SCAC: Random Updates on the Court

- April 12: Court unveiled the Protective Order Kit during National Crime Victims' Rights Awareness Week at a press conference given by Justice O'Neill, First Lady Anita Perry, and Attorney General Greg Abbott. The Court appreciates the hard work of the SCAC in helping us get these forms approved in an expedited manner. We will probably need to revisit the forms this summer after session and after the e-access/SDF rules are promulgated. [Speaking of which, we are still hoping to have those out sometime this month.]

- April Argument: First time we have had a full Court at argument since September.

- Set argument in the School Finance case for July

SCAC: Pending Bills Update

Bill	Author	relating to . . .	Rulemaking authority	status
SB15	Janek	civil claims involving exposure to asbestos/silica	SCT may promulgate amendments to TRCPs regarding the joinder of claimants in asbestos-related actions or silica-related actions consistent with bill.	Passed S; H Floor on 5/10
SB1648	Staples	civil actions	SCT shall adopt rules to provide for the fair, speedy, and efficient resolution of class actions.	Passed H.
SCR8/ HCR77	Duncan/ Crabb		Urging SCT to adopt rules to deal with overlapping CA issues.	Passed both chambers
HB 920	Uresti	protective and guardianship services for elderly/disabled	SCT may adopt rules consistent with this chapter, including rules governing the certification of individuals providing guardianship services *[may not be SCAC issue]*	in conference w/ SB6
HB1204	Raymond	access to certain info in divorce decree or SAPCR	SCT shall adopt rules restricting access to personal info form in divorce/SAPCR cases.	*not moving*
HB1400	Dutton	discovery procedures in Tort Claims Act suit	SCT shall adopt rules under which π may, if the D asserts plea to jurisdiction, obtain reas discovery to investigate jurisdiction.	*not moving*
SB1148	Harris	personal info in court records	The supreme court shall adopt rules to implement and supplement this section. *[TJC proposal on SDFs.]*	*not moving*
HB2752	Keffer	reapportionment of cong'l districts and the creation of the Tex. Cong'l Redistricting Comm'n	If comm'n fails to adopt plan within certain time, their authority is suspended and SCT shall adopt a plan w/in 45 days.	*not moving*

Additionally, there are a number of bills pending that would require the Court to amend their PN rules, adopt similar consent rules, and/or adopt reporting requirements on PN/PC cases. HB 1212 (parental consent bill that permits the SCT to adopt rules to allow for the confidential docketing of PC cases) and HB2997 (requiring the SCT to adopt rules governing the collection of statistical information on PN cases) are the two most likely to move. They are both out of committee and pending in Calendars.

This list does not include bills that might require changes to our rules because of an obvious conflict. *See, e.g.*, SB165 (private process servers); HB 62 (relating to procedures for appealing a residential eviction suit).

JUDICIAL COMMITTEE ON INFORMATION TECHNOLOGY

Peter Vogel
Chair

June 28, 2004

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
201 West 14th Street, Suite 104
Austin, Texas 78701

Re: Recommended Changes to the Texas Rules of Civil Procedure (TRCP) for Electronic Court Filing

Dear Chief Justice Phillips:

Attached for your consideration are the recommended changes to the Rules of Civil Procedure (TRCP) to incorporate electronic court filing. The recommended TRCP changes are consistent with the standard local rules template agreed by the Court in November 2002 and revised by the Court in June 2004.

These proposed changes to incorporate electronic court filing

a. Allow courts to order electronic filing on the motion of a party in a case (Rule 167),
b. Allow courts to order electronic service on the motion of a party in a case (Rule 167),
c. Allow judges to issue electronic orders (Rule 19a), and
d. Allow electronic service (Rule 21a).

JCIT greatly appreciates the Court's recent agreement to revise the standard local rules for use by Texas courts until the Texas Rules of Civil Procedure are amended.

If you have any questions or comments, please contact me at 214-999-4422 or Mike Griffith at 512-463-1641.

Respectfully submitted,

Peter Vogel
Chair, Judicial Committee on Information Technology

cc: The Honorable Nathan L. Hecht, Justice, Supreme Court of Texas
The Honorable Wallace B. Jefferson, Justice, Supreme Court of Texas

Proposed Additions and Amendments to the Texas Rules of Civil Procedure in order to Allow for the Electronic Filing (E-Filing) of Documents

June 2004

Rule 4. Computation of Time

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail, ~~or~~ by telephonic document transfer, or by electronic transmission, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.

Rule 11. Agreements To Be in Writing

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record. A written agreement between attorneys or parties may be electronically filed only as a scanned image.

Rule 19a. Judge's Orders

A judge signs an order by applying his or her handwritten signature to a paper order or by applying his or her digitized signature to an electronic order. A digitized signature is a graphic image of the judge's handwritten signature.

Rule 21. Filing and Serving Pleadings and Motions

Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefore, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket.

An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge.

The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application. In the case of a pleading, plea, motion or application that is electronically filed, a certification is deemed to be signed by the filer's use of a confidential and unique identifier when electronically filing the pleading, plea, motion or application.

After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

Rule 21a. Methods of Service

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by electronic transmission to the recipient's e-mail address, or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by electronic transmission to the recipient's e-mail address may only be effected where the recipient has agreed to receive electronic service or where the court has ordered the parties to electronically serve documents. Service by telephonic document transfer or by electronic transmission after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail, ~~or~~ by telephonic document transfer, or by electronic transmission, three days shall be added to the prescribed period. Notice may be served

by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. In the case of service by electronic transmission, a certification is deemed to be signed by the filer's use of a confidential and unique identifier when electronically filing the pleading, plea, motion or other form of request. Every certification of service by electronic transmission must include the filer's e-mail address, the recipient's e-mail address and the date and time of service. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

Rule 45. Definition and System

Pleadings in the district and county courts shall

(a) be by petition and answer;

(b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole;

(c) contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense;

(d) be ~~in writing,~~ on paper or be electronically filed with the clerk by transmitting them through TexasOnline.

Paper pleadings shall ~~measuring~~ measure approximately 8½ inches by 11 inches, and shall be signed by the party or his attorney, and either the signed original together with any verification or a copy of said original and copy of any such verification shall be filed with the court. The use of recycled paper is strongly encouraged.

When a paper copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.

Electronically-filed pleadings shall be formatted for printing on 8½ inch by 11 inch paper, and shall be signed by the party or his attorney in the manner specified by Rule 57.

All pleadings shall be construed so as to do substantial justice.

Rule 57. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, and, if available, telecopier number and e-mail address. In the case of an electronically-filed pleading of a party represented by an attorney, the attorney's use of a confidential and unique identifier when filing the pleading constitutes the signature of the attorney whose name appears first in the pleading's signature block unless the pleading states that the use of the identifier constitutes the signature of a different attorney in the signature block. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, and, if available, telecopier number and e-mail address. In the case of an electronically-filed pleading of a party not represented by an attorney, the filer's use of a confidential and unique identifier when filing the pleading constitutes the signature of the party.

Rule 74. Filing With the Court Defined

The filing of pleadings, other ~~papers~~ documents, and exhibits as required by these rules shall be made by filing them with the clerk of the court~~,~~. A ~~except that the~~ judge may permit ~~the papers~~ paper documents to be filed with him, in which event he shall note thereon the filing date and time and forthwith transmit them to the office of the clerk. A judge may not accept electronically-transmitted documents for filing. This rule does not prohibit judges from accepting and considering pleadings submitted on electronic media during trial.

Rule 74a. When Electronically-Filed Document is Considered Filed

(a) Except as noted in part (c) of this rule, a person who electronically files a document is considered to have filed the document with the clerk at the time the filer electronically transmits the document to an electronic filing service provider (EFSP). A report of the electronic transmission of the document from the filer to the EFSP shall be prima facie evidence of the date and time of the transmission.

(b) When a clerk accepts an electronically-transmitted document for filing, the clerk shall place an electronic file mark on the front page of the document noting the date

and time the document was filed which, except as noted in part (c) of this rule, shall be the date and time that the filer electronically transmitted the document to an EFSP.

(c) Except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings, an electronically-filed document that serves to commence a civil suit will not be considered to have been filed on Sunday when the document is electronically transmitted to an EFSP on Sunday. Rather, such a document will be considered to have been filed on the succeeding Monday.

Rule 74b. Documents That May Not be Electronically Filed

All documents that may be filed in paper form may be electronically filed with the exception of the following:

(a) documents in juvenile cases;
(b) documents in mental health cases;
(c) documents in proceedings under Chapter 33, Family Code;
(d) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;
(e) bonds;
(f) wills or codicils thereto;
(g) subpoenas;
(h) affidavits of inability to afford court costs.

Rule 93. Certain Pleas to be Verified

(a) A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

1. That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.

2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.

3. That there is another suit pending in this State between the same parties involving the same claim.

4. That there is a defect of parties, plaintiff or defendant.

5. A denial of partnership as alleged in any pleading as to any party to the suit.

6. That any party alleged in any pleading to be a corporation is not incorporated as alleged.

7. Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.

8. A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as fully proved. The denial required by this subdivision of the rule may be made upon information and belief.

9. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.

10. A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

11. That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.

12. That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.

13. In the trial of any case appealed to the court from the Industrial Accident Board the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner unless denied by verified pleadings:

    (a) Notice of injury.
    (b) Claim for compensation.
    (c) Award of the Board.
    (d) Notice of intention not to abide by the award of the Board.
    (e) Filing of suit to set aside the award.

(f) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.
(g) That there was good cause for not filing claim with the Industrial Accident Board within the one year period provided by statute.
(h) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

14. That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.

15. In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all the terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.

16. Any other matter required by statute to be pleaded under oath.

(b) A document that is required to be verified, notarized, acknowledged, sworn to, or made under oath may be electronically filed only as a scanned image.

(c) Where a filer has electronically filed a scanned image under this rule, a court may require the filer to promptly file the document in a traditional manner with the county clerk.

Rule 167. Orders Regarding Electronic Filing

Upon the motion of a party and for good cause shown, a court may order electronic filing and service of documents other than those documents that may not be electronically filed as set forth in Rule 74b.

DALE WAINWRIGHT
JUSTICE
THE SUPREME COURT OF TEXAS

P.O. BOX 12248
AUSTIN, TEXAS 78711
(512) 463-1332 P
(512) 936-2308 F

November 8, 2004

Mr. Charles L. Babcock
Jackson Walker LLP
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Exhibits in Court Reporter's Records

Dear Chip:

The Court would like the Advisory Committee to study the attached memorandum from Frank Montalvo, dated April 13, 2002. Judge Montalvo, who formerly chaired the Court Reporter's Certification Board, recommended that the Uniform Format Manual for Court Reporters, as well as any related court rules, be amended to clarify that any exhibit admitted, tendered in an offer of proof, or offered in evidence should be a part of the court reporter's record. In response to this recommendation, Lisa has drafted proposed revisions to several rules and court orders, including TRCPs 75a & 75b, the order issued under TRCP 14b, and TRAP 13.1. The Court would like this added to the agenda for discussion in the Nov. 12 SCAC meeting, if possible.

As always, thank you for all the hard work you do for the Court.

