SCAC MEETING AGENDA (Second Amended)
Friday, December 11, 2015
9:00 a.m.

Location: **Texas Associations of Broadcasters**
502 E. 11th Street, #200
Austin, Texas 78701
(512) 322-9944

1. **WELCOME (Babcock)**

2. **STATUS REPORT FROM JUSTICE JEFFREY BOYD**

   Justice Boyd will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the October 2015 meeting.

3. **EX PARTE COMMUNICATIONS**

   Judicial Administration Sub-Committee Members:
   Ms. Nina Cortell - Chair
   Hon. David Peeples
   Hon. Tom Gray
   Professor Lonny Hoffman
   Hon. Bill Boyce
   Mr. Michael A. Hatchell

   (a) Proposed Rule on Certain Non-Party Communications To A Judge
   (b) SCAC Memo on Ex Parte Communications
   (c) Example Emails to Justices
   (d) Ex Parte Communications from Litigants
   (e) Survey of Court Clerks on Ex Parte Communications

4. **TEXAS RULE OF EVIDENCE 203 AND 503; PROPOSED CHANGE TO 801(e)(1)(B)**

   Evidence Sub-Committee Members:
   Mr. Gilbert "Buddy" Low - Chair
   Hon. Harvey Brown - Vice
   Hon. Levi Benton
   Prof. Elaine Carlson
   Prof. Lonny Hoffman
   Mr. Roger Hughes
   Mr. Peter Kelly
   Hon. Elsa Alcala

   (f) TRE 503(b)(1)(c)
   (g) TRE 203
   (h) TRE 801-Original
   (i) FRE 801
   (j) TRE 801-Restyled 2015
   (k) Rule 801(e)(1)
   (l) Notes of Advisory Committee on FRE 801
   (m) Low Email To Committee Members 11-3-15 re: 801

5. **TIME STANDARDS FOR THE DISPOSITION OF CRIMINAL CASES IN DISTRICT AND STATUTORY COUNTY COURTS**

166-166a Sub-Committee Members:

Hon. David Peeples - Chair
Richard Munzinger – Vice
Hon. Jeff Boyd
Prof. Elaine Carlson
Ms. Nina Cortell
Mr. Rusty Hardin
Ms. Christina Rodriguez
Mr. Carlos Soltero
Hon. Elsa Alcala

(n) Memorandum from Sub-Committee

6. **THREE-JUDGE DISTRICT COURT; and ADR AND CONSTITUTIONAL COUNTY COURT JUDGES**

Legislative Mandates Sub-Committee Members:

Mr. Jim M. Perdue, Jr., - Chair
Hon. Jane Bland
Hon. Robert H. Pemberton
Mr. Pete Schenkkan
Hon. David L. Evans
Mr. Robert L. Levy
Hon. Brett Busby
Prof. Elaine A. G. Carlson
Mr. Wade Shelton

(o) Proposed TRJA 14 - Special 3 Judge Panel (Rev'd 12-1-15)
(p) Bill Analysis for SB 455
(q) SB 455
(q-1) December 8, 2015 Rep. Schofield and Senator Creighton letter re: SB 455
(r) Rule 13. Multidistrict Litigation
(s) Redistricting Litigation
(t) Subcommittee Report

7. **PROPOSED APPELLATE RULE 57**

Appellate Sub-Committee Members:

Prof. Bill Dorsaneo – Chair
Ms. Pamela Baron – Vice
Hon. Bill Boyce
Hon. Brett Busby
Prof. Elaine Carlson
Mr. Frank Gilstrap
Mr. Charles Watson
Mr. Evan Young
Mr. Scott Stolley

(u) Proposed Appellate Rule 57
(v) SCAC Memorandum-December 2, 2015
(v-1) SCAC Memorandum-December 10, 2015

8. **RULES FOR JUVENILE CERTIFICATION APPEALS; and RULES FOR THE ADMINISTRATION OF A DECEASED LAWYER'S TRUST ACCOUNT**

Legislative Mandates Sub-Committee Members:

Mr. Jim M. Perdue, Jr., - Chair
Hon. Jane Bland
Hon. Robert H. Pemberton
Mr. Pete Schenkkan
Hon. David L. Evans
Mr. Robert L. Levy
Hon. Brett Busby
Prof. Elaine A. G. Carlson
Mr. Wade Shelton

(w) Proposed Rule Changes-Juvenile Certification
(x) SB 888 (Enrolled Bill)
(y) 2015-6-2 Bill Analysis
(z) Misc. Docket No. 15-9156
(aa) TRAP 28.4 (Accelerated Appeals in Termination Cases)
(bb) Report on SB 995-Estate Code Chapter 456 (Administration of Deceased Lawyer's Trust Accounts)

9. **CONSTITUTIONAL ADEQUACY OF TEXAS GARNISHMENT PROCEDURE**

523-734 Sub-Committee Members:

Mr. Carl Hamilton – Chair
Mr. L. Hayes Fuller – Vice
Mr. E. Rodriguez

(cc) Report on Constitutional Adequacy of Texas Garnishment Procedure w/attachment *Strickland vs. Alexander*; In the United States District Court of the Northern District of Georgia

SCAC Reception begins @ 5:30-7:30 pm
Committee Photograph to be taken @ 6:00 pm
Jackson Walker LLP
100 Congress Avenue, Suite 1100
Austin, Texas 78701

Item 3 – Ex Parte Communications

PROPOSED RULE OF JUDICIAL ADMINISTRATION 17

If a written communication is sent to and received by a judge from a non-party with respect to a case pending before the judge, then the clerk of the court or the judge must:

(a) preserve the writing among the documents in the case to which the communication is related;

(b) send a copy of the writing to all parties, if that has not already occurred; and

(c) take such other action as the court deems appropriate.

