purports to have originated from a particular person, sufficient

authentication if call returned as instructed. Some risk of authenticating practical jokes, forged calls, etc.

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- "Day in the life" videos. *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759 (Tx. App. - CC 1999). Asbestosis case. Victim dead by time of trial. Plaintiffs introduce 4 ½ minute video showing victim in last days, with sound. Jury finds for plaintiff, awards \$8.8 million. Def. appeals, contending that audio should not have been admitted as hearsay.
  - Court holds admissible as statement of then-existing state of mind. TRE 803(3)
  - Relevance or authenticity not challenged. Should it have been? Would that have prevailed?

33 

- Defense video surveillance tapes. Are their existence and/or contents discoverable? Are they ever excludable "work product"?
- *Gibson v. National RR Passenger Corp.*, 170 FRE 408 (E.D. Pa. 1997). Minor burned on Amtrak's property, sues under "attractive nuisance doctrine." Seeks discovery of surveillance videotapes.
  - Court holds that Amtrak need not produce surveillance videotapes because they are "work product," unless def decides to use at trial.
  - Whether to be used or not, defendant must disclose existence, but not contents, of video, prior to deposing the plaintiff.
  - However, if decides to use at trial, def not required to produce videos until after plaintiff's depo taken, to preserve impeachment value.

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- *Smith v. Diamond Offshore Drilling, Inc.*, 168 FRD 582 Galveston 1996. Judge Sam Kent. Plaintiff injured when cab of crane he was operating came loose from pedestal mount. (Not stated in opinion, but with an offshore rig, this usually means a fall 100' or so to the sea.) Plaintiff seeks discovery of surveillance videotapes taken of him. Defendant resists under "work product" doctrine.
  - These are clearly work product, because they were prepared in anticipation of litigation or preparation of defenses. FRCP 26(b)(3).
  - However, "substantial need" doctrine applies to this type of work product.
  - To preserve impeachment value, defendant only required to disclose existence of video prior to deposing the plaintiff.
  - However, in this type of case, video is not only valuable for impeachment, but may be substantive evidence corroborating injury, which cannot be duplicated by the plaintiff without a claim of fabrication. Therefore, defendant is required to produce it, 30 days after plaintiff deposed, whether or not the video will be used at trial.

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- The "Best Evidence Rule" really a misnomer. No rule stating what is "best" evidence to prove a fact. However, sometimes originals required.
- FRE 1002. To prove contents of a writing or photograph, the original is required, *except as otherwise provided by the rules*.
- FRE 1003. Duplicates admissible the same as originals unless genuine question as to authenticity.
- Original lost, destroyed, or otherwise unavailable at hearing or trial - other evidence of

contents.

- If original lost or destroyed, other evidence admissible, unless proponent lost or destroyed in bad faith FRE 1004(1)
- If original cannot be obtained by subpoena, other evid of contents admissible. FRE 1004(2)
- If opponent has possession of original, put on notice for need, and does not produce at hearing, can introduce other evid of contents. FRE 1004(3)
- If contents do not relate closely to a controlling issue, other evid of contents admissible (circumstantial evid rule). FRE 1004(4)

36 

- Public Records - Admissible by certified copy. FRE 1005
- FRE 1006. Summaries. Admissible if:
  - Records voluminous; and
  - Originals made available to opponent.
  - Judge can require originals to be produced at trial.
- FRE 1007. Can prove contents of writing thru testimony of opponent.
- FRE 1008. Court makes preliminary determination of admissibility. However, jury determination when issue raised as to:
  - Existence of original;
  - Whether document produced at trial is the original; or
  - Whether other evid of contents is true.