Sincerely,

Dale Wainwright

J. Dale Wainwright

cc: Court
Lisa Hobbs, Rules Attorney

COURT REPORTERS
CERTIFICATION BOARD

M E M O R A N D U M

To: Thomas R. Phillips, Chief Justice
Justices – Supreme Court

From: Frank Montalvo
District Judge, 288th District Court
Chairman, Court Reporters Certification Board

Subject: **PROPOSED MISCELLANEOUS ORDER**
Request Approval of Revised Uniform Format Manual
Effective September 1, 2002

Date: August 13, 2002

Dear Chief Justice Phillips and Justices of the Supreme Court:

The Board requests consideration by the Supreme Court of the following proposed *Miscellaneous Order:*

Approval of Revisions to the Uniform Format Manual for Texas Court Reporters

---

The current manual was first adopted for use by the Supreme Court in 1999. The Board approved revisions to the manual at the Board meeting on July 27, 2002, and is now submitting a draft for the Court's approval.

There is one area of confusion regarding **exhibits** that the Board respectfully requests a determination be made by the Supreme Court as to what language is applicable in accordance with Texas Statutes and Rules.

There appears to be a conflict between Rules 75a of the Texas Rules of Civil Procedure and Rule 14b. 75a says, "The court reporter or stenographer shall file with the clerk of the court all exhibits which were **admitted or tendered** on a bill of exception during the course of any hearing, proceeding, or trial."

In the Supreme Court's Order relating to retention and disposition of exhibits, it says, "In compliance with the provision of Rule 14B, the Supreme Court hereby directs that exhibits **offered or admitted** into evidence shall be retained and disposed of by the clerk of the court."

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Email: info@crcb.state.tx.us
Website: www.crcb.state.tx..us

Under the Government Code Section 52.045(b)(1), it states, "the evidence **offered** in the case."

Provided in the draft copy are three figure 5 pages (certification page for Texas CSRs) and three figure 6 pages (certification page for exhibits), on which the language regarding exhibits is presented three ways, " **admitted or tendered"** OR **"offered"** OR my recommendation, **"admitted, tendered in an offer of proof or offered into evidence"**.

Examples are as follows:

Figure 5, example 1: "I further certify that this Reporter's Record of the proceedings truly and correctly reflects the **exhibits,** if any, **admitted or tendered** on an offer of proof."

OR

Figure 5, example 2: "I further certify that this Reporter's Record of the proceedings truly and correctly reflects the **exhibits,** if any, **offered** into evidence."

OR

Figure 5, example 3 (my recommendation): "I further certify that this Reporter's Record of the proceedings truly and correctly reflects the **exhibits,** if any, **admitted, tendered in an offer of proof or offered** into evidence."

Figure 6, example 1: "...do hereby certify that the foregoing exhibits constitute true and complete duplicates of the original **exhibits,** excluding physical evidence, **admitted or tendered** on an offer of proof into evidence..."

OR

Figure 6, example 2: "...do hereby certify that the foregoing exhibits constitute true and complete duplicates of the original **exhibits,** excluding physical evidence, **offered** into evidence..."

OR

Figure 6, example 3 (my recommendation): "...do hereby certify that the foregoing exhibits constitute true and complete duplicates of the original **exhibits,** excluding physical evidence, **admitted, tendered in an offer of proof or offered** into evidence..."

Supreme Court
CRCB – Revised Uniform Format Manual
August 13, 2002

Reporters across the state continue to debate the issue as to whether they are required to retain and include in the Reporter's Record on appeal all exhibits **offered** or only those **admitted** into evidence. The Courts' decision on which form to include in the Uniform Format Manual will clarify the issue. I would respectfully suggest the appropriate language should be, "...**admitted, tendered in an offer of proof or offered** into evidence..."

Enclosed is a draft of the revised Uniform Format Manual and a proposed order, for your convenience.

If we may be of further assistance, please do not hesitate to contact Michele Henricks at:
Phone: (512)463-1747
Email: **Michele.henricks@crcb.state.tx.us**

Thank you very much for your consideration in this matter.

Sincerely Yours,

Frank Montalvo
Chairman, CRCB

FM/mlh

Enclosure(s)

PROPOSED AMENDMENTS RELATING TO EXHIBITS TO INCLUDE IN REPORTER'S RECORD

November 11, 2004

PROPOSED AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

Rule 75a Filing Exhibits: Court Reporter to File with Clerk

The court reporter or stenographer shall file with the clerk of the court all exhibits which were admitted, tendered in an offer of proof, or offered in evidence ~~or tendered on bill of exception~~ during the course of any hearing, proceeding, or trial.

Rule 75b Filed Exhibits: Withdrawal

All filed exhibits admitted, ~~in evidence or~~ tendered in an offer of proof, or offered in evidence ~~on bill of exception~~ shall, until returned or otherwise disposed of as authorized by Rule 14b, remain at all times in the clerk's office or in the court or in the custody of the clerk except as follows:

(a) The court may be order entered on the minutes allow a filed exhibit to be withdrawn by any party only upon such party's leaving on file a certified, photo, or other reproduced copy of such exhibit. The party withdrawing such exhibit shall pay the costs of such order and copy.

(b) The court reporter or stenographer of the court conducting the hearing, proceedings, or trial in which exhibits are admitted, tendered in an offer of proof, or offered in evidence, shall have the right to withdraw filed exhibits, upon giving the clerk proper receipt therefor, whenever necessary for the court reporter or stenographer to transmit such original exhibits to an appellate court under the provisions of Rule 379 or to otherwise discharge the duties imposed by law upon said court reporter or stenographer.

PROPOSED AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE

13.1. Duties of Court Reporters and Recorders

The official court reporter or court recorder must:

***

(b) take all exhibits admitted, tendered in an offer of proof, or offered in evidence during a proceeding and ensure that they are marked;

***

The Order Relating to Retention and Disposition of Exhibits dated July 15, 1987, effective January 1, 1988, is amended as follows:

Supreme Court Order Relating to Retention and Disposition of Exhibits

In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits ~~offered or~~ admitted, tendered in an offer of proof, or offered in ~~into~~ evidence shall be retained and disposed of by the clerk of the court in which the exhibits are filed upon the following basis.

[This order shall apply only to . . .]

The Uniform Format Manual for Texas Court Reporters is amended as follows:

OFFICIAL REPORTER'S RECORD - CERTIFICATION PAGE FOR TEXAS CSRs- figure 5

THE STATE OF TEXAS)
COUNTY OF ^COUNTY NAME)

I, ^REPORTER'S NAME, Official/Deputy Official Court Reporter in and for the ^### District Court of ^County Name County, Texas, do hereby certify that the following contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted, tendered in an offer of proof, or offered in evidence.

* I further certify that the total cost for the preparation of this Reporter's Record is $ _____ and was paid/will be paid by _____.

WITNESS MY OFFICIAL HAND on this, the ____ day of _____, _____.

_____

^REPORTER'S NAME, Texas CSR ^####
Expiration Date: ^##/##/##
Official Court Reporter, ^### District Court
^County Name County, Texas
^Address
^City, ^State ^Zip
^(###) ### - ####

(* To be included only in the final volume of the original of the Reporter's Record)

OFFICIAL REPORTER'S RECORD - CERTIFICATION PAGE FOR EXHIBITS - figure 6

TRIAL COURT CAUSE NO(S). ^##-###, ^##-###

^PLAINTIFF(S),	)	IN THE DISTRICT COURT
	)	
VS.	)	^COUNTY NAME COUNTY, TEXAS
	)	
^DEFENDANT(S)	)	^### JUDICIAL DISTRICT

I, ^Reporter's Name, Official Court Reporter in and for the ^### District Court of ^County Name County, Texas, do hereby certify that the following exhibits constitute true and complete duplicates of the original exhibits, excluding physical evidence, admitted, tendered in an offer of proof, or offered in evidence during the ^Proceeding Name in the above-entitled and numbered cause as set out herein before the Honorable ^Judge's Name, Judge of the ^### District Court of ^County Name County, Texas, and a jury trial, beginning ^Month ^Date, ^Year.

* I further certify that the total cost for the preparation of this Reporter's Record is $ _____ and was paid/will be paid by _____.

WITNESS MY OFFICIAL HAND on this, the ____ day of _____, _____.

_____

^REPORTER'S NAME, Texas CSR ^####
Expiration Date: ^##/##/##
Official Court Reporter, ^### District Court
^County Name County, Texas
^Address
^City, ^State ^Zip
^(###) ### - ####

(* To be included only in the final volume of the original of the Reporter's Record)

UARS

Certified Shorthand Reporters

UNITED AMERICAN REPORTING SERVICES, INC.

David B. Jackson
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Mr. Charles L. Babcock
Jackson Walker, L.L.P.
1401 McKinney, Suite 1900
Houston, Texas 77010

Re: Exhibits in Court Reporter's Records

Dear Mr. Babcock:

Pursuant to our discussion at the Supreme Court Advisory Committee Meeting on January 8th, 2005, I am by this letter attempting to address the issues raised in Judge Montalvo's Memorandum to the Supreme Court dated August 13, 2002 and Justice Wainwright's transmittal of that memorandum on November 8, 2004.

This has been a confusing issue for court reporters, and in my experience substituting for various courts around the Dallas area I've seen it handled pursuant to both interpretations of the Rules.

The court reporter's first concern is that exhibits that have not been admitted be kept separate from exhibits that go in the jury room. That's been the rationale I've most often heard for giving back any exhibit that has not been admitted or tendered on a bill of exception to the attorney who offered the exhibit before any exhibits go to the jury room.

Of course, the second rationale goes to the issue our committee discussed at length on Friday the 7th. Exhibits that have not been admitted nor properly tendered on a bill of exception are exhibits that are more likely to unnecessarily take up space in the already overcrowded district clerk's office.

Dealing with this from a practical standpoint, I would suggest that the wording in Rules 75a of the Texas Rules of Civil Procedure and Rule 14b in the Supreme Court's Order be consistent to reflect, "The court reporter or stenographer shall file with the clerk of the court all exhibits which were admitted or tendered on a bill of exception during the course of any hearing, proceeding, or trial."

However, if there is the possibility that exhibits that have not been properly tendered on a bill of exception could result in grounds for a successful appeal, I think Judge Montalvo's recommendation of consistent language in 75a and 14b of "admitted, tendered in an offer of proof or offered" would be the appropriate way to clear up the ambiguity.

So I'm assuming the debate will be the extent to which those exhibits would have an impact on the appeal and the related chain of custody issues versus the increased burden on the court reporter and the clerk to safeguard those exhibits.

Thank you for allowing me to address this issue.

Respectfully,

David B. Jackson, CSR #672, RDR

Court of Appeals
First District of Texas
1307 San Jacinto Street, 10th Floor
Houston, Texas 77002-7006

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www.1stcoa.courts.state.tx.us

June 2, 2004

The Hon. Nathan Hecht
Texas Supreme Court
P. O. Box 12248
Austin, Texas 78711-2248

Dear Justice Hecht:

This letter is written to request your consideration of (1) a resolution for the different requirements found in the current rules of civil and appellate procedure regarding certificates of service and (2) deleting the requirement for a certificate of conference on motions for rehearing filed in the appellate courts. Both suggested changes would benefit the practioners and the appellate courts.

First, the current version of Texas Rule of Appellate Procedure 9.5(d) requires a certificate of service to state: (1) the date of service; (2) the method of service–hand delivery, mail, commercial delivery service, or fax, or combination of these methods; (3) the name of each person served; (4) the address of each person served; and (5) if the person served is a party's attorney, the name of the party represented by that attorney. Texas Rule of Civil Procedure 21a only requires a statement that the requirements of the rule have been met. If the two rules had the same requirements, we believe that fewer non-conforming documents would be presented to the appellate courts.

