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.

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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