Proposed Official Comment

This rule encompasses all forms of written communications, including electronic communications. Communications "sent to" a judge are communications that are directed to a judge (individually or collectively with other judges), and the term does not include communications directed to a broad audience such as newspaper editorials, billboards, and non-specific posts on social media. Communications "received by" a judge are communications that are received *and* seen by the judge, and the term does not include communications that may have been technically received but are not seen by the judge. With respect to subsection (c), examples of actions the court might consider include (1) a letter informing the parties that they may respond to the communication, or (2) a response to the sender of the communication.

Note to the Committee:

The Subcommittee decided not to include a reference in the rule to Section 36.04 of the Texas Penal Code, but thought that the full Committee should be aware of the code provision:

(a) A person commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

15408239_5

To: Chip Babcock August 10, 2015

From: Martha Newton

Re: Research on Ex Parte Communications

I. Introduction

Last spring, while Case No. 11-0024, *In the Matter of the Marriage of J.B. and H.B.*, and No. 11-0114, *Texas v. Naylor* (the same-sex-divorce cases) were pending, the justices of the Supreme Court of Texas received numerous messages sent to the justices' Court email addresses from individuals unaffiliated with the parties to those cases. The messages urged the justices to uphold Texas's same-sex-marriage ban before the Supreme Court of the United States issued its decision in *Obergefell v. Hodges*. Examples are attached. The emails were the result of a lobbying campaign as publicized in the *Austin American-Statesman*.[1]

When the Court began receiving the emails, I was asked to research whether legal prohibitions against ex parte communications encompass the kind of messages that the justices received, and whether any legal authority dictated how the Court should respond. My research yielded no clear answer, but I have summarized it below in case the research is helpful to the Advisory Committee's work on this issue.

Additionally, our Clerk, Blake Hawthorne, contacted other appellate court clerks to inquire how courts handle communications like those received by the justices. The clerks' responses are attached. Ultimately, the Court decided to forward the emails to the Clerk's office, which stamped them as amicus letters and added them to the case files for the *J.B.* and *Naylor* cases.

II. Summary of Research on Ex Parte Communications

The rule on ex parte communications in the Texas Code of Judicial Conduct, consistent with its counterparts in the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges, prohibits a judge from even *permitting* an improper ex parte communication.[2] But unlike those other codes, the Texas rule only

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[1] Chuck Lindell, *Conservative Leader Lobbies Texas Court on Gay Marriage*, AUSTIN AM.-STATESMAN (Mar. 31, 2015, 5:20 p.m.), http://www.mystatesman.com/news/news/state-regional-govt-politics/conservative-leader-lobbies-texas-court-on-gay-mar/nkjj5/#f98723b4.3597037.735698.

[2] TEX. CODE JUD. CONDUCT, Canon 3(B)(8); MODEL CODE JUD. CONDUCT Canon 2, Rule 2.9(A) (2011); CODE CONDUCT U.S. JUDGES Canon 3(A)(4); (all prohibiting a judge from "initiat[ing], permit[ting], or consider[ing]" an improper ex parte communication).

expressly prohibits ex parte communications about the merits of a pending case between a judge and a party, an attorney, or another person involved in the case.[3]

The ABA and federal codes prohibit a broader category of communications. The ABA Model Code prohibits a judge from initiating, permitting, or considering any communication made to the judge outside the presence of the parties.[4] The listed exceptions to the general rule and the comment to the rule clarify that the general prohibition applies to communications from a person unrelated to the case.[5] The applicable rule in the federal code is virtually identical to its ABA counterpart.[6] In addition, the ABA and federal codes state expressly that "[i]f a judge receives an unauthorized ex parte communication *bearing on the substance of a matter*, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested."[7]

A 1993 opinion of the State Bar Judicial Ethics Committee also advises that ex parte communications be disclosed, although the specific question that the committee addressed describes a situation that may be distinguishable from the facts here: "What is a judge's ethical obligation upon receiving *from a litigant* a letter which attempts to communicate privately to the judge *information concerning a case* that is or has been pending?"[8] The Committee outlines a three-step process: (1) give the letter to the clerk to be put in the case file; (2) send a copy to all parties; and (3) send a letter to the communicant, with a copy to the parties, stating that the communication was improper, that the judge will take no action in response to it, and that the letter has been sent to all

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[3] *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8) ("A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between a judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding."); Misc. Docket No. 93-0132 (June 30, 1993) (adopting Canon 3(B)(8) in its current form).

[4] MODEL CODE JUD. CONDUCT Canon 2, Rule 2.9(A) ("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows . . . .").

[5] *See id.* Rule 2.9(A)(2) (a judge may obtain the written advice of a disinterested expert on the law); Rule 2.9(A)(3) (a judge may confer with court staff); Rule 2.9 cmt. 3 ("The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.").

[6] CODE CONDUCT U.S. JUDGES Canon 3(A)(4) ("Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.").

[7] *Id.* (emphasis added); *see* MODEL CODE JUD. CONDUCT Canon 2, Rule 2.9(B) (virtually identical language).