Secondly, we would respectfully request that the Supreme Court revisit Texas Rule of Appellate Procedure 10.1(a)(5) (certificates of conference on motions). In our experience, requiring a certificate of conference on a motion for rehearing is unnecessary and unproductive.

Civ. only 191.2

I am available to discuss these suggestions with you and can be reached at 832-814-2011.

Sincerely,

Sherry Radack

Sherry Radack
Chief Justice

R10 either in R9 or M/rhrg rule
Cert of conf on a m/rhrg is not required.

Lisa Hobbs

From: Frank Gilstrap [fgilstrap@hillgilstrap.com]

Sent: Wednesday, May 04, 2005 9:19 PM

To: 'Magill, Sharon'; lisa.hobbs@courts.state.tx.us; aalbright@mail.law.utexas.edu; adawson@brsfirm.com; andy.harwell@co.mclennan.tx.us; annedallas@aol.com; bmilfelt@edwardsfirm.com; brown@wrightbrownclose.com; bwolbrueck@wilco.org; cac@obt.com; clopez0826@yahoo.com; cortelln@haynesboone.com; cwatson@lockeliddell.com; d.b.jackson@charter.net; 'David Gaultney'; dpeeples@co.bexar.tx.us; 'Elaine Carlson'; ecarlson@stcl.edu; 'Jan Patterson'; jane.bland@lstcoa.courts.state.tx.us; jeff.boyd@tklaw.com; jeffersl@haynesboone.com; juan.hinojosa@senate.state.tx.us; kent_sullivan@justex.net; levi_benton@justex.net; lsoules@soulesandwallace.com; maHatchell@lockeliddell.com; martinj@tklaw.com; nathan.hecht@courts.state.tx.us; och@atlashall.com; pfs@waymark.net; psbaron@austin.rr.com; pschenkkan@gdhm.com; rduggins@canteyhanger.com; rhpem@aol.com; richard@momnd.com; rmeadows@kslaw.com; rmun@scotthulse.com; rvaladez@shelton-valadez.com; 'Sarah Duncan'; ssusman@susmangodfrey.com; stephen.tipps@bakerbotts.com; stephen.yelenosky@co.travis.tx.us; tjacks@mithoff-jacks-aus.com; tom_lawrence@jp.co.harris.tx.us; tracy_christopher@justex.net; wdorsane@smu.edu; wedwards@edwardsfirm.com; whall@fullbright.com; cbabcock@jw.com; 'Senneff, Angie'

Subject: RE: Bill Dorsaneo Draft of Proposed Administrative Rule for cases transferred

I want to pose a question about the working draft of TRAP 15.5, entitled "Precedent in Transferred Cases."

Under the working draft, the rule is triggered when a transferee court decides a case so that "the outcome would have been different" under the precedent of the transferor court. In lieu of "outcome would have been different," should the rule be triggered when the transferor court would have "held differently" from the transferee court? In other words, should we use the phrase "holds differently," which is found in Sections 22.001(a)(2) and 22.225(c) of the Civil Practice and Remedies Code?

Until House Bill 4, the phrase "holds differently," as used in these sections, had a narrow judicial definition. See Christy v. Williams, 156 Tex. 555, 298 S.W.2d 565, 568-569 (1957). But under HB4, the phrase now has a broad legislative definition. See CPRC secs. 22.001(e) & 22.225(e).

If the Committee decides to eschew the "holds differently" standard, then it should be mindful of two problems.

First, do we really want two standards for "conflict": one ("holds differently") that is found in the CPRC and defined by the legislature and another ("outcome would have different") that will be found the rules and defined by the courts? This would not be the first time that Texas had multiple standards for "conflict" but that doesn't necessarily make it a good thing. See Coastal Corp. v. Garza, 979 SW2d 318, 325 (Tex.1998)(Hecht,J., dissenting).

Second, the transferee courts, in order to avoid the problem, might tend to give the phrase "outcome would have been different" an extremely narrow construction in order to avoid triggering the rule. The Supreme Court did this for 50 years after Christy, and that was the reason the legislature broadened the definition of "holds differently" in HB4. In this regard, the proposed language ("outcome would have different") recalls part of the Christy standard ("whether one would operate to overrule the other in case they were both rendered by the same court.") See Christy, 298 SW2d at 568-569.

Finally, I am resorting to this memo because I won't be able to attend this week's meeting. But I have a good excuse. I will be at Michigan State watching my brother receive his Ph.D.

-----Original Message-----

From: Magill, Sharon [mailto:smagill@mail.smu.edu]
Sent: Wednesday, May 04, 2005 6:14 PM
To: lisa.hobbs@courts.state.tx.us; aalbright@mail.law.utexas.edu; adawson@brsfirm.com; andy.harwell@co.mclennan.tx.us; annedallas@aol.com; bmilfelt@edwardsfirm.com; brown@wrightbrownclose.com; bwolbrueck@wilco.org; cac@obt.com; clopez0826@yahoo.com; cortelln@haynesboone.com; cwatson@lockeliddell.com; d.b.jackson@charter.net; David Gaultney; dpeeples@co.bexar.tx.us; Elaine Carlson; ecarlson@stcl.edu; Frank Gilstrap; Jan Patterson; jane.bland@lstcoa.courts.state.tx.us; jeff.boyd@tklaw.com; jeffersl@haynesboone.com; juan.hinojosa@senate.state.tx.us; kent_sullivan@justex.net; levi_benton@justex.net; lsoules@soulesandwallace.com; maHatchell@lockeliddell.com; martinj@tklaw.com; nathan.hecht@courts.state.tx.us; och@atlashall.com; pfs@waymark.net; psbaron@austin.rr.com; pschenkkan@gdhm.com; rduggins@canteyhanger.com; rhpem@aol.com; richard@momnd.com; rmeadows@kslaw.com; rmun@scotthulse.com; rvaladez@shelton-valadez.com; Sarah Duncan; ssusman@susmangodfrey.com; stephen.tipps@bakerbotts.com; stephen.yelenosky@co.travis.tx.us; tjacks@mithoff-jacks-aus.com; tom_lawrence@jp.co.harris.tx.us; tracy_christopher@justex.net; wdorsane@smu.edu; wedwards@edwardsfirm.com; whall@fullbright.com; cbabcock@jw.com; Senneff, Angie
Subject: Bill Dorsaneo Draft of Proposed Administrative Rule for cases transfered

MEMORANDUM

To: Lisa Hobbs
cc: Justice Nathan Hecht and Appellate Rules Subcommittee Members
From: William V. Dorsaneo, III
Re: Transfer of Appellate Cases
Date: May 2, 2005

Here is a slightly revised draft of the proposed Administrative Rule for cases transferred from one court of appeals to another court of appeals. Because time is short, I have emailed it to all committee members.

Rule 15. Transfer of Court of Appeal Cases

15.1 Authority to Transfer. The Supreme Court may order cases transferred from one court of appeals to another at any time that, in the opinion of the Supreme Court, there is good cause for the transfer.

15.2 Jurisdiction When Transferred. The court of appeals to which a case is transferred has jurisdiction of the case without regard to the district in which the case originally was tried and to which it is returnable on appeal.

15.3 Place of Decision. The court of appeals to which a case is transferred shall deliver, enter and render the opinions, orders and decisions in a transferred case at the place where the court to which the case is transferred regularly sits as provided by law.

15.4 Oral Argument.

(a) Except as provided by Subsections (b) and (e), the justices of the court of appeals to which a case is transferred shall hear oral argument, after due notice to the parties or their attorneys, at the place from which the case is originally transferred.

(b) If requested by all parties or their attorneys, the oral argument in a transferred case may be heard in the regular place of the court to which the case is transferred.

(c) If a case is transferred to a court that regularly sits not more than 35 miles from the place the court from which the case was transferred regularly sits, the court, at the discretion of its chief justice and after notice to the parties or their counsel, may hear oral arguments at the place it regularly sits. For purposes of this subsection, the place where a court of appeals regularly sits is that

specified in Subchapter C, Chapter 22, and the mileage between the places is that determined by the comptroller under Chapter 660.

(d) The actual and necessary traveling and living expenses of the justices in hearing an oral argument at the place from which the case is transferred shall be paid by the state from funds appropriated for that purpose.

(e) At the discretion of its chief justice, a court to which a case is transferred may hear oral argument through the use of teleconferencing technology as provided by Section 22.302. The court and the parties or their attorneys may participate in oral argument from any location through the use of teleconferencing technology. The actual and necessary expenses of the court in hearing an oral argument through the use of teleconferencing technology shall be paid by the state from funds appropriated for the transfer of case, as specified in Subsection (d).

15.5 Precedent in Transferred Cases

Alternative One

In cases transferred by the Supreme Court from one court of appeals to another court of appeals, the court of appeals may, when it issues its opinion, and must on motion for rehearing by a party, state whether the outcome would have been different had the court of appeals applied precedent of the court from which the case is transferred.

The Supreme Court may take the following action on a petition for review that alleges error because precedent of the transferor court was not applied to resolve the case:

(a) grant the petition for review and decide the issues itself,

(b) set aside the judgment of the court of appeals without reference to the merits and, in the interest of justice, transfer the case to the transferor court for decision on the merits, or

(c) deny or refuse the petition.

Alternative Two

In cases transferred by the Supreme Court from one court of appeals to another, the court of appeals to which the case is transferred must [consider and give due regard to] [decide the case in accordance with] the view held by the transferor appellate court of Texas law as reflected in the decisions of the transferor court, and state whether the outcome would have been different had the transferee court applied its own or another court of appeals' precedent or view of Texas law.

The Supreme Court may take the following action on a petition for review that alleges error because precedent of the transferor court was applied to resolve the case:

(a) grant the petition for review and decide the issues itself,

(b) grant the petition for review, resolve the actual or apparent conflict of decisions and, if necessary, remand the case to the court of appeals for further action.

(c) deny or refuse the petition.

COORDINATING A CONUNDRUM: TEXAS COURTS OF APPEALS' STRUGGLE WITH DECIDING WHICH PRECEDENT TO APPLY WHEN CASES ARE TRANSFERRED TO THEM UNDER TEXAS SUPREME COURT AUTHORITY

I. Introduction

The question of whether the courts of appeals should decide cases transferred to them under the transfer power granted to the Supreme Court by Tex. Gov't Code § 73.001 by applying their own precedent or that of the transferring court admits of no clear answer. Certainly no one can quarrel with the principle that state laws should apply uniformly to parties in different territorial districts. Unfortunately, under current Texas practice, conflict is precisely the result of having a system of coordinate courts of appeals that enunciate interpretations of state laws for their own territorial jurisdictions absent a requirement of mandatory acceptance of the precedent of sister courts. Tex. Gov't Code § 22.001(a)(2) gives the Supreme Court jurisdiction to hear cases concerning conflicts of law between the courts of appeals, but the courts of appeals themselves have been engaged in the struggle to determine which precedent to apply when cases are transferred to them. The question then becomes, who decides? Should the courts of appeals themselves determine which precedent to apply, thereby opening the door to conflicting outcomes within territorial districts, or should the question be reserved for § 22.001(a)(2) cases heard by the Supreme Court?

Part II is a brief look at the historical development of the Texas courts of appeals and the power granted to the Texas Supreme Court to transfer cases between the courts of appeals, as well as a recent resolution urging the Texas Supreme Court to adopt a rule or rules of appellate procedure to deal with the issue of conflicting precedent in appellate case transfers. Part III examines two recent decisions, one by the Tenth District and one by the Fourth District, which

highlight the confusion and difficulty that the courts of appeals are struggling with in the area of precedential conflicts between the courts. Part IV looks at two states' attempt at resolving the issues related to transfer of appeals between courts of appeals; New York and California have adopted different rules for the transfer of cases on appeal, and each gives insight into how a rule of appellate procedure could be structured in Texas; Part V analyzes the problem by asking whether resolution of conflicts between the courts of appeals is more correctly left to those courts or to the Supreme Court under its jurisdiction to hear conflicts of law cases arising between the courts of appeals.

II. Historical Development of the Texas Courts of Appeals

Prior to 1876, appellate jurisdiction in Texas was exclusively in the Texas Supreme Court. The Texas Constitution of 1876 created the appellate courts, whose jurisdiction included appellate jurisdiction in all criminal cases from the district courts as well as all appeals, civil and criminal, from the county courts.[1] The Texas Supreme Court retained jurisdiction in all civil appeals from the district courts.[2] By 1890 civil appeals from the district courts had increased to the point that the Supreme Court could not keep-up, and in September, 1891, the Texas Constitution was amended to create the courts of civil appeals to hear all civil appeals from district and county courts.[3] Criminal appeal jurisdiction was vested by this same amendment in

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[1]Townes, TEXAS PLEADINGS 2d, 101-02 (1913) (hereinafter *Townes*).

[2]*Id.*

[3]*Id.* at 103-04. Townes indicates it was "a physical impossibility for the Supreme Court to keep-up with the vast and ever increasing number of appeals in civil cases." *Id.*

the courts of criminal appeals.[4]

A. JURISDICTION

The Amendment of September 22, 1891 gave the courts of civil appeals jurisdiction "coextensive with the limits of their respective districts, which shall extend to all civil cases of which the district or county courts have original or appellate jurisdiction."[5] In addition, the courts of civil appeals retained "such other jurisdiction, original and appellate, as may be prescribed by law."[6] Pursuant to this grant of power, the 24th legislature passed "An act to give jurisdiction to the several Courts of Civil Appeals over cases transferred from one of such courts to another under the direction of the Supreme Court, and providing for the transfer of such cases."[7] This act made it the duty of the Supreme Court to equalize the dockets of the various courts of civil appeals once a year by directing transfers from courts with heavier docket loads to those with lighter loads.[8] The courts of civil appeals to which cases were transferred were granted jurisdiction of the transferred cases "without regard to the districts in which such cases were originally tried and returnable on appeal."[9]

Justice Charles W. Barrow, in an article from 1978, discussed the procedures as they then

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[4]*Id.*

[5]Bond v. Carter, 96 Tex. 359 (1903) (citing Article 5, section 6 of the Texas Constitution as amended September 22, 1891).

[6]*Id.*

[7]Act of Apr. 19, 1895, 24th Leg., R.S., ch. 53, 1, 1895 Tex. Gen. Laws 79.

[8]*Id.*

[9]*Id.*

stood for inter-court transfers.[10] Repealed in 1985, Texas Revised Civil Statute article 1738 gave the Supreme Court more latitude in transferring cases between courts of civil appeals.[11] The Court now had authority to transfer cases "at any time" when the Supreme Court determined that good cause existed for such transfer.[12] Article 1738 continued to grant the transferee court jurisdiction over the cases regardless of the district in which they were originally tried.[13] However, oral argument was to be heard in the district from which the case was transferred.[14] Finally, opinions issued in transferred cases were to be "delivered, entered and rendered at the place where the court to which the cases are transferred regularly sits."[15] Thus, it appears plausible that the opinion would become precedent for the transferee court, not necessarily the transferor court.

B. OVERLAPPING DISTRICTS

In 1927, the legislature moved Hunt County from the Fifth District in Dallas to the Sixth District in Texarkana.[16] Then, in 1934, the legislature moved it back to the Fifth District,

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[10]Barrow, Charles W., Transfer of Cases Between Courts of Civil Appeals by the Supreme Court of Texas, 41 Tex. B.J. 335 (1978) (hereinafter *Barrow*).

[11]Tex. Rev. Civ. Stat. art. 1738 (1963).

[12]*Id.*

[13]*Barrow*, *supra* note 10 at 335.

[14]*Id.*

[15]*Id.*

[16]Worthen, James T., *The Organizational & Structural Development of Intermediate Appellate Courts in Texas*, 1892-2003, 46 S. Tex. L. Rev. 33, 64 (2004) (hereinafter *Worthen*).

thereby creating the first county within overlapping appellate court jurisdiction.[17] When the Twelfth Court of Appeals was created in Tyler, eight counties fell within its jurisdiction and the jurisdiction of another court of appeals.[18] Because of the overlaps, civil appellants in these eight counties have the opportunity to elect in which court of appeals district the appeal will be heard.[19] Thus, in *Miles v. Ford Motor Company*[20] the Supreme Court held that, absent inequitable conduct estopping a party from asserting prior active jurisdiction or a lack of intent to prosecute, the first party to perfect an appeal controls venue selection.[21] The Court in *Miles* reiterated a concern regarding overlapping appellate district jurisdiction when it said: "[T]he problems created by overlapping districts are manifest. Both the bench and bar in counties served by multiple courts are subjected to uncertainty from conflicting legal authority."[22]

C. RECENT PROPOSED LEGISLATION

The Texas State Senate has recently introduced a bill, SCR No. 7, which would cause the legislature to urge the Supreme Court to adopt a new rule or rules designed to resolve conflicting precedent in transferred and overlapping jurisdiction cases.[23] The resolution, which has been

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Miles v. Ford Motor Co., 914 S.W.2d 135 (Tex. 1995).

[21] *Id.* at 138-39 (holding that "the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts" and citing to Tex. Gov't Code §73.001, discussed *infra*).

[22] *Id.* at 139.

[23] 79R7358 TLE-F, S.C.R. No. 7 by Duncan.

filed with the Secretary of State by the Senate, asks the Supreme Court "to adopt rules providing for the random assignment of cases" for cases arising in a county located within two or more districts.[24] In addition, and more importantly, the resolution asks the Supreme Court to adopt rules governing the precedent to be applied when an appeal is transferred pursuant to the Supreme Court's constitutional grant of authority to transfer cases.[25] The resolution goes on to indicate that the rule should be specific to situations in which there is a conflict of precedent between the transferring and transferee courts.[26]

III. Current Appellate Court Jurisdiction and Transfer Concerns

The overlapping of Texas courts of appeals continues to be an issue in Texas.[27] The Texas legislature has made some improvements in this regard, the latest in 2003 when the legislature restored Brazos county to the exclusive jurisdiction of the Tenth District.[28] However, eliminating the overlapping appellate court jurisdiction will have no effect on cases transferred pursuant to the Supreme Court's transfer authority.[29] Indeed, as the following cases show, the

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] According to a recent Court of Appeals map there are twenty-two counties lying within two or more Courts of Appeals' jurisdictions.

[28] *Worthen*, *supra* note 16 at 65.

[29] Currently the Supreme Court's authority to transfer appeals from one district to another is governed by Tex. Gov't Code §73.001, which states that the Court may order transfer of cases "at any time" the Court finds "good cause" to do so. *See* Tex. Gov't Code § 73.001. The

concerns of the *Miles* court that "[b]oth the bench and bar . . . are subjected to uncertainty from conflicting legal authority" is as active as ever.[30]

A. TENTH CIRCUIT – WACO

In *Jaubert v. Texas*[31] Judge Vance of the Tenth Circuit issued this strong statement of position on the applicable law question: "There are some who argue that we should apply the law of the court from which the case was transferred to cases transferred out of one court of appeals and into another. We disagree."[32] In this criminal case Jaubert failed to preserve his ineffectiveness of counsel claim at his trial.[33] The Fort Worth Court of Appeals would have heard this claim for the first time on appeal, but the case was transferred pursuant to Tex. Gov't

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Supreme Court has previously approved an appellate redistricting plan that would eliminate all county overlaps, consolidate the territorial jurisdiction of some districts, and substantially increase the number of appellate court judges in the busiest districts. By evening-out the disparity in workloads between the courts of appeals, the Supreme Court hopes to the need to transfer cases between the courts of appeals will be eliminated. Notably, the redistricting plan promulgated by the Supreme Court: consolidates the First and Fourteenth Districts into the First; creates a new Fourteenth District in the Rio Grande Valley; increases justices in Houston, Dallas and Beaumont districts; and expands the Eleventh District from twenty-three to fifty-five counties. *See*, email from Osler McCarthy to Lisa Hobbs, "Texas Supreme Court advisory: Appellate redistricting," February 28, 2005 (originally dated December 17, 2002).

[30]*Miles*, 914 S.W.2d at 139.

[31]Jaubert v. Texas, 65 S.W.3d 73 (10th Dist.–Waco 2000).

[32]*Id.* at 75.

Code § 73.001 to the Waco Court of Appeals.[34] In his concurrence, Judge Gray more subtly examined the transfer issue under the light of a choice of law analysis.[35] Like other judges and Justices faced with the question of which district's law to apply, he asked the question: "Should we apply the law as we believe it should be across the State of Texas or should we apply the law in the manner we believe [the transferring court] would apply it?"[36] Because the Waco court determined in a previous case that state law as interpreted by the Waco court would apply in transfer cases, Judge Gray found himself bound by *stare decisis* to concur in the judgment that Jaubert's claim was not preserved and therefore non-reviewable.[37]

B. FOURTH CIRCUIT – SAN ANTONIO

In *American National Insurance Co. v. International Business Machines,*[38] the Fourth Circuit Court of Appeals in San Antonio held that fraudulent inducement to contract is a viable claim separate from a breach of contract claim.[39] This determination conflicted with the precedent in the First District, where the appeal had originally been assigned by the 56th Judicial District Court of Galveston County.[40] Under First and Fourteenth District precedent no claim for

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 76.

[36] *Id.* at 77.

[37] *Id.*

[38] Am. Nat. Ins. Co. v. IBM, 933 S.W.2d 685 (4th Dist.–San Antonio 1996).

[39] *Id.* at 687.

[40] *Id.* at 689-90.

fraudulent inducement could accompany a benefit-of-the-bargain damage action sounding in contract.[41] Thus, the court's determination to apply its own precedent rather than either the First or Fourteenth District's led to a conflict of laws issue.[42] Indeed, the majority's opinion admitted that its holding was in direct conflict with the First and Fourteenth District precedent, but stated that it believed that its role was to interpret Texas state law, not the law of the First or Fourteenth District.[43] The appropriate remedy in such circumstances was appeal to the Texas Supreme Court in accordance with Tex. Gov't Code § 22.001(a)(2).[44]

In her dissent, Judge Duncan addressed the conflict of laws inherent in coordinate court transfer cases. First she recognized that no court has enunciated choice of law rules for resolving conflicts between the coordinate appellate courts.[45] Secondly she pointed out that all too often transferee courts are silent as to the transfer status of the case and that there is a conflict of applicable law between the transferee court and the transferring court.[46] In enunciating her preferred approach that the courts of appeals adopt a choice of law rule requiring transferee courts to apply the law of the transferring court, she looked to traditional conflict of law analysis.[47] Her approach purports to take account of the needs of the intrastate transfer system,

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[41] *Id.* at 690.

[42] *Id.* As Judge Duncan's dissent pointed out, the transcript was filed and briefing made in the First District before transfer to the Fourth District. *Id.*

[43] *Id.* at 688.

[44] *Id.*

[45] *Id.* at 690.

[46] *Id.* at note 3.

[47] *Id.* at 692.

as well as the policies and interests of the transferring and receiving courts.[48] Her analysis is a useful framework for considering whether a rule of appellate procedure should require a transferee court to apply the precedent and state law interpretation of the transferring court.

1. The Needs of the Intrastate Transfer System

Equalization of appellate court dockets has been the primary concern underlying the Supreme Court's power to transfer cases between the courts of appeals.[49] According to Judge Duncan, efficiency, the "laudable goal" of equalization, is properly effected when the transfer system is convenient for the courts, pragmatically workable, and fair to litigants.[50]

a. Convenience

A 1927 amendment required that transferred cases be heard in the place where the transferring court usually sits.[51] This requirement has carried-over for the current courts of appeals by Tex. Gov't Code § 73.003.[52] Thus, argues Judge Duncan, transferee courts are akin to a panel of visiting judges, a role that would require them to apply the law of the transferring

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[48]*Id.* at 692-94.

[49]*See Townes, supra* note 1 at 103-04 and Act of Apr. 19, 1895, *supra* note 7.

[50]*Am. Nat. Ins. Co.*, 933 S.W.2d at 692-94.

[51]*Id.* at 692 (citing Act of March 10, 1927, 40th Leg., R.S., ch. 76 §§ 1-2, 1927 Tex. Gen. Laws 115, 115-16).

[52]Tex. Gov't Code § 73.003(b), (c), requiring that transfer cases by heard in the place where the transferring court usually sits unless the parties agree otherwise or the court is closer than 35 miles from the transferring court.

court.[53] Notwithstanding that, the convenience factor seems to Judge Duncan to be neutral in conflicts analysis, because the Fourth Circuit could just as easily apply the First or Fourteenth Districts' law as its own.[54]

b. Workability

The issue of workability is essentially law-of-the-case analysis.[55] Judge Duncan argues that a rule allowing a transferee court to apply its own law is unworkable because remanding a case back to the trial court would effectively require the trial court to apply the law of the transferee court.[56] Thus, in this case, the trial court applied the law as enunciated by the Houston courts of appeals, holding that American National did not have a cause of action in fraud, and the parties briefed the appellate court on authority of the First and Fourteenth Districts. However, on remand, the trial court will be bound to recognize the fraud action.[57] Finally, statistically the case on further appeal would be heard by either the First or Fourteenth District Court of Appeal, which likewise would be bound by the Fourth District's precedent.[58] Thus, in Judge Duncan's opinion, because the coordinate courts can only set aside, annul or vacate another court's order under a clearly erroneous standard, to apply the transferee court's interpretation of state law to the transferring district is unworkable.[59]

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[53] *Am. Nat. Ins. Co.*, 933 S.W.2d at 692.

[54] *Id.*

[55] *Id.* at 693.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 694.

c. Fairness

The issue of fairness is simply and succinctly put by Judge Duncan: "[H]ow can it be fair when IBM would win in the transferring court, while in the receiving court it loses - when the sole purpose of the transfer is docket equalization, not the promotion of one court of appeals' view of the substantive law?"[60] By engendering such an unfair result, Judge Duncan worries that the transfer system will not achieve general acceptance, and will violate fundamental principles of justice.[61]

2. Relevant Policies and Interests of the Courts

At the time this opinion issued, the Houston Courts of Appeals had "uniformly and consistent[ly]" held that the "contort" claim was barred.[62] This uniformity and consistency underscores the interests and policy goals which those districts sought to further.[63] In contrast, the Fourth District, according to Judge Duncan, had no interest whatsoever in the outcome.[64] The transaction under which this case arose did not occur in the Fourth District's territorial jurisdiction, the trial did not take place in the district courts of the Fourth District, and in all likelihood the Fourth District Court of Appeals would not hear any further appeal.[65] In addition, The Fourth Circuit had recently enunciated its own position on the "contort" claim and had no further need to define the interests and policies it sought to further within its territorial

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

jurisdiction.[66] Thus, the balance of interests between transferee and transferring court in this case weighed heavily in favor of applying the transferring court's precedent.[67]

IV. Other States's Solutions to the Problem of Appeals Transfers

Two states that have dealt with the issue of appellate case transfers are notable. California and New York have addressed and resolved the issue in different ways, both of which are instructive for our purposes.

A. NEW YORK

New York Civil Practice Law and Rule § 5711 provides that appeals may be transferred from one department to another "in furtherance of justice."[68] The Court of Appeal of New York, the state's highest court, has held in *Doyle v. Amster*[69] that cases transferred between one of the state's four appellate departments should be decided on the law of the transferring court.[70] In *Doyle* an appeal was transferred from the Second Department of the Appellate Division to the

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[66] *Id.*

[67] *Id.*

[68] New York Civ. Prac. L. & R. § 5711 (2004). The Advisory Committee Notes to §5711 indicate that "Furtherance of justice" includes: "(1) lack of a quorum of four justices; (2) Lack of concurrence of three justices; (3) Inability to dispose of business within a reasonable time; (4) Where the order was granted or the case tried before a judge who is now one of the justices of the Appellate Division." *Id.*

[69] Doyle v. Amster, 594 N.E.2d 911 (NY 1992).

[70] *Id.* at 913.

Third Department pursuant to New York Constitution, article VI, §4.[71] The case involved a challenge to the Clarkstown Zoning Board's determination that Doyle be denied his application to subdivide a parcel of land located in New City.[72] Although the law in the Second and Third Divisions was "essentially the same," the Court found that if the law had been different, "the view of the originating intermediate appellate court governs."[73] The conflict of law between the Divisions would persist, said the Court, "until we finally settle the issue."[74]

B. CALIFORNIA

California also allows for inter-court transfers of cases on appeal. California Rules of Court 47.1 vests authority in the Supreme Court to transfer "causes" between the state's courts of appeals.[75] The Advisory Committee Comment to Rule 47.1 states that "only the Supreme Court may transfer causes between Courts of Appeal."[76] However, Rule 62 gives authority to the courts of appeal to order cases transferred to it "if the appellate division certified . . . that transfer is necessary to secure uniformity of decision or to settle an important question of law."[77] Thus, in *Snukal v. Flightways Manufacturing, Inc.,*[78] the California Supreme Court reaffirmed that the courts of appeals have "uncontrolled discretion" to transfer appeals to its jurisdictions under rule

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[71] *Id.*

[72] *Id.* at 912.

[73] *Id.* at 913.

[74] *Id.*

[75] Cal R. Court R 47.1.

[76] *Id.*

[77] Cal. R. Court R 62.

[78] Snukal v. Flightways Manufacturing, Inc., 3 P.3d 286 (Cal. 2000).

62.[79] That discretion, however, does not include the discretion to "select and review only an issue or issues not dispositive of the appeal."[80] Instead, according to the Court, the court of appeal must "decide the issues necessary to resolution of the appeal and thereafter to transmit the remittitur to the municipal court (or, in the instance of a limited civil case tried in a unified superior court, to transmit the remittitur to the superior court)."[81]

V. Analysis

We take as a first principle that the law should not be different in different places within the state. This is clearly the rationale behind the legislative grant of power in the Supreme Court to hear cases where there is a conflict between the courts of appeals on issue of state law.[82] In this fundamental respect, the courts of appeals are interpreting the law of the state, not merely the law as it exists in their respective districts. 22.001(a)(2) would be unnecessary if the coordinate courts were interpreting and applying state law only as it applies in their own

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[79] *Id.* at 293.

[80] *Id.*

[81] *Id.* at 291.

[82] *See* Tex. Gov't Code § 22.001(a)(2) (a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case), (6) (any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute).

districts. If state law is allowed to mean different things in different territorial districts, conflicts would pose no significant issue of state jurisprudence.

In another sense, however, the statutory grant of jurisdiction in the Supreme Court to decide on conflicts arising between the courts of appeals militates against the courts themselves deciding conflicts of law. It has been argued that until the Supreme Court inveighs on which court of appeals has correctly interpreted state law, the coordinate courts ought to respect the interpretation of the court from which a case has been transferred. This is precisely Judge Duncan's approach. When a transferring court has already issued its interpretation of state law, with its concomitant interests and policy objectives, unfair surprise and disparate results may follow from a transferee court applying its own precedent. However, Judge Duncan's approach does not work when the transferring court has not decided the state law issue. In that circumstance, it would be appropriate for a coordinate transferee court to apply its own standing precedent. Indeed, it is difficult to see how such a court could do otherwise unless it simply guessed at what the transferring court would decide under the circumstances.

VI. Conclusion

Perhaps the issue ought to be framed as a choice between principle and pragmatism. The courts of appeals see themselves as interpreters of state law and upholders of the postulate that state law does not mean different things in different places. By interpreting and applying state law consistent with their own precedent, transferee courts are faithful to the first principle when they hold fast to their own precedent. In doing so, the transferee court maintains integrity within itself. Pragmatically this steadfastness leads to disparate results that cause confusion and

perhaps unfair disappointment for litigants and their attorneys. Having tried a case in one district, briefed their appeal under that district's precedent, they must steel themselves for the possibility that their appeal will be transferred, and that the transferee court interprets state law in such a way as to turn their winning arguments into losing propositions. A rule that mandates that the courts of appeals apply the precedent of the transferring court would have the benefit of certainty for litigants and the judiciary, though it must acknowledge that, until the Supreme Court decides the issue, state law is indeed different in different territorial districts.

MEMORANDUM

To: Appellate Rules Subcommittee, Supreme Court Advisory Committee

From: William V. Dorsaneo, III

Re: Appellate Rule Changes Concerning Civil Practice and Remedies Code Section 51.04 (d)-(f).

Date: December 30, 2004

Here is a redrafted version of proposed changes to Appellate Rules 12.1 and 25. These redrafts are based primarily on the August 2004, transcript of the Advisory Committee and the votes taken at the meeting. Chairman Chip Babcock has also directed us to consider whether any other changes to the Texas Rules of Appellate Procedure are required by House Bill 4. I believe that Appellate Rule 29.5 (Further Proceedings in Trial Court) needs revision because of the changes made to Section 51.014 of the Civil Practice and Remedies Code. A copy of a proposed revision to Appellate Rule 29.5 is also included at the end of this memorandum. Would all of you please look at Justice Hecht's letter of June 16, 2003 to see if any other changes are needed? I hope everyone had a Merry Christmas and wish all of you a Happy New Year.

Rule 12.1 Docketing the Case. On receiving a copy of the notice on appeal, the petition for permission to appeal, the petition for review, the petition for discretionary review, the petition in an original proceeding, or a certified question, the appellate clerk must:

(a) endorse on the document the date of receipt;

(b) collect any filing fee;

(c) docket the case;

(d) notify all parties of the receipt of the document; and

(e) if the document filed is a petition for review filed in the Supreme Court, notify the court of appeals clerk of the filing of the petition.

Rule 25. Perfecting Appeal

25.1 Civil Cases – Appeal As of Right.

(a) ***Notice of appeal.*** An appeal is perfected when a written notice of appeal is filed with the trial court clerk within the time allowed by Rule 26. If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice.

(b) ***Jurisdiction of appellate court.*** The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal.

(c) ***Who must file notice.*** A party who seeks to alter the trial court's judgment or other appealable order must file a notice of appeal. Parties whose interests are aligned may file a joint notice of appeal. The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.

(d) **Contents of notice**. The notice of appeal must:

(1) identify the trial court and state the case's trial court number and style;

(2) state the date of the judgment or order appealed from;

(3) state that the party desires to appeal;

(4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case

the notice must state that the appeal is to either of those courts;

(5) state the name of each party filing the notice;

(6) in an accelerated appeal, state that the appeal is accelerated; and

(7) in a restricted appeal:

(A) state that the appellant is a party affected by the trial court's judgment but did not participate–either in person or through counsel–in the hearing that resulted in the judgment complained of;

(B) state that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and

(C) be verified by the appellant if the appellant does not have counsel.

(e) ***Service of notice; copy filed with appellate court.*** The notice of appeal must be served on all parties to the trial court's final judgment or, in an interlocutory appeal, on all parties to the trial court proceeding. A copy of the notice of appeal must be filed with the appellate court clerk.

(f) ***Amending the notice.*** An amended notice of appeal correcting a defect or omission in an earlier filed notice may be filed in the appellate court at any time before the appellant's brief is filed. The amended notice is subject to being struck for cause on the motion of any party affected by the amended notice. After the appellant's brief is filed, the notice may be amended only on leave of the appellate court and on such terms as the court may prescribe.

(g) ***Enforcement of judgment not suspended by appeal.*** The filing of a notice of appeal does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless:

(1) the judgment is superseded in accordance with Rule 24, or

(2) the appellant is entitled to supersede the judgment without security by filing a notice of appeal.

25.2 Civil Cases – Appeal By Permission

(a) ***Petition for permission to appeal.***

(1) To request permission to appeal an interlocutory order that is not otherwise appealable as of right in accordance with Section 51.014(d)-(f) of the Civil Practice and Remedies Code, any party to the trial court proceeding must file a petition for permission to appeal with the clerk of the appellate court that has appellate jurisdiction over the action.

(2) The petition must be filed not later than the 10th day after the date a district court signs a written order granting permission to appeal. The appellate court may extend the time to file the petition if within 15 days after the deadline for filing the petition, the petitioner:

(A) files the petition in the appellate court, and

(B) files in the appellate court a motion complying with Rule 10.5(b)

(b) ***Contents of petition; service; response or cross-petition***

(1) The petition must:

(A) identify the trial court and state the case's trial court number and style;

(B) give a complete list of all parties to the trial court proceeding and the names and addresses of all trial and

appellate counsel;

(C) identify the district court's order granting permission to appeal by stating the date of the order and attaching a copy of the order to the petition;

(D) state that all parties agree to the district court's order granting permission to appeal;

(E) identify the written order sought to be appealed by stating the date of the order and attaching a copy of the order to the petition;

(F) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.

(2) The petition must be served on all parties to the trial court proceeding.

(3) If any party timely files a petition, any other party may file a response or a cross-petition not later than 7 days after the initial petition is served. Any response or cross-petition must be served on all parties to the trial court proceeding.

(c) ***Form of papers; number of copies:***

All papers must conform to Rule 9. Except by the appellate court's permission, a petition, response, or cross-petition may not exceed 10 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition. An original and 3 copies must

be filed unless the appellate court requires a different number by local rule or by order in a particular case.

(d) ***Submission of petition; appellate court's order.*** Unless the court of appeals orders otherwise, the petition and response or cross-petition will be submitted to the appellate court without oral argument. A copy of the appellate court's order granting or denying permission to appeal, dismissing the petition, or otherwise directing the parties to take further action, must be served on all parties to the trial court proceedings. No motion for rehearing may be filed.

(e) ***Grant of petition; prosecution of appeal***

(1) Within 10 days after the entry of the appellate court's order granting permission to appeal, in order to perfect an appeal under these rules, any party to the trial court proceeding must file a notice of accelerated appeal with the district clerk and the clerk of the appellate court in conformity with Rule 25.1 together with a docketing statement as provided in Rule 32. The provisions of Rule 26.3 apply to such a notice.

(2) After perfection of the appeal, the appeal may be prosecuted in the same manner as any other accelerated appeal.

[Alternative (e)]

(e) ***Grant of petition; prosecution of appeal***

(1) Within 10 days after the entry of the order granting permission to appeal, any party to the trial court proceeding must:

(A) file a notice of accelerated appeal with the district clerk to perfect the appeal,

(B) file with the clerk of the court of appeals a copy of the notice of accelerated appeal and a docketing statement in accordance with Rule 32, and

(C) pay all required fees

(2) After perfection of the appeal, the appeal may be prosecuted in the same manner as my other accelerated appeal.

25.3 Criminal Cases.

Rule 29 Orders Pending Interlocutory Appeal in Civil Cases.

Rule 29.5 Further Proceedings in Trial Court.

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case. Unless prohibited by statute, the trial court ~~and~~ may make further orders, including one dissolving the order appealed from and, unless prohibited by statute, the court may proceed with a trial on the merits. But the court must not make an order that:

(a) is inconsistent with any appellate court temporary order; or

(b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal

COMMENT to 2004 change. Rule 29.5 is amended to conform to Sections 51.014 (b), (c) and (e) of the Civil Practice and Remedies Code.

Memorandum

To: SCAC Members
From: William V. Dorsaneo, III
Re: Proposed Amendments to Appellate Rule 28
Date: March 2, 2005

For the last several months the Advisory Committee and the Appellate Rules Subcommittee have been working on accelerated appeals. During this process, the committee has tentatively approved a draft of a permissive appeal provision and directed the subcommittee to incorporate the draft into a revised Appellate Rule 28. During this process the subcommittee has attempted to deal with other problems in the appellate rules concerning accelerated appeals, particularly problems caused by Texas statutes that must be read together with Rule 28. This memorandum primarily addresses other problems and concludes with a draft proposal for revision of Appellate Rule 28.

Based on my review of various statutory lists and of the statutes themselves, accelerated or expedited review is provided for in a number of different statutes. Many of the statutes, like the general interlocutory appeal statute contained in Section 51.014 of the Civil Practice and Remedies Code,

provide for an interlocutory appeal of an interlocutory order, leaving the appellate procedural details to the Appellate Rules. See C.P.R.C. § 15.003(b) (interlocutory appeal may be taken" of certain venue orders "under the procedures established for interlocutory appeals") Fam. C. § 6.507 ("An order under this subchapter, except an order appointing a receiver, is not subject to interlocutory appeal"); R.C.S. Art. 4447 cc (allowing "interlocutory appeal to an appropriate appellate court" of order requiring disclosure of environmental, health and safety audit); Nat. Res.C. § 85.253 (allowing appeal of "order granting or refusing" injunctive relief including "temporary restraining order" or "granting or overruling" "motion to dissolve temporary restraining order" "or other form of injunctive relief"); C.P.R.C. § 26.051 (allowing appeal of order denying plea to jurisdiction asserting that an agency of the state has exclusive or primary jurisdiction, as part of an appeal of a class certification order) Gov. C. § 1205.068 (making certain orders and "the judgment" appealable under "the rules of the supreme court for accelerated appeals in civil cases").

Other statutes, which deal with accelerated appeals of final orders, specifically embrace the procedures for an accelerated appeal under the Texas Rules of Appellate Procedure with or without embellishment. See Fam. C. § 109.002 ("The procedures for an accelerated appeal under the

Texas Rules of Appellate Procedure apply to an appeal in which termination of the parent-child relationship is in issue"); Fam. C. § 263.405 ("An appeal of a final order rendered under this subchapter is governed by the rules of the Supreme Court for accelerated appeals in civil cases and the procedures provided by this section.") At least one statute provides more vaguely that a party is "entitled to an expedited appeal," without explaining what that means. See Fam. C. § 262.112 (allowing "expedited appeal" of order that child may not be removed from child's home by Department of Protective and Regulatory Services).

Several statutes provide their own fast track timetables. See Health & Safety Code § Safety Code 574.070(a) ("[a]n appeal from an order requiring court ordered mental health services" must be filed "not later than the 10th day after the date on which the order is signed"); Health & Safety Code § 81.191(a) ("[a]n appeal from an order for the management of a person with a communicable disease . . ." must be filed "not later that the 10th day after the date on which the order is signed"); Elec. C. § 232.015 (acceleration of appeal in contests of general or special elections may be accelerated by the "trial or appellate court" "in a manner consistent with the procedures prescribed by Section 232.014").

Appellate Rule 28 does not adequately deal with many of these statutes or other ones, which suggest or direct the appellate courts to give "precedence" or "priority" to certain classes of cases. For example the only final order mentioned in Appellate Rule 28 is an order in a quo warranto proceeding (see T.R.A.P. 28.2).

The last several conference calls held by the Appellate Rules Subcommittee have yielded the conclusion, if not the consensus, that Appellate Rule 28.1 should comprehensively apply to all types of accelerated, expedited or fast track appeals, without listing all of the statutes in the rule. Based on these conference calls, I proposed the following language for inclusion in Rule 28's first sentence.

> Appeals from interlocutory orders, when allowed as of right by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and all appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed are accelerated appeals.

Appeals that are merely given "priority" or "precedence" are not mentioned in the proposed revision because this kind of general statutory language seems to be precatory, at least in the view of many courts, at least when it is not accompanied by stronger statutory language. Also, these statutes do not seem to be causing any trouble, although at last some appellate judges seem troubled by them.

Another alternative would be to list some of the more troublesome statutes in the rule, such as Family Code provisions accelerating appeals from final judgments in termination cases. For example, specific reference could be made in the sentence to "appeals in a suit in which termination of the parent-child relationship is in issue as provided in Section 109.002 of the Texas Family Code and appeals of final orders as provided in subchapter E of Chapter 203 of the Texas Family Code. . ."

After defining what appeals are covered by Appellate Rule 28, I believe that a majority of the subcommittee concluded that Appellate Rule 28 should be drafted to eliminate as many of the statutory difficulties as possible. I drafted the following language to accomplish this goal.

> Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines.

This language can be softened by moving the language "regardless of any statutory deadlines" to a comment or eliminating it entirely, although that will make the sentence less clear to some readers. The other and opposite alternative would be something like the following.

> Unless otherwise provided by statute, accelerated appeals are perfected by the filing of a notice of appeal in compliance with Rule 25, within the time allowed by Rule 26.1(b) or as extended as provided in Rule 26.3.

If this second alternative is ultimately adopted, I believe that the first sentence of proposed Appellate Rule 28.1 contained in this memorandum should be revised to expressly include termination cases as suggested above. I also believe that a detailed comment should be written to accompany the rule because this alternative merely advises parties that the statutes take a variety of approaches to acceleration.

Finally, the last sentence of Proposed 28.1(a) (or perhaps the first sentence of 28.1(b)) should state:

> Filing a motion for new trial, any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

Rule 28. Accelerated Appeals in Civil Cases

28.1 Civil Cases - Appeal As of Right

Alternative One

(a) **Perfection of Appeal**. Appeals from interlocutory orders, when allowed as of right by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and all appeals required by law to be filed or perfected within less than thirty days after the date of the order or judgment being appealed, are accelerated appeals. Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3, regardless of any statutory deadlines. Filing a motion for new trial , any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

Alternative Two

(a) **Perfection of Appeal.** Appeals from interlocutory orders, when allowed as of right by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, including appeals in a suit in which termination of the parent-child relationship is in issue as provided in Section 109.002 of the Texas Family Code and appeals of final orders as provided in Section 109.002 of the Texas Family Code and appeals of final orders as provided in subchapter E of Chapter 203 of the Texas Family Code, are accelerated appeals. Unless otherwise provided by statute, accelerated appeals are perfected by the filing of a notice of appeal in compliance with Rule 25, within the time allowed by Rule 26.1(b) or as extended as provided in Rule 26.3. Filing a motion for new trial, any other posttrial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.

(b) **Further Trial Court Proceedings.** In nonjury proceedings, the trial court need not, but may – within 30 days after the order is signed – file findings of fact and conclusions of law. In a quo warranto proceeding, the trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure Rule 329(a)-(b) until 50 days after the judgment is signed. If not determined by signed written order within that period, the motion for new trial will be deemed overruled by operation of law on expiration of that period.

(c) **Record and Briefs.** In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn an uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35 and 38.

28.2 Civil Cases – Appeal By Permission

(a) Petition for permission to appeal.

(1) To request permission to appeal an interlocutory order pursuant to Section 51.014(d)-(f) of the Civil Practice and Remedies Code, a

party to the trial court proceeding must file a petition for permission to appeal with the clerk of the appellate court that has appellate jurisdiction over the action.

(2) The petition must be filed not later than the 10th day after the date a trial court signs a written order granting permission to appeal. The appellate court may extend the time to file the petition if, within 15 days after the deadline for filing the petition, the petitioner:

(A) files the petition in the appellate court, and

(B) files in the appellate court a motion complying with Rule 10.5(b)

(b) Contents of petition; service; response or cross-petition

(1) The petition must:

(A) identify the trial court, and trial judge, and state the case's trial court number and style;

(B) list the names of all parties to the trial court proceeding and the names, addresses and telefax numbers of all trial and appellate counsel;

(C) identify the district court's order granting permission to appeal by stating the title and date of the order and attaching a copy of the order to the petition;

(D) state that all parties agree to the district court's order granting permission to appeal;

(E) identify the written order sought to be appealed by stating the title and date of the order and attaching a copy of the order to the petition;

(F) state concisely the issues or points presented, the facts necessary to understand the issues or points presented, the reasons why the

order complained of involves a controlling question of law as to which there is substantial ground for difference of opinion, why an immediate appeal may materially advance the ultimate termination of the litigation, and the relief sought.

(2) The petition must be served on all parties to the trial court proceeding.

(3) If any party timely files a petition, any other party may file a response or a cross-petition not later than 7 days after the initial petition is served. Any response or cross-petition must be served on all parties to the trial court proceeding.

(c) **Form of papers; number of copies:**

All papers must conform to Rule 9. Except by the appellate court's permission, a petition, response, or cross-petition may not exceed 10 pages, exclusive of pages containing the identity of parties and counsel, any table of contents, any index of authorities, the issues presented, the signature and proof of service and the accompanying documents required to be attached to the petition. An original and 3 copies must be filed unless the appellate court requires a different number by local rule or by order in a particular case.

(d) **Submission of petition; appellate court's order.** Unless the court of appeals orders otherwise, the petition and response or cross-petition will be submitted to the appellate court without oral argument. A copy of the appellate court's order granting or denying permission to appeal, dismissing the petition, or otherwise directing the parties to take further action, must be served on all parties to the trial court proceedings. No motion for rehearing may be filed.

(e) **Grant of petition; prosecution of appeal**

(1) Within 10 days after the signing of the appellate court's

order granting permission to appeal, in order to perfect an appeal under these rules, any party to the trial court proceeding may file a notice of accelerated appeal with the district clerk and the clerk of the appellate court in conformity with Rule 25.1 together with a docketing statement as provided in Rule 32. The provisions of Rule 26.3 apply to such a notice.

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as any other accelerated appeal.

[Alternative (e)]

(e) **Grant of petition; prosecution of appeal**

(1) Within 10 days after the signing of the order granting permission to appeal, any party to the trial court proceeding must:

(A) file a notice of accelerated appeal with the district clerk to perfect the appeal,

(B) file with the clerk of the court of appeals a copy of the notice of accelerated appeal and a docketing statement in accordance with Rule 32, and

(C) pay all required fees

(2) After perfection of the appeal, the appeal shall be prosecuted in the same manner as my other accelerated appeal.

Lisa Hobbs

From: Lisa Hobbs
Sent: Thursday, April 28, 2005 3:33 PM
To: aalbright@mail.law.utexas.edu; adawson@brsfirm.com; andy.harwell@co.mclennan.tx.us; annedallas@aol.com; bmilfelt@edwardsfirm.com; brown@wrightbrownclose.com; bwolbrueck@wilco.org; cac@obt.com; clopez0826@yahoo.com; cortelln@haynesboone.com; cwatson@lockeliddell.com; d.b.jackson@charter.net; David Gaultney; dpeeples@co.bexar.tx.us; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; Jan Patterson; jane.bland@1stcoa.courts.state.tx.us; jeff.boyd@tklaw.com; jeffersl@haynesboone.com; juan.hinojosa@senate.state.tx.us; kent_sullivan@justex.net; Leigh Ann Bunker (Tipps' sect.); levi_benton@justex.net; Lisa Hobbs; lsoules@soulesandwallace.com; mahatchell@lockeliddell.com; martinj@tklaw.com; Nathan Hecht; och@atlashall.com; pfs@waymark.net; psbaron@austin.rr.com; pschenkkan@gdhm.com; rduggins@canteyhanger.com; rhpem@aol.com; richard@momnd.com; rmeadows@kslaw.com; rmun@scotthulse.com; rvaladez@shelton-valadez.com; Sarah Duncan; Scott Brister; ssusman@susmangodfrey.com; stephen.tipps@bakerbotts.com; stephen.yelenosky@co.travis.tx.us; Terry Jennings; tjacks@mithoff-jacks-aus.com; Tom Gray; tom_lawrence@jp.co.harris.tx.us; tracy_christopher@justex.net; Wallace Jefferson; wdorsane@mail.smu.edu; wdorsaneo@gibsondunn.com; wedwards@edwardsfirm.com; whall@fulbright.com
Cc: 'Babcock, Chip'; 'Senneff, Angie'
Subject: SCAC: Subcommittee Report on TRCP 223

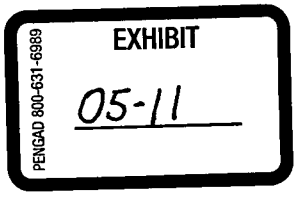
Here is a report from Paula Sweeney on Texas Rule of Civil Procedure 223:

Pasted below is the most current work product of our subcommittee on the shuffle rule for discussion by the full committee, as I think we would benefit from full committee input at this stage. It is not a recommendation, but our work in progress, which is approaching consensus. I also expect that there will be a request from Judge Peeples that the committee vote to abolish the rule in its entirety.

MOST RECENT SHUFFLE RULE PROPOSAL:

"After assignment to a particular court, and prior to beginning of the voir dire examination, any party or attorney may request a jury shuffle. The judge or clerk will shuffle the names of all members of the assigned jury panel in the case by computer, manually, or by other process of random selection. The names shall then be transcribed on the jury list from which the jury is to be selected to try such case, in the order randomly selected. There shall be only one shuffle in each case."

This item will not be posted on the website before the meeting next week, but I will bring hard copies to the meeting.



Lisa Hobbs

From: Senneff, Angie [asenneff@jw.com]
Sent: Wednesday, May 04, 2005 11:04 AM
To: aalbright@mail.law.utexas.edu; adawson@brsfirm.com; andy.harwell@co.mclennan.tx.us; annedallas@aol.com; bmilfelt@edwardsfirm.com; brown@wrightbrownclose.com; bwolbrueck@wilco.org; cac@obt.com; clopez0826@yahoo.com; cortelln@haynesboone.com; cwatson@lockeliddell.com; d.b.jackson@charter.net; david.gaultney@courts.state.tx.us; dpeeples@co.bexar.tx.us; ecarlson@houston.rr.com; ecarlson@stcl.edu; fgilstrap@hillgilstrap.com; jan.patterson@3rdcoa.courts.state.tx.us; jane.bland@1stcoa.courts.state.tx.us; jeff.boyd@tklaw.com; jeffersl@haynesboone.com; juan.hinojosa@senate.state.tx.us; kent_sullivan@justex.net; Leigh Ann Bunker (Tipps' sect.); levi_benton@justex.net; lisa.hobbs@courts.state.tx.us; lsoules@soulesandwallace.com; mahatchell@lockeliddell.com; martinj@tklaw.com; nathan.hecht@courts.state.tx.us; och@atlashall.com; pfs@waymark.net; psbaron@austin.rr.com; pschenkkan@gdhm.com; rduggins@canteyhanger.com; rhpem@aol.com; richard@momnd.com; rmeadows@kslaw.com; rmun@scotthulse.com; rvaladez@shelton-valadez.com; sarah.duncan@courts.state.tx.us; scott.brister@courts.state.tx.us; ssusman@susmangodfrey.com; stephen.tipps@bakerbotts.com; stephen.yelenosky@co.travis.tx.us; terry.jennings@1stcoa.courts.state.tx.us; tjacks@mithoff-jacks-aus.com; tom.gray@courts.state.tx.us; tom_lawrence@jp.co.harris.tx.us; tracy_christopher@justex.net; wallace.jefferson@courts.state.tx.us; wdorsane@mail.smu.edu; wdorsaneo@gibsondunn.com; wedwards@edwardsfirm.com; whall@fulbright.com
Cc: Lisa Hobbs
Subject: SCAC - forwarded from Judge Peeples FW: rule 223

Please see Judge Peeples' email below regarding the jury shuffle.

Abolish Jury shuffle?
Vote: Yes-12
No-13

Angie Senneff
Legal Secretary to
Chip Babcock and Larry Carbo

Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010
713-752-4384
713-752-4221 (fax)

-----Original Message-----
From: dpeeples@bexar.org [mailto:dpeeples@bexar.org]
Sent: Wednesday, May 04, 2005 11:00 AM
To: Senneff, Angie
Subject: rule 223

Angie:

I e-mailed this to the committee mailing list, but the message came back that many of them were undeliverable. Could you please forward this to the committee? Thanks.

David Peeples

Dear committee members:

When we discuss the jury shuffle at the upcoming SCAC meeting, I intend to suggest and argue that the supreme court should do away with the shuffle entirely rather than continue along the lines the subcommittee has been discussing (i.e. try to mesh the shuffle and the questionnaire, etc.). Here is why I think Texas should abolish the shuffle.

1. The policy reasons are: (1) Our system already provides randomness in the central jury room, and that is all that any litigant is entitled to.

(Incidentally, I favor doing whatever needs to be done to ensure randomness at the front end of the process in all 254 counties.) (2) The shuffle wastes valuable court and juror time. The time wasted is especially out of proportion in short cases. (3) And it gives litigants a tool for committing Batson-like violations, though I doubt that this happens much in civil cases. I realize that Batson deals with strikes, not shuffles. But the two areas are close kin, and legal history is full of doctrines that were transplanted from one area to another. I would not want that to happen in a Texas case.

2. Perhaps all this is why Texas appears to be the only jurisdiction in the country (maybe the world) that gives litigants the right to a shuffle. I contacted the National Center for State Courts and asked about this. They said their information is that Texas stands alone on this, which is why it is called "the Texas jury shuffle." I call your attention to two articles.
Michael M. Gallagher, Abolishing the Texas Jury Shuffle, 35 St. Mary's L. J. 303 (2004) and Donna M. Bobbitt, The Texas Jury Shuffle: A Question of Constitutionality, 57 Tex. B. J. 596 (1994). Each of these articles says Texas is the only state that has a shuffle as of right. On this issue, may I say that if Texas is wise and correct on this and everyone else is wrong, I could understand our continuing to grant an absolute right to a shuffle.
But I don't think that on this issue everyone is out of step but Texas.

3. The federal courts do not have the shuffle. I verified this with a friend of mine in the federal system. In 1968 Congress enacted the Jury Selection and Service Act, amended in 1978, now found at 28 U.S.C. §§ 1861-1869. This statute deals comprehensively with how jurors are identified and summoned and then ultimately picked. Section 1870 appears to give the district judge discretion in dealing with a challenge to the array ("All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court."), but I have not had time to see what the cases and treatises say about this or whether it amounts to a discretionary shuffle. I am told, however, that in my part of the state it is never requested. From what I have been able to learn, litigants can argue that the randomness procedures were not followed and therefore they should have some kind of relief, but I just have not had time to check further. In any event, there is no right to a shuffle in the federal system.

4. In closing, let me add to what I said parenthetically in paragraph one above. We need to study and make sure that there are random procedures in all of our courts. Randomness in calling and empaneling jurors is fundamental, and I want to be sure it is guaranteed. But once there is randomness in the central jury room, the shuffle in the courtroom does nothing to make the panel even more random. All it does is allow the litigant who likes the spares better than the first twenty-four to "improve"
-- from his or her partisan viewpoint -- the sequence of the individuals who were already randomly selected.

To summarize, we need to discuss this and then recommend to the court that rule 223 be amended to delete the right to a shuffle in court. Of course, rule 223 still needs to be rewritten and modernized.

I look forward to seeing everyone on Friday.

David Peeples

JUDGE TRACY CHRISTOPHER
295TH CIVIL DISTRICT COURT
301 FANNIN
HOUSTON, TEXAS 77002
(713) 755-5541

COP

April 27, 2004

Honorable Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711-2248

Re: Rule 223 of the Texas Rules of Civil Procedure

Dear Justice Hecht:

We currently have our individual juror lists in Harris County printed out by computer. With a push of a button, our computer will "shuffle" the names on the list and reprint a new jury list. Unfortunately such a shuffle does not comply with a literal reading of Rule 223.

We are also in the process in Harris County of scanning our juror information cards into a computer. Once that is done, we would also be able to shuffle the jury list and then rearrange the juror information cards in the computer for quick reprinting.

As you know, an old fashioned shuffle can take 45 minutes to an hour to complete. Our jurors wait patiently (or not) for the process to be completed. The computerized system will allow a shuffle to be completed much more quickly.

The judges in Harris County would like to request a change to the language of Rule 223 to allow for the computer shuffle. Thank you for considering this.

Tracy Christopher

Tracy Christopher

LEVI J. BENTON
JUDGE, 215TH DISTRICT COURT
COURTHOUSE
HOUSTON, TEXAS 77002

TELEPHONE
(713) 755-6382

February 21, 2005

The Honorable Nathan L. Hecht
Associate Justice
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711-2248

Re: Jury Shuffle under ***TRCP*** 223

Dear Justice Hecht:

I understand that the Supreme Court Advisory Committee is scheduled to consider proposed changes to rule 223, ***Texas Rules of Civil Procedure*** when the committee meets on March 4-5, 2005. As you know, this rule gives litigants a right to shuffle the venire panel in civil matters prior to voir dire. This letter addresses why I urge the Committee to recommend abolishing the right to shuffle. These are my personal opinions. I am not speaking on behalf of the Harris County judiciary.

Obviously, litigants and all interested persons want a process that has integrity and fairness. In any given case, one litigant or the other may not like the distribution of the venire panel. The current rule permitting a shuffle after litigants have the opportunity to see the panel and/or read the demographic information about them constitutes an attack on the integrity of the entire process by which jurors are summoned. This redundant shuffle should not be necessary if we indeed have jury statutes that produce lawfully sanctioned juries. My point stated differently is that:

1. We presume (as we must) that the jury selection statutes are constitutional;
2. We presume that the state and county agents charged with implementing and operating under the jury statutes on a daily basis do so in a lawful manner; and
3. The current process of randomly selecting a jury satisfies the constitutional guarantee that every litigant's claim will be decided by a jury of his or her peers. If we are not satisfied that the current system of jury selection meets all constitutional requirements, then we should address those root problems rather than continue to permit a redundant shuffle that does not address problem 1 or 2 above if they are problems and certainly does not cure those problems.

The Honorable Nathan L. Hecht
Associate Justice
Texas Supreme Court

Whether requested by a civil plaintiff or a defendant, a jury shuffle has enormous potential to discredit the work judges, lawyers and others do to bring a sense of fairness to the administration of justice. This potential blight raises its ugly head when the professionals or the relative low income earners or lesser educated are shuffled from back to front or vice versa and one of the litigants leaves the courthouse wondering whether it was the maneuvering of what was purportedly a random draw of citizens in a venire panel or whether it was the evidence admitted during the course of the trial that was the impetus for the result reached by the jury.

When we deal with the jury shuffle or any jury matter our focus should be on the petit jury statutory scheme and the integrity of the processes by which the statutory scheme is implemented and executed on a daily basis. (I intend to express my observations about our petit jury statutory scheme in a letter to Chief Justice Jefferson in the next few days.) Our focus should not be on contemporizing this blight on Texas law. We will not have served our state well if we but modernize the shuffle rule to bring it into the internet age. Instead, we must kill this germ which infects Texas law for good and devote ourselves to the enactment jury rules and statutes that produce juries that reflect cross sections of all communities in the trial court's venue. Since becoming the Judge of the 215th District Court, I have had a few jury shuffles.[1] Though no explanation is demanded or required, the reasons often expressed for the shuffle relate to a desire to alter the educational and/or vocational distribution of the venire panel. The problem with those reasons is that many Texans believe there to be a correlation between race, education and vocation. Therefore, many perceive any request to shuffle as being motivated by racial or other invidious reasons. This perception is not good for the wonderful civil justice system we are honored to participate in. This perception is an unnecessary distraction to all that is good about the jury system.

This letter would not be complete if I did not also address the shuffle in criminal proceedings. Quite obviously, I recognize that we in Texas have two courts of last resort. The Supreme Court has been the leader in developments in Texas law. I profoundly hope the Court will lead the Legislature and the Court of Criminal Appeals in bringing about long needed change in this area.[2] Jury shuffles and a claimed violation of equal protection rights are almost inseparable twins whenever a reviewing court addresses the jury shuffle in criminal cases. This has been the case approximately six times since 1995 according to my very brief and limited research. Quite often, a person whose skin has been affectionately kissed by the sun, like mine, raises the complaint. Whether the reviewing court found an equal protection violation or not was not my concern. Rather, I concerned myself with the fact that the equal protection argument was a consistent theme raised whenever a complaint on appeal related to a shuffle. This argument distracts from and devalues Texas jurisprudence. It also causes distrust of our civil and criminal justice systems. It leads to the wrong impression regarding our jury selection system. The only remedy for this bad impression is to rid ourselves of the instrument which causes it. If the

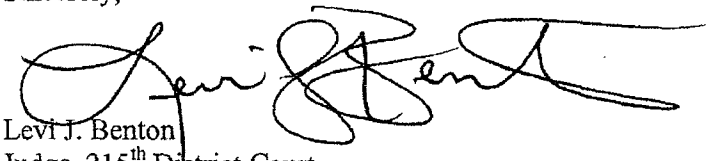
[1] I understand that we in Harris County do not maintain statistics on the number of jury shuffles.
[2] I have forwarded a copy of this letter to Judge Sharon Keller, Presiding Judge, Texas Court of Criminal Appeals.

The Honorable Nathan L. Hecht
Associate Justice
Texas Supreme Court

Supreme Court will lead by abandoning the rule in civil proceedings, perhaps we can cause the Legislature to critically look at the problems and distractions caused by the rule in criminal proceedings.[3]

I urge the Advisory Committee to send the Supreme Court a recommendation to abolish the right to a shuffle. If the Advisory Committee and/or the Court are not prepared to go that far, I hope that it will be abolished in counties that use electronic or mechanical methods of selection of persons for jury service pursuant to sec. 62.011, ***Texas Govt. Code***. If the rule is not abolished, I urge the Court to include equal protection provisions in the rule. Finally, I regret that I have other obligations that will preclude me from attending the March 4-5 meeting. Please bring my concerns and observations to the attention of the Committee. Feel free to call me if you have any questions.

Sincerely,



Levi J. Benton
Judge, 215th District Court

cc: The Honorable Wallace B. Jefferson
The Honorable Sharon Keller
Mr. Charles Babcock, Chairman, Supreme Court Rules Advisory Committee

[3] I am unaware of any appellate opinion addressing alleged equal protection violations arising from a jury shuffle in a civil matter. I have heard of such complaints being made in the trial courts. The absence of appellate complaints is not a good reason to continue to sanction this practice.

The Supreme Court of Texas

Lisa Hobbs, Rules Attorney **Direct: 512.463.6645**
201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512.463.1312 Facsimile: 512.463.1365
lisa.hobbs@courts.state.tx.us

April 12, 2005

Mr. Charles L. Babcock
Jackson Walker LLP
1401 McKinney Street, Ste. 1900
Houston, Texas 77010

Re: Proposed Amendment to Texas Rule of Civil Procedure 10

Dear Chip,

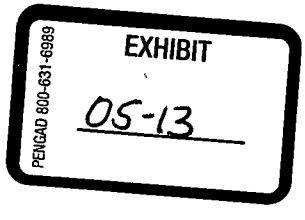
Judge Tony Lindsay of the 280th Judicial District Court in Harris County recommends amending Texas Rule of Civil Procedure 10 to require a withdrawing attorney to include in a motion to withdraw the last known phone number—in addition to the already required last known address—of a party who will be proceeding without new counsel. Judge Lindsay reports that clerks request this information in some counties as a matter of course and thinks the rules should reflect this practice. Justice Hecht asked me to refer this matter to the advisory committee for consideration.

For the committee's convenience, I attach two proposals. The first proposal simply adds two words to the current rule. The second proposal restructures the current rule and is taken from the recodification draft, which already included the telephone number in its attorney-withdrawal rule.

Kind Regards,

Lisa Hobbs

c: Justice Nathan L. Hecht
Judge Tony Lindsay



PROPOSED AMENDMENTS TO TEXAS RULES OF CIVIL PROCEDURE
RULE 10. WITHDRAWAL OF ATTORNEY

VERSION 1 ***(proposed modification underlined)***

An attorney may withdraw from representing a party only upon written motion for good cause shown. If another attorney is to be substituted as attorney for the party, the motion shall state: the name, address, telephone number, telecopier number, if any, and State Bar of Texas identification number of the substitute attorney; that the party approves the substitution; and that the withdrawal is not sought for delay only. If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and telephone number and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party. The Court may impose further conditions upon granting leave to withdraw. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.

VERSION 2 ***(from recodification draft)***

A trial court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the trial 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 mail 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 setting that the attorney knows about at the time of the 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 (1) 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 (2) and (3).