The Supreme Court of Texas

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February 17, 2022

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

Re: Referral of Rules Issues

Dear Chip:

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

Texas Rule of Evidence 503(b)(1)(C). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amending Texas Rule of Evidence 503(b)(1)(C) to allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Part of the proposal was already discussed by the Committee at its December 11, 2015 meeting. The Committee should review and make recommendations, particularly regarding the proposed addition of "related."

Texas Rule of Evidence 803(16). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amending Texas Rule of Evidence 803(16) to limit the hearsay exclusion's ancient documents exception to documents created before electronically stored information was widely used. The Committee should review and make recommendations.

Texas Rule of Appellate Procedure 6.5(d). In the attached memorandum, the State Bar Court Rules Committee proposes exempting non-lead counsel from Texas Rule of Appellate Procedure 6.5's withdrawal requirements if lead counsel continues representation. The Committee should review and make recommendations.

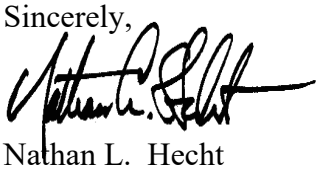
Rules for Identifying Potential Disqualification and Recusal Issues. Texas Rules of Appellate Procedure 38, 52, 53, and 55 are designed to capture the information needed for disqualification and recusal purposes by requiring that petitions and briefs contain the basic information about a case, including the identity of "all" counsel. The Committee should study and

make recommendations on how to strengthen the requirement of disclosure on parties and counsel at the outset so courts will have better information to make informed, reasoned decisions on disqualification and recusal. The Committee should consider whether the Court should:

- amend Rules 38, 52, 53, and 55 to clarify that "all" counsel means both current and former counsel at all levels of a proceeding;
- amend Rules 38, 52, 53, and 55 to clarify that the requirement to list the "names" of all counsel includes all firm names at which they practiced during their representation;
- amend other rules, like those governing the notice of appeal and the docketing statement in the courts of appeals, to require disclosure earlier and more often; and
- impose a duty to amend and supplement.

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

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

MEMORANDUM

From: Administration of Rules of Evidence Committee (AREC)

To: State Bar of Texas (SBOT)
Supreme Court of Texas
The Texas Supreme Court Advisory Committee (SCAC)

Date: November 29, 2021

Re: Recommendation to amend Tex. R. Evid. 503(b)(C) to remove requirement of a "pending action"

RECOMMENDATION

AREC recommends amending Rule 503 to include "anticipated" litigation as follows:

503. Lawyer-Client Privilege

(b) Rules of Privilege.

(1) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

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

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

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a related pending or anticipated action or that lawyer's representative, if the communications concern a matter of common interest in the ~~pending~~ action;

(D) between the client's representatives or between the client and the client's representative; or

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

This would allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Though the Rule uses the words "common interest," it does not provide a broad common-interest protection (discussed below), as the communication must be made to a lawyer or their representative, and does not reach communications among *parties* who share the common interest.

BACKGROUND

In September 2015, AREC submitted a recommendation to SCAC to expand Rule 503(b)(1)(C) to cover "anticipated" litigation. Prior to that recommendation, interested SBOT Committees were given the opportunity to provide input and all responding Committees expressed support for the change.

On December 11, 2015, SCAC approved of the proposed AREC recommendation by a vote of 25 to 7. However, to date this recommendation has not been adopted and incorporated into the rules of evidence.

In May 2021, AREC voted to submit the above recommended rule change. The SBOT Administrative Committee reviewed the recommendation and had questions about including "related" in the change. AREC again reviewed the recommendation, and in September 2021, again voted to submit this recommended change.

DISCUSSION

Texas' current "allied litigant privilege" is a variation of the "common interest doctrine."[1] *See* Tex. R. Evid. 503(b)(1)(C); *see also In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012) (discussing Texas' "allied litigant" privilege). It protects communications "to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." *In re XL Specialty Ins. Co.*, 373 S.W.3d at 52. The pending action requirement means that "no commonality of interest exists absent **actual litigation**." *Id*. (emphasis added).

By omitting the pending action requirement, the privilege is extended to communications with another party's attorney even if litigation is not yet filed. This change would aid in more efficient case management and scheduling, and remove any potential procedural tactic of filing suit (or delaying suit) for the sole purpose of shielding (or hindering) common-interest communications. This would also bring Texas law into conformity with Fifth Circuit law.[2] Finally, the anticipated action requirement should, as a practical matter,

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[1] The "common interest doctrine" allows separately represented parties with common legal interests to share information with each other and their respective attorneys without destroying the attorney-client privilege. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Restatement (Third) of the Law Governing Lawyers § 76 (2000) ("(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication. (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.").

[2] The Fifth Circuit recognizes the common interest privilege when there is pending litigation or a palpable threat of litigation at the time of the communication. *In re Santa Fe Int'l Corp.*, 272 F.3d 705,

impose a temporal limitation to tie unfiled related actions to their respective statutes of limitations.

SBOT's Administrative Committee has asked whether "related" should be included in the recommended change, as the term is undefined and could be considered vague. AREC has reviewed this issue and does not believe a definition is required.

"Related" and "unrelated" are used multiple times within the TRE without definition. *See, e.g.,* Tex. R. Evid. 901(6)(B) (example of authenticating telephone conversation includes evidence the call was made a business' number and was related to business reasonably transacted over the phone), 902(9) (commercial paper and related documents are self authenticating), 1004(e) (original writing, recording, or photograph is not required if it is not closely related to a controlling issue"). The word, in various forms, is also used throughout Texas statutes. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 42.001(5) (definition of "litigation costs" by referring to money and obligations "directly related to the action"); Tex. Probate Code § 33.002 (Action Related to Probate Proceeding in Statutory Probate Court).

The Rule's common-interest requirement also acts to bookend, or flank, the Rule 503(b)(C) privilege. This ensures both that the pending or anticipated actions are related, and that the communication concerns a matter of common interest. It would protect, for example:

- Communications among (1) counsel for a physician in an administrative action before the Texas Medical Board involving patient care, and (2) separate counsel for that physician in a suit by a patient against the physician.
- Communications among (1) counsel for a senior government employee in a criminal case involving acts against "whistleblower" employees; and (2) counsel for that same employee in a whistleblower civil suit; and (3) counsel for that employee in unemployment or occupational licensing administrative proceedings. These separate criminal, civil, and administrative actions may involve the same facts and witnesses, but will also involve different parties—and are all clearly related.
- Communications among counsel for insurers in separate actions involving the same agent or insured.

711 (5th Cir. 2001). A "palpable threat of litigation" means an actual, imminent, or directly foreseeable lawsuit. *Id.* at 714 (quoting district court opinion). If communications are made to protect from possible, but not imminent, civil or criminal action, then the common interest doctrine does not apply. *U.S. v. Newell*, 315 F.3d 510, 525-26 (5th Cir. 2002). Additionally, the communication must be made to *further* the common interest. *BCR Safeguard Holding, LLC v. Morgan Stanley Real Estate Advisor, Inc.*, 614 F. App'x 690, 704 (5th Cir. 2015). If a document evinces a conflict of interest between the two parties, then the common interest doctrine will not apply to shield the document from disclosure under the common interest doctrine. *Id.*; *see also U.S. v. Schwimmer*, 892 F.2d 237, 240-44 (2nd Cir. 1989) (discussing common interest privilege and applying common interest rule to information given by defendant to CPA hired by co-defense counsel to serve joint defense interests).

- Communications among counsel for an insurer in a declaratory judgment action involving coverage, and counsel for the same insurer in a suit against it by a policyholder.

The term "related" in AREC's Recommendation clearly includes actions with overlapping facts, claims, witnesses, or parties. Beyond these clear examples, courts are well equipped to analyze the facts at issue in making a determination as to whether separate actions are related.

/s/ *Angie Olalde*
2021-22 Chair, AREC

MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Angie Olalde, Chair of State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's recommendation to amend TRE 803(16) on ancient documents to align with amendments to the federal ancient documents hearsay exception

Date: September 10, 2021

Summary

Currently, Texas Rule of Evidence 803(16) excepts from the hearsay rule "A statement in a document **that is at least 20 years old** and whose authenticity is established." Tex. R. Evid. 803(16) (emphasis added).

In 2017,the Federal Rules of Evidence were amended to change the 20-year requirement to a date certain:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (16) Statements in Ancient Documents. A statement in a document **that was prepared prior to January 1, 1998** and whose authenticity is established.

Fed. R. Evid. 803(16) (emphasis added). This was done to address the risk that the hearsay exception for ancient documents could be used as a vehicle for admitting unreliable electronically stored information (ESI). *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803.

AREC recommends amending TRE 803(16) to be consistent with FRE 803(16). This means the exception is no longer tied to a 20-year age limit, but instead focuses on documents created before ESI was widely used.

Background and AREC's Work

ESI has become prevalent since Google first started in 1998. Many fear that the proliferation of unreliable emails, tweets, texts, blogs, web postings and more could be admissible under the ancient documents exception.

AREC and its subcommittee that studied this issue researched and considered several issues, and including the following information:

1. Is Rule 803(16) used often enough to keep, or should we abrogate it?

A quick review of Texas cases shows this rule is still used quite often for trespass to try title cases, wills, products liability, mineral rights cases, and even an occasional criminal case. The case law extends from the time of the common law rule to 2020. Thus, AREC does not recommend removing the rule. The Federal Rule Committee reached the same conclusion after receiving more than 200 comments against abrogation of the rule. In some instances, it is the only way to prove a fact. "As a practical matter, there is usually no other way to prove heirship of a person who died in 1836 than by the recitations in ancient documents." *Zobel v. Slim,* 576 S.W.2d 362, 365 (Tex. 1978).

2. Should the rule remain unchanged to allow ESI over 20 years old to be exempted as ancient documents?

AREC considered whether ESI would actually pose an issue if admitted under a hearsay exception.

While the condition of traditionally ancient documents such as deeds or wills can be examined to analyze authenticity, that type of review is not available for ESI, which by its nature is electronically stored. Other problems with ESI include the fact that the *content* of a computer-created document can be easily modified, even unintentionally (for example, moving a file from one location to another could alter an electronic document's metadata). Thus, situations could arise where ESI was created more than 20 years ago, but arguments could ensue over whether it has been modified in such a way as to remove it from the ancient documents exception. Additionally, a traditional written document is generally limited to several sheets of paper, while ESI can include a much greater quantity of information, making it more difficult to ascertain whether all parts of proffered ESI may meet the ancient documents exception.

Finally, it is advisable to have similar application of this rule in federal and Texas state courts. A few states that have adopted the federal version have mentioned the avoidance of forum shopping as a reason for being in harmony with federal courts.

3. Could we change the language of Rule 803(16) to exempt "hardcopy" documents that are 20 years or older?

The Federal Rules Advisory Committee considered this idea and rejected it. The Committee noted that the distinction between ESI and hardcopy would be fraught with questions and difficult to ascertain. Scanned copies of old documents? Digitized versions of an old book? *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803 (explaining "A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.").

4. Will excluding non-ESI documents written after 1998 be a problem?

In many cases, documents produced after January 1, 1998 will be preserved electronically and typically will not face the same issues of admitting a rare hardcopy document. For hardcopy documents created after January 1, 1998, their statements could still be admitted under other exceptions to the hearsay rule, such as for records kept in the course of a regularly conducted business activity under TRE 803(6). As our contemporary medium of communication is largely electronic, as opposed to written letters, AREC recommends this amendment, and that it conform to the federal rule's January 1, 1998 date. *See, e.g., id.* ("The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule.").

AREC'S Recommendation

We recommend Texas Rule of Evidence 803(16), the ancient documents hearsay exception, be amended to match its federal counterpart, as follows:

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

…

(16) Statements in Ancient Documents. A statement in a document that was prepared prior to January 1, 1998 ~~is at least 20 years old~~ and whose authenticity is established.

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 6.5(d)

I. Exact Language of Existing Rule

Rule 6. Representation by Counsel

6.1. Lead Counsel

(a) *For Appellant*. Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.

(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

6.2. Appearance of Other Attorneys

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

6.3. To Whom Communications Sent

Any notice, copies of documents filed in an appellate court, or other communications must be sent to:

(a) each party’s lead counsel on appeal;

(b) a party’s lead counsel in the trial court if:

(1) that party was represented by counsel in the trial court;

(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion*. A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel*. If an attorney substitutes for a withdrawing attorney, the motion to withdraw need not comply with (a) but must state only the

substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

II. Proposed Amendments to Existing Rule

Rule 6. Representation by Counsel

6.1. Lead Counsel

(a) *For Appellant*. Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.

(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

6.2. Appearance of Other Attorneys

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(b) a party's lead counsel in the trial court if:

(1) that party was represented by counsel in the trial court;

(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion*. A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel or Withdrawal of Non-Lead Counsel*. If an attorney substitutes for a withdrawing ~~attorney~~lead counsel, or if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court, the motion to withdraw need not comply with (a) but, if substitution of counsel is sought, must state ~~only~~ the substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

Texas Rule of Appellate Procedure 6.5(a) requires a lawyer to jump through many hoops in order to withdraw from representing a party in an appellate court. The withdrawing lawyer must include in the motion to withdraw a list of current deadlines and settings in the case, the party's name and last known address and telephone number, a statement that a copy of the motion was delivered to the party; and a statement that the party was notified in writing of the right to object to the motion.

Rule 6.5(d) exempts a withdrawing lawyer from these requirements if the client will continue to be represented by counsel in the appellate court by way of substitution. However, situations arise in which a client will continue to be represented by counsel in the appellate court other than by substitution. For example, when a partner and associate at the same law firm appear in an appellate court on a client's behalf, and later the associate moves to a different firm, the

associate's withdrawal from the representation will not deprive the client of the partner's continued representation. In this common circumstance, requiring the withdrawing associate to meet the requirements of Rule 6.5(a) creates an unnecessary burden of time and expense for parties, counsel, and appellate courts.

To eliminate these unnecessary portions of withdrawal motions, the proposed changes to Rule 6.5(d) would exempt a withdrawing attorney from the requirements of Rule 6.5(a) if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court. This exemption would be in addition to the current exemption for when another attorney is substituting for a withdrawing lead counsel.

The other aspects of Rule 6.5(d) are unchanged. For example, if substitution of counsel is sought, the motion to withdraw must state the substitute attorney's name, contact information, and State Bar number. In addition, Rule 6.5(d) still requires the withdrawing attorney (whether or not seeking substitution) to comply with Rule 6.5(b), requiring delivery of the motion to withdraw to the party either in person or by certified and first-class mail to the party's last known address. The provisions in Rule 6.1(c) for designating new lead counsel also remain unchanged.