[8] Comm. on Jud. Ethics, State Bar of Tex., Op. 154 (1993) (emphasis added).

parties.[9] Here, the emails received by the Court were from strangers to the case, and they merely expressed the sender's personal view of how the cases should be decided and when. Furthermore, like the provisions of the ABA and federal codes, the 1993 opinion seems to contemplate a single communication, not a hundred of them.

In sum, while some legal authorities define ex parte communications broadly enough to include communications from a person unrelated to the case at issue, I did not find any authority distinguishing between a communication containing real information that may bear on the outcome of a case and a communication that merely expresses the communicant's personal view of how a case should come out. Similarly, while authorities counsel that judges should disclose ex parte communications to the parties, they do not distinguish between a judge's receipt of a single message and a judge's receipt of numerous messages.

[9] *See id.*; *see also Youkers v. State*, 400 S.W.3d 200, 204-07 (Tex. App.—Dallas 2013, pet. ref'd) (rejecting the defendant's challenge to an adverse ruling based on the defendant's allegation of bias stemming from the TC's receipt of a private Facebook message from the victim's father where, after receiving the message, the TC followed the protocol outlined in Judicial Ethics Committee Opinion No. 154).

[redacted]

From: Laura Branson <Laura@haulmarkservices.com>
Sent: April 01, 2015 10:24 AM
To: [redacted]
Subject: Marriage in Texas - One man One woman

To all,

The Supreme Court of the United States will hear oral arguments on April 28 to determine whether homosexuals have a Constitutional right to marry. Texas' forceful voice in favor of historic and Biblical marriage **must be heard before April 28th**.

I expect that this Court would rule and affirm the constitutionality of the Texas Constitution Marriage Amendment, Article 1, Section 32, which provides**, "Marriage in this state shall consist only of the union of one man and one woman."**

Sincerely,

Laura Branson

Haulmark Services, Inc.
O 281-345-0911
F 281-345-3787

[redacted]

From: cfnjapan@juno.com
Sent: March 30, 2015 4:39 PM
To: [redacted]
Subject: The Texas Marriage Amendment

Dear Members of the Texas Supreme Court,

Our family and families in Texas recognize the **AUTHORITY that you have** as Members of the Texas Supreme Court, and we appreciate how you have faithfully used that power.

Together with you we also recognize that that **Authority was given to you by God Himself**, from whom all authority comes. (Romans 13:1) We trust that you will vote to affirm the decision of the Texas 5th Court of Appeals regarding the Texas Constitution Marriage Amendment being constitutional under the U.S. Constitution. Your affirmation in this case ("J B" No. 11-0024) will be in line with God's Word and with truth.

The Source of Authority has clearly spoken that **homosexuality is**

"shameful,
immoral,
ungodly,
unrighteous
inexcusable idolatry,
suppresses truth,
exchanges the truth of God for a lie,
darkens the mind and heart,
dishonors the body,
worships the creature rather than God,
and receives the penalty of its error". (Romans 1:18-32)

As you can see, "**the judgement of God is according to truth** against those who **practice** such things...or who **approve of those** who practice them". (Romans 2:2 and 1:32)

So we all encourage you to take a stand and to vote **IN FAVOR of the Texas Marriage Amendment**, which recognizes that Marriage is only between one man and one woman. As you already recognize, Marriage is embedded by God into creation, and people can no more change the law of marriage than they can change the law of gravity.

We trust you, and we thank you for your diligence in upholding truth.

With appreciation,

Charles and Dianne Gyurko

[redacted]

From: Brenda Sumner <brenda.sumner@sbcglobal.net>
Sent: March 30, 2015 1:30 PM
To: [redacted]
Subject: Texas Constitution Marriage Amendment

Importance: High

Dear madam;

I encourage the Texas Supreme Court to demonstrate the same courage displayed by the Texas Fifth Court of Appeals and declare, without equivocation, that the Texas Constitution Marriage Amendment is constitutional under the United States Constitution.

PLEASE rule in favor of the Texas Constitution Marriage Amendment.

Thank you and God bless America!!!

Sincerely,

Brenda Sumner

[redacted]

From: Wkbart@gmail.com
Sent: March 30, 2015 1:15 PM
To: [redacted]
Subject: Texas Constitution of Marriage

As a father of 3 and grandfather of 9, I have experienced first hand the value of a husband and a wife working together and bringing the separate perspective and qualities of the male and female to the family relationships. Marriage between a man and a women is ordained if God. Please help insure that Texas does its part to preserve and protect this institution that is so critical to the survival of our society.
Sincerely,
WK Barton

Sent from my iPad

[redacted]

From: [redacted]
Sent: April 22, 2015 10:43 AM
To: [redacted]
Subject: FW: Should Homosexuals have the Constitutional Right to Marry

Follow Up Flag: Follow up
Flag Status: Flagged

From: [redacted]
Sent: Wednesday, April 22, 2015 8:46 AM
To: [redacted]
Subject: FW: Should Homosexuals have the Constitutional Right to Marry

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From: Acbhhw@aol.com [mailto:Acbhhw@aol.com]
Sent: Thursday, April 09, 2015 11:27 AM
To: [redacted]
Cc: acbhhw@aol.com
Subject: Should Homosexuals have the Constitutional Right to Marry

Your Honor:

It has come to my attention that you are set to hear Oral Arguments by April 28th on whether homosexuals have a Constitutional right to marry.

I would like to submit to you that as a citizen of the State of Texas, I am strongly opposed to violating our Judean-Christian principals that Marriage is a God-ordained institution (Genesis 2:24) and not a “man-made decree”. My view is that marriage is this state shall consist only of the union of one man and one woman.

I am not an attorney and therefore can not quote law, but I do believe in principles. Marriage is not a fundamental right, and therefore homosexuals should not demand this. I believe that there are other avenues that may be available to them, such as a Civil Union, but not Marriage.

Please review the Decision of the Texas Fifth Court of Appeals on this matter as well as the decision of the Alabama Supreme Court, under the leadership of Chief Justice Roy Moore. It appears that these decisions are clear and appropriate.

I am trusting in your wisdom in this matter.

Sincerely,

Ms. Audrey C. Wahl

[redacted]

[redacted]

EX PARTE COMMUNICATIONS FROM LITIGANTS
Opinion No. 154 (1993)
State Bar of Texas, Judicial Section, Committee on Judicial Ethics

QUESTION: What is a judge's ethical obligation upon receiving from a litigant a letter which attempts to communicate privately to the judge information concerning a case that is or has been pending?

ANSWER: Canon 3A(5)* provides that a judge shall not permit or consider improper ex parte or other private communication concerning the merits of a pending or impending judicial proceeding. (Canon 10** provides that the word "shall" when used in the Code means compulsion.) Judges may comply with Canon 3A(5)* by doing the following: 1) Preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk's file. 2) Send a copy of the letter to all opposing counsel and pro se litigants. 3) Read the letter to determine if it is proper or improper; if improper, the judge should send a letter to the communicant, with a copy of the judge's letter to all opposing counsel and pro se litigants, stating that the letter was an improper ex parte communication, that such communication should cease, that the judge will take no action whatsoever in response to the letter, and that a copy of the letter has been sent to all opposing counsel and pro se litigants.

Canon 3A(4)* provides that a judge shall accord to every person who is legally interested in a proceeding the right to be heard according to law. Consideration of an ex parte communication would be inconsistent with Canon 3A(4),* because it would not accord to other parties fair notice of the content of the communication, and it would not accord to other parties an opportunity to respond. Canon 3*** provides that the judicial duties of a judge take precedence over all the judge's other activities. A judge's consideration of a controversy that is not brought before the court in the manner provided by law would be inconsistent with the judicial duty to determine "cases" and "controversies" (Art. 3, Constitution of the United States). A judge has no authority or jurisdiction to consider, or to take any action concerning, out-of-court controversies. A judge's consideration of a controversy that is not properly before the court could give the appearance of inappropriate action under color of judicial authority, which would tend to diminish public confidence in the independence and impartiality of the judiciary, rather than promote it as Canon 1 and Canon 2 require a judge to do.

Finally, a judge should try to minimize the number of cases in which the judge is disqualified. If a judge permits a communication to the judge concerning any matter that may be the subject of a judicial proceeding, that could necessitate disqualification or recusal.

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* Now see Canon 3B(8). ** Now see Canon 8B(1). *** Now see Canon 3A.

Survey of Court Clerks on Ex Parte Communications	
Court	**Response**
Alaska Supreme Court	We don't have a written policy or rule, but I think if the justices get letters about pending cases, they forward them to me for a response. I don't think they get many emails like that but I'm sure they would forward those, too.
Australia - High Court of Australia and all appellate court in Australia	Apropos your questions below, I advise that the situation here is not dissimilar to what I understand to be the situation in the USA. Members of the public sometimes write to the High Court or particular justices about a pending matter, but the justices will never respond. Any paper communication which somehow gets to their chambers may be passed to me, but might just as well be simply 'binned' by the receiving justice. Rarely, some person will work out a justice's email address and email him or her, but again no justice would respond to such a communication. Most of the communications that are passed to me from a receiving justice deserve no response at all from me, while I might occasionally write to a sender pointing out the inappropriateness of communicating with justices on pending cases. There are no written policies or rules—but the situation is clear. The situation would be the same in all of the appellate courts in Australia. You may be interested in a letter sent recently by the Chief Justice of Australia to the Chair of the Council of Australian Law Deans about incidents in which legal academics attempted to provide to the High Court copies of papers relating to matters pending before the Court. A copy is attached; the letter is in the public arena down here, so you would be welcome to share it if you wish. The CJ's views are reasonably clear, I think. (Letter discusses email sent by academic to the Court and concludes "No doubt the author of the email was acting in good faith, however communications with the Court on matters pending before the Court providing materials which are not accessible to the parties, a fortiori after the Court has reserved its decision, are inappropriate and inconsistent with the transparency of the judicial process." Letter goes on to suggest that an effort be made to advise law professors to stop sending articles to the court.)
California Court of Appeal, Second Appellate District, Los Angeles	No written policy. But communications are forwarded to the Clerk and the responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
Canada - Supreme Court of Canada	E-mails and other correspondence are usually forwarded to our Communications Unit in the Registrar's Office (Clerk's Office), who will determine whether or a not a response is warranted. If there is a response, it would usually be to the effect that the Court is only permitted to consider material submitted by parties to a case, or interveners, and that it would be inappropriate to comment on a case that is before the Court.
Colorado Court of Appeals and	Communications sent to the Clerk and marked received and filed in a

Supreme Court	miscellaneous file with no response.
Florida Supreme Court	Justices send these types of materials to the Clerk's Office and we either send a letter, or with the numerous postcards we are receiving RE gay marriage, we just scan and save to a retention file.
Georgia Supreme Court	Would treat them like any other letter—either we respond and advise them it is improper to communicate with a Justice or we keep them in a file without a response.
Illinois Supreme Court	In Illinois, correspondence received in chambers concerning a pending case or some other topic is referred by chambers to my office for a response. The Clerk's office response generally indicates that the correspondence has been referred to our office for a response. We then inform the writer that the Court can't make decisions based on correspondence and that it can only consider matters properly before it consistent with Supreme Court Rules. If appropriate, we also let them know that the justices of the Court are prohibited by Court rules from ex parte communication. Sometimes the response letter simply indicates that we are in receipt of their letter, with no further information. Similar to what you describe, since the beginning of this month, we have received a hundred or so post cards addressed to our Chief Justice from the Liberty Tree Alliance (out of Houston, TX) – Alan Keyes, Chairperson, urging our Court to strike down gay marriage laws. We received a copy of the letter that went out to who knows how many people that apparently enclosed a stamped post card addressed to our Court. The back of the post card has some printed material with a signature line for the sender to sign their name. We do not intend to respond to these post cards.
Indiana Supreme Court	No formal published policy or rule. The Justices forward those types of emails or letters to me and I provide a response under my signature as the Court's Administrator. I have some standard form letters that I use and tweak them to address the particular circumstances. The one I would use in response to the sort of letter you describe below would say something like: "The Court generally does not or cannot, because of its own rules, comment on matters that have come before the Court and have been decided, or that are pending or that may possibly come before the Court. We appreciate the concerns of citizens, like yourself, who take the time to express their thoughts about particular cases or issues. We regret we cannot be of more assistance."
Louisiana Supreme Court	These letters forwarded to Clerk's Office and staff person responds that our Code of Judicial Conduct provides that "a judge shall not permit private or ex parte interviews, arguments or communications designed to influence his or her judicial action in any case, either civil or criminal." Canon 3. A. (5)

Maryland Court of Appeals	Judges give the correspondence to clerk for reply.
Michigan Supreme Court	No written policy. But communications are forwarded to the Clerk and the responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
Texas Court of Appeals - Corpus Christi/Edinburgh	When the Hannah Overton case was pending at our court, we received lots of emails from the public. Here's how we responded: I am in receipt of your email concerning the Hannah Overton case. Your attempt to influence this case is inappropriate and your email will not be forwarded to the justices. Any efforts at attempting to influence the justices could result in a recusal of the entire court and further delay the appeal. All judges are bound by the Code of Judicial Conduct which does not allow a judge to permit or consider any ex parte communication. An ex parte communication occurs when a party to a case or someone else, talks or writes to or otherwise communicates directly with the judge about the issue in the case without the other parties' knowledge. This ban helps judges decide cases fairly since their decisions are based on the evidence and applicable law. It also preserves public trust in the legal system. As the clerk of the court, I cannot allow you to contact any of the justices concerning this case. All contact with the Court must come through the clerk's office. If you have any questions, please do not hesitate to contact me.
Texas Court of Appeals - Tyler	E-mails are immediately forwarded directly to the Clerk. Clerks sends the following reply: "All correspondence or contact with the Court of Appeals should be conducted through the office of the Clerk of the Court, not the individual Justices or Attorneys at the Court. See Tex. R. App. 9.6. The Clerk's Office is not authorized to answer any questions via email or facsimile. Please call the Clerk's Office at 903-593-8471 for further information not reflected on the Court's website."
Texas Court of Criminal Appeals	We do not have a policy for emails. All regular mail is responded to by the clerk's office. We do reference Rule 9.6 when we feel it is appropriate.
United States Supreme Court	Letters commenting on cases are generally discarded. But if someone appears to be asking the Court for some form of relief, we will send them a letter explaining that we do not have jurisdiction (assuming we don't).
Utah Supreme Court	All mail screened by the Clerk. Email would be forwarded to the Clerk to respond to.
Virginia Supreme Court	No written policy. But communications are forwarded to the Clerk and the responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
Washington Supreme Court	No written policy. But communications are forwarded to the Clerk and

	he responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).
West Virginia Court of Appeals	No written policy. But communications are forwarded to the Clerk and he responds essentially the same as Supreme Court of Louisiana (ex parte communications are not permitted).

Item 4 – Texas Rules of Evidence

TRE 503(b)(1)(c)

ROBIN MALONE DARR
District Judge
385th Judicial District Court
500 N. Loraine, Ste. 801
Midland, TX 79701

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

August 28, 2015

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

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

Dear Chief Justice Hecht and Mr. Lowe:

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

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

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

Sincerely,

Robin Malone Darr
Chair, Administrative Rules of Evidence Committee

RULE 503 REPORT

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

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

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

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

(b) Rules of Privilege.

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

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

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

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

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

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

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

(b) Rules of Privilege.

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

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

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

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

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

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

court's judgment and may yet prevail. And he is not barred from suing the officials who continue to hold the trailer to establish his ownership. Any of these procedures, and certainly all of them together, afford York ample opportunity to recover the trailer and therefore preclude his takings claim.

* * *

The court of appeals' judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

In re XL SPECIALTY INSURANCE COMPANY and Cambridge Integrated Services Group, Inc., Relators.

No. 10-0960.

Supreme Court of Texas.

Argued Nov. 10, 2011.

Decided June 29, 2012.

Background: Workers' compensation carrier and carrier's third party administrator petitioned for writ of mandamus with regard to trial court ruling that the attorney-client privilege did not apply to communications from carrier's outside counsel to carrier and its employee. The Court of Appeals denied the petition in a memorandum opinion. Carrier and administrator petitioned for a writ of mandamus.

Holdings: The Supreme Court, Jefferson, C.J., held that:

(1) allied litigant doctrine did not apply to communications between carrier's attorney and employer;

(2) carrier and employer were not representatives of each other under rule of evidence governing attorney client privilege; and

(3) trial court acted within its discretion in ordering production of only documents involving communications between carrier's law firm and its clients.

Denied.

Willett, J., dissented and filed opinion.

1. Privileged Communications and Confidentiality ⇐102

Confidential communications between client and counsel made to facilitate legal services are generally insulated from disclosure. Rules of Evid., Rule 503(b).

2. Privileged Communications and Confidentiality ⇐106

The attorney-client privilege promotes free discourse between attorney and client, which advances the effective administration of justice. Rules of Evid., Rule 503(b).

3. Privileged Communications and Confidentiality ⇐101

A strict rule of confidentiality of communications between client and counsel may suppress relevant evidence; for that reason, courts balance this conflict between the desire for openness and the need for confidentiality in attorney-client relations by restricting the scope of the attorney-client privilege. Rules of Evid., Rule 503(b).

4. Privileged Communications and Confidentiality ⇐167

The attorney-client privilege belongs to the client and must be invoked on its behalf. Rules of Evid., Rule 503(b).

5. Privileged Communications and Confidentiality ⇐122

Where an attorney acts as counsel for two parties, communications made to the

attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.

6. Privileged Communications and Confidentiality ⇦122

The "allied litigant doctrine" protects communications made between a client, or the client's lawyer, to another party's lawyer, not to the other party itself. Rules of Evid., Rule 503(b)(1)(C).

See publication Words and Phrases for other judicial constructions and definitions.

7. Privileged Communications and Confidentiality ⇦124

Under certain circumstances, communications between an insurer and its insured may be shielded from discovery by the attorney-client privilege. Rules of Evid., Rule 503.

8. Courts ⇦85(1)

Evidentiary rules have the force and effect of statutes and should be construed accordingly. Rules of Evid., Rule 101 et seq.

9. Privileged Communications and Confidentiality ⇦122

Allied litigant doctrine did not apply to communications between workers' compensation carrier's attorney and employer, who was not represented by carrier's lawyer and was not a party to the litigation or any other related pending action, even if employer had a shared joint interest with carrier during the administrative proceedings in the outcome of the claim in that employer contracted for a substantial deductible; rule required that the communication be made to a lawyer or her representative representing another party in a pending action. Rules of Evid., Rule 503(b)(1)(C).

10. Privileged Communications and Confidentiality ⇦122

Attorney represented workers' compensation carrier alone, not employer, and, thus, joint client rule of privilege was inapplicable to communications between carrier's attorney and employer. Rules of Evid., Rule 503(b)(1)(C).

11. Privileged Communications and Confidentiality ⇦124, 409

Conversations between workers' compensation carriers and employers regarding claims are only privileged if the parties show that the communications come within the ambit of rule of evidence governing attorney client privilege. Rules of Evid., Rule 503.

12. Privileged Communications and Confidentiality ⇦124

It is possible that a workers' compensation insurer could be a representative of the employer under rule of evidence governing attorney client privilege, thereby making some of its communications privileged. Rules of Evid., Rule 503.

13. Privileged Communications and Confidentiality ⇦159

Workers' compensation carrier and employer were not "representatives" of each other under rule of evidence governing attorney client privilege which protected communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; employer could not have been carrier's representative, as it did not have the authority to obtain legal services for carrier. Rules of Evid., Rule 503(a)(2), (b)(1)(a).

See publication Words and Phrases for other judicial constructions and definitions.

14. Privileged Communications and Confidentiality ⇦124, 152

Trial court acted within its discretion in ordering production of only docu-

ments involving communications between workers' compensation carrier's outside counsel and its clients and not communications between outside counsel and employer, although affidavit of claims adjuster employed by carrier's third party administrator testified that it retained outside counsel on carrier's behalf and that attorney would communicate regarding their opinions, provide information necessary to the proper rendition of their legal services, and that the records were not disclosed to anyone who was not an employee of administrator, carrier, or in furtherance of the provision of the services, where affidavit spoke only to communications between outside counsel and its clients, not to communications between outside counsel and the employer.

David L. Brenner, Belinda May Arambula, Burns Anderson Jury & Brenner LLP, Austin, TX, for XL Specialty Insurance Company.

Michael P. Doyle, Jeffrey L. Raizner, Patrick Mason Dennis, Doyle Raizner LLP, Alan B. Daughtry, Attorney–at–Law, Houston, TX, for Real Party in Interest Jerome Wagner.

David L. Brenner, Burns Anderson Jury & Brenner LLP, Austin, TX, for Other Interested Party Melissa Martinez.

Chief Justice JEFFERSON delivered the opinion of the Court, in which Justice HECHT, Justice WAINWRIGHT, Justice MEDINA, Justice GREEN, Justice JOHNSON, Justice GUZMAN, and Justice LEHRMANN joined.

We must decide whether, in a bad faith action brought by an injured employee against a workers' compensation insurer, the attorney-client privilege protects communications between the insurer's lawyer and the employer during the underlying administrative proceedings. We hold that the privilege does not apply.

I. Background

XL Specialty Insurance Company is Cintas Corporation's workers' compensation insurer. XL's policy included standard provisions requiring Cintas to cooperate in the investigation, settlement, and defense of a claim. The policy also provided for a one million dollar deductible per claim.

Jerome Wagner, a Cintas employee, sought workers' compensation benefits for a work-related injury. Melissa Martinez, a claims adjuster with XL's third party administrator, Cambridge Integrated Services Group, Inc., denied the claim. In a contested case hearing before the Division of Workers' Compensation, the hearing officer determined that Wagner sustained a compensable injury and was entitled to medical and temporary income benefits. During the course of the administrative litigation, XL's outside counsel, Rebecca Strandwitz of Flahive, Ogden & Latson, P.C., sent communications about the status and the evaluation of the proceedings to Cambridge and Cintas.

After the workers' compensation dispute was resolved, Wagner sued XL, Cambridge, and Martinez for breach of the common law duty of good faith and fair dealing and violations of the Insurance Code and Texas Deceptive Trade Practices Act. During discovery, Wagner sought the communications made between Strandwitz and the insured, Cintas, during the administrative proceedings. XL and Cam-

bridge argued that the attorney-client privilege protected those communications. After an in-camera inspection, the trial court held that the privilege did not apply.

XL and Cambridge sought mandamus relief from the court of appeals, which denied the petition. 368 S.W.3d 549, 550. They then petitioned this Court for a writ of mandamus, arguing that the attorney-client privilege protects the communications.

II. Attorney–Client Privilege in Multi–Party Litigation

[1–4] Confidential communications between client and counsel made to facilitate legal services are generally insulated from disclosure. *See* TEX.R. EVID. 503(b); *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996). Recognized as "the oldest of the privileges for confidential communications known to the common law," *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) (citation omitted), the attorney-client privilege promotes free discourse between attorney and client, which advances the effective administration of justice. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex.1993). But a strict rule of confidentiality may also suppress relevant evidence. *Id.* For that reason, "[c]ourts balance this conflict between the desire for openness and the need for confidentiality in attorney-client relations by restricting the scope of the attorney-client privilege." *Id.* The privilege belongs to the client and must be invoked on its behalf. *West v. Solito*, 563 S.W.2d 240, 244 n. 2 (Tex.1978).

Texas evidentiary rules define the privilege as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (B) between the lawyer and the lawyer's representative;
>
> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.

TEX.R. EVID. 503(b).[1]

Rule 503(b) protects not only confidential communications between the lawyer

1. Although many of our evidentiary rules mirror their federal counterparts, *see, e.g.*, FED. R.EVID. 801; TEX.R. EVID. 801, there is no federal analogue to our Rule 503. In 1972, the Chief Justice of the United States proposed to Congress the Rules of Evidence for United States Courts and Magistrates. 56 F.R.D. 183 (1972). The Proposed Rules were drafted by the Judicial Conference Advisory Committee on the Rules of Evidence and approved by the Judicial Conference of the United States and the Supreme Court. *Jaffee v. Redmond*, 518 U.S. 1, 8 n. 7, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). The Proposed Rules defined nine specific testimonial privileges, including the lawyer-client privilege, which was contained in Proposed Rule 503. *See* PROPOSED FED.R.EVID. 503, *reprinted in* 56 F.R.D. 183, 235–40 (1972). Congress rejected Proposed Rule 503 in favor of Federal Rule of Evidence 501's general mandate that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," although "in civil actions and proceedings, with respect to an element of a

and client, but also the discourse among their representatives. It is an exception to the general principle that the privilege is waived if the lawyer or client voluntarily discloses privileged communications to a third party. *See* TEX.R. EVID. 511(1).

XL [2] relies primarily on the privilege defined in Rule 503(b)(1)(C)—which has been variously described as the "joint client" privilege, the "joint defense" privilege, and the "common interest" privilege. Courts sometimes use these terms interchangeably, but they involve distinct doctrines that serve different purposes. As we explain below, however, none of them accurately describes the privilege at issue in this case.

A. Joint Client Privilege

[5] The joint client or co-client doctrine applies "[w]hen the same attorney simultaneously represents two or more clients on the same matter." PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:30 (2011). Joint representation is permitted when all clients consent and there is no substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to the other. 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 (2000). "Where [an] attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients." *In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922 (Tex.App.-Dallas 2006, pet. denied); *see also* TEX.R. EVID. 503(d)(5) (noting that communications made by two or more clients to a lawyer retained in common are not privileged "when offered in an action between or among any of the clients").

B. Joint Defense and Common Interest Doctrines

Representations involving multiple clients with separate counsel call for the application of what have been called the joint defense and common interest doctrines. Courts and parties often confuse the relevant nomenclature. *See In re Teleglobe Commc'n Corp.*, 493 F.3d 345, 363 n. 18 (3d Cir.2007) ("[M]uch of the caselaw confuses the community-of-interest privilege (which is the same as the 'common-interest privilege' ...) with the co-client privilege.") (citation omitted).[3] Unlike the joint client rule, the joint defense and common interest rules apply when there has been sharing of information between or among *separately represented* parties. *See* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 cmt. c ("Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person

claim or defense as to which State law supplies the rule of decision, the privilege of a witness ... shall be determined in accordance with State law." FED.R.EVID. 501 (1975) (amended 2011). "Although Congress did not adopt this rule, courts have relied upon [Proposed Rule 503] as an accurate definition of the federal common law of attorney-client privilege...." *United States v. Spector*, 793 F.2d 932, 938 (8th Cir.1986).

2. For ease of reference, we refer to relators XL and Cambridge as "XL." Their legal arguments are identical, and our conclusion that the privilege does not apply here disposes of both of their claims.

3. *See also* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5493 (1986) ("Federal courts continue to confuse the allied lawyer doctrine, which applies when parties with separate lawyers consult together, and the joint-client doctrine, which applies when two clients share the same lawyer, by using the phrase 'joint defense privilege' to mangle the two concepts.").

with allied interests cooperates with the client and the client's lawyer. . . .").

The joint defense rule applies when multiple parties to a lawsuit, each represented by different attorneys, communicate among themselves for the purpose of forming a common defense strategy. *In re JDN*, 211 S.W.3d at 923. Unlike the common interest doctrine, the joint defense doctrine applies only in the context of litigation. VINCENT S. WALKOWIAK, THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 18 (4th ed.2008).

The common interest rule (also known as the "community of interest," "pooled interests," or "allied lawyer" doctrine) is more expansive than the joint defense doctrine.[4] The parties must share a mutual interest, but unlike the joint defense doctrine, the common interest rule applies to "two or more separately represented persons whatever their denomination in pleadings and whether or not involved in litigation." 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 reporter's note cmt. b; *see also* RICE § 4:35, 474–75 ("The 'community of interest' rule is distinguished from the 'joint defense' rule by the fact that the collaboration between the parties need not be related to a pending legal action."). Thus, plaintiffs and nonlitigating persons with common interests can assert this exception to the waiver rule. 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 reporter's note cmt. b (noting that common interest is the preferable term because it includes "both claiming as well as defending parties and nonlitigating as well as litigating persons").[5]

III. Texas Rule of Evidence 503(b)(1)(C)—The Allied Litigant Doctrine

Courts of appeals have generally applied Rule 503(b)(1)(C) to joint defense situations where multiple defendants, represented by separate counsel, work together in a common defense.[6] Notably, and in contrast to the proposed federal rule,[7] Texas requires that the communications be

4. Thus, the common interest doctrine is different from the joint client doctrine for the very same reason as the joint defense doctrine: unlike the joint client situation, in the common interest arrangement, each client has her own lawyer—they are not jointly represented by one lawyer. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:20 (3d ed.2007); *see also* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. a (2000) (noting that the common interest rule "differs from the co-client rule of [privilege] in that the clients are represented by separate lawyers").

5. *See also, e.g., In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir.2001) ("Because the privilege sometimes may apply outside the context of actual litigation, what the parties call a 'joint defense' privilege is more aptly termed the 'common interest' rule.").

6. *See, e.g., In re JDN Real Estate—McKinney L.P.*, 211 S.W.3d 907, 922 (Tex.App.-Dallas 2006, orig. proceeding [mand. denied]) ("[R]ule 503(b)(1)(C) . . . address[es] the joint-defense privilege, which applies when multiple parties to a lawsuit represented by different attorneys communicate among themselves."); *In re Dalco*, 186 S.W.3d 660, 666 (Tex.App.-Beaumont 2006, orig. proceeding [mand. denied]) ("... [T]he 'joint defense privilege,' found in TEX.R. EVID. 503(b)(1)(C)[,] ... [w]hen applicable ... 'cloaks communications with confidentiality where "a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."' " (quoting *United States v. Gotti*, 771 F.Supp. 535, 545 (E.D.N.Y.1991))).

7. *See* PROPOSED FED.R.EVID. 503(b)(3), *reprinted in* 56 F.R.D. 183, 236 (1972) (protecting communications between a client "to a lawyer representing another in a matter of common interest"); *see also, e.g., In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir.2001) (noting that the common interest privilege applies to both communications between co-defendants in actual litigation and their counsel as well as to "communications between *potential* co-defendants and their counsel" (emphasis in original)); *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir.1989) (" 'The need

made in the context of a pending action.[8] *See* TEX.R. EVID. 503(b)(1)(C) (protecting from disclosure communications between a client "to a lawyer ... representing another party in a *pending action* and concerning a matter of common interest therein") (emphasis added).[9] Although criticized,[10] the pending action requirement limits the privilege "to situations where the benefit and the necessity are at their highest, and ... restrict[s] the opportunity for misuse." *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C.2003). Thus, in jurisdictions like Texas, which have a pending action requirement, no commonality of interest exists absent actual litigation. Accordingly, our privilege is not a "common interest" privilege that extends beyond litigation. Nor is it a "joint defense" privilege, as it applies not just to defendants but to any parties to a pending action. Rule 503(b)(1)(C)'s privilege is more appropriately termed an "allied litigant" privilege.[11]

[6] The allied litigant doctrine protects communications made between a client, or

to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter,' ... and it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply...." (citations omitted)).

8. A number of other states' evidentiary rules also require communications to be made in the context of pending litigation in order for the doctrine to apply. *See, e.g.*, HAW. R. EVID. 503(b) (protecting communications made "by the client ... to a lawyer ... representing another party in a pending action and concerning a matter of common interest"); ME. R. EVID. 502(b)(same); MISS. R. EVID. 502(b)(same); N.H. R. EVID. 502(b) (same); OKLA. STAT. tit. 12 § 2502(B)(3) (same); S.D. CODIFIED LAWS § 19–13–3 (same). In addition, Uniform Rule of Evidence 502(b)(3) also includes a "pending action" requirement. UNIF. R. EVID. 502(b)(3).

9. *See also In re Dalco*, