



## The Supreme Court of Texas

CHIEF JUSTICE  
NATHAN L. HECHT

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October 9, 2015

Mr. Charles L. "Chip" Babcock  
Chair, Supreme Court Advisory Committee  
Jackson Walker L.L.P.  
1401 McKinney, Suite 1900  
Houston, TX 77010

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 203.** The State Bar Administration of Rules of Evidence Committee (AREC) has submitted the attached proposal to amend Texas Rule of Evidence 203. AREC recommends changing the deadline in Rule 203(a)(2) for a party to produce any written material that the party intends to use to prove foreign law from 30 days before trial to 45 days before trial. The change would align the requirements of Rule 203 with the requirement in Rule 1009 that a party produce a translation of any foreign language document that the party intends to introduce into evidence at least 45 days before trial.

**Texas Rule of Evidence 503.** AREC has also submitted the attached proposal to amend Texas Rule of Evidence 503, which governs application of the attorney-client privilege. Rule 503(b)(1)(C) codifies the "allied litigant" doctrine. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012). As set forth in the rule, the doctrine protects communications (1) between a client or the client's lawyer (or the representative of either); (2) to a lawyer for another party (or the lawyer's representative); (3) *in a pending action*; and (4) concerning a matter of common interest in the pending action. *See* TEX. R. EVID. 503(b)(1)(C); *In re XL Specialty Ins. Co.*, 373 S.W.3d at 52-53. AREC recommends that the privilege be expanded to include communications made in anticipation of future litigation.

**New TRAP Rule on Filing Documents Under Seal.** Except for Rule 9.2(c)(3), which states that documents filed under seal or subject to a pending motion to seal must not be filed electronically, the Texas Rules of Appellate Procedure do not address under what circumstances a document may be filed under seal in an appellate court, nor do they set forth any procedure for filing a document under seal. The

Court requests that the Advisory Committee draft a new rule addressing how and under what circumstances a document may be filed under seal in an appellate court. The rule should address both documents that were filed under seal in the trial court and documents that were not filed under seal or were not filed at all in the trial court.

**Rules for Juvenile Certification Appeals.** SB 888, passed by the 84th Legislature, amends Family Code section 56.01 to permit an immediate appeal from the decision of a juvenile court under section 54.02 waiving its exclusive jurisdiction and certifying the juvenile to stand trial as an adult. Section 56.01(h-1) requires the Court to adopt rules to accelerate these appeals. Concerned that the statutory change might catch some practitioners unaware, the Court in August issued an administrative order (Misc. Docket No. 15-9156), which imposes temporary procedures for accelerated juvenile certification appeals pending the adoption of permanent rules. The Court requests the Advisory Committee to draft an appropriate rule.

**Time Standards for the Disposition of Criminal Cases in District and Statutory County Courts.** Rule of Judicial Administration 6.1 sets forth aspirational time standards for the disposition of cases in the district and statutory county courts. Since its adoption in 1987, subsection (a) has provided that, so far as reasonably possible, criminal cases should be brought to trial or final disposition “[a]s provided by Article 32A.02, Code of Criminal Procedure.” Former article 32A.02, known as the Speedy Trial Act, required the trial court to grant a motion to set aside an indictment, information, or complaint if the state was not ready for trial within a specified time period. Shortly after Rule 6.1(a) became effective, the Court of Criminal Appeals ruled article 32A.02 unconstitutional as a violation of separation of powers. *See Meshell v. State*, 739 S.W.2d 246, 257-58 (Tex. Crim. App. 1987). Article 32A.02 was formally repealed in 2005, but Rule 6.1(a) has not been amended. The Court requests the Advisory Committee’s recommendations on how Rule 6.1(a) should be amended to reflect the repeal of Article 32A.02.

**Rules for the Administration of a Deceased Lawyer’s Trust Account.** SB 995, passed by the 84th Legislature, adds to the Estates Code Chapter 456, which governs the disbursement and closing of a deceased lawyer’s trust or escrow account for client funds. Section 465.005 authorizes the Court to adopt rules for the administration of funds in a trust or escrow account that is subject to Chapter 456.

**Constitutional Adequacy of Texas Garnishment Procedure.** A federal district court has ruled that Georgia’s post-judgment garnishment statute violates due process because it (1) does not require that the debtor be notified that seized property may be exempt under state or federal law; (2) does not require that the debtor be notified of the procedure for claiming an exemption; and (3) does not provide a prompt and expeditious procedure for a debtor to reclaim exempt property. *Strickland v. Alexander*, No. 1:12-CV-02735-MHS, 2015 WL 5256836, at \*9, 12, 16 (N.D. Ga. Sept. 8, 2015). In light of this decision, the Court requests the Advisory Committee’s recommendations on whether further revisions should be made to the garnishment rules proposed in the final report of the Ancillary Proceedings Task Force.

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

Sincerely,



Nathan L. Hecht  
Chief Justice

Attachments



## ROBIN MALONE DARR

District Judge  
385<sup>th</sup> Judicial District Court  
500 N. Loraine, Ste. 801  
Midland, TX 79701

432/688-4385  
432/688-4935 (fax)

August 6, 2015

Chief Justice Nathan Hecht  
Supreme Court of Texas  
*via e-mail*

Mr. Gilbert I. "Buddy" Lowe  
Vice Chair of Supreme Court Advisory Committee  
*via e-mail*

Dear Chief Justice Hecht and Mr. Lowe:

A proposal to amend Rule 203 (attached) is being presented only on behalf of the Administrative Rules of Evidence Committee of the State Bar of Texas and should not be construed as representing the position of the Board of Directors, the Executive Committee or the general membership of the State Bar of Texas. The Administrative Rules of Evidence Committee is a volunteer standing committee of the State Bar of Texas. This proposed amendment has been approved by the membership of the Administrative Rules of Evidence Committee pursuant to applicable procedures and represents the views of a majority of the members of the Committee.

A subcommittee, headed by Mr. John Janssen, reviewed the Article 2 Rules and recommended the change in Rule 203. The relevant part of the subcommittee report is set out below.

Rule 203. Determination of the Laws of Foreign Countries. The subcommittee had recommended further study of how the 30-day pre-trial deadline for raising the issue of law of a foreign countries interfaces or should interface with the 45-day before trial provision of Rule of Evidence 1009(a) relating to the translation of foreign language documents. At the February 23<sup>rd</sup> meeting, the subcommittee recommended changing the 30-day pre-trial deadline in Rule 203 to a 45-day deadline so as to align with Rule 1009.

If I can be of further assistance please do not hesitate to contact me.

Sincerely,  
  
Robin Malone Darr  
Chair, Administrative Rules of Evidence Committee

**MOTION: That Rule 203 be amended to read as follows:**

Rule 203. Determining Foreign Law

(a) Raising a Foreign Law Issue. A party who intends to raise an issue about a foreign country's law must:

(1) give reasonable notice by a pleading or other writing; and

(2) at least ~~30~~45 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.



## ROBIN MALONE DARR

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August 28, 2015

Chief Justice Nathan Hecht  
Supreme Court of Texas  
*via e-mail*

Mr. Gilbert I. "Buddy" Lowe  
Vice Chair of Supreme Court Advisory Committee  
*via e-mail*

Dear Chief Justice Hecht and Mr. Lowe:

A proposal to amend Rule 503 (attached) is being presented only on behalf of the Administrative Rules of Evidence Committee of the State Bar of Texas and should not be construed as representing the position of the Board of Directors, the Executive Committee or the general membership of the State Bar of Texas. The Administrative Rules of Evidence Committee is a volunteer standing committee of the State Bar of Texas. This proposed amendment has been approved by the membership of the Administrative Rules of Evidence Committee pursuant to applicable procedures and represents the views of a majority of the members of the Committee.

After the Texas Supreme Court's holding in *In Re: XL Specialty Insurance*, 373 S.W.3d 46 (Tex. 2012), a subcommittee, headed by Mr. Terry Jacobson, studied Rule 503 extensively. The full Administration of Rules of Evidence Committee has now studied Rule 503. Our report and motion to amend Rule 503(b)(1)(C) are attached.

If I can be of further assistance please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robin Darr".

Robin Malone Darr  
Chair, Administrative Rules of Evidence Committee

## RULE 503 REPORT

The Administration of the Rules of Evidence Committee has been analyzing the allied litigant privilege found in Rule 503(b)(1)(C) in light of the Texas Supreme Court's holding in *In Re: XL Specialty Insurance*, 373 S.W.3d 46 (Tex. 2012). In that case the Supreme Court held that:

But no matter how common XL's and Cinta's interest might have been, our rule requires that the communication be made to a *lawyer or her representative* representing another party in a *pending action*. *Id.* at 55 (italics in the original).

Thus, there are two elements required to shield a communication from discovery under Rule 503(b)(1)(C) – the communication needs to be made (1) to a lawyer or the lawyer's representative who represents another party (2) in a pending action. Statements not made to a lawyer are not privileged regardless of whether there is a pending action. And only statements made when an action is pending are privileged.

After extensive study and discussion AREC has decided to recommend amending Rule 503(b)(1)(C) (as restyled effective April 1, 2015) to incorporate an anticipation of litigation standard. Other interested State Bar Committees were given the opportunity to provide input and the Committees that have expressed an opinion have agreed with AREC. Our Motion to Amend reflects the our recommendation for Rule 503(b)(1)(C), as amended, would provide that:

(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 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.

**MOTION: That Rule 503(b)(1)(C) be amended to read as follows:**

(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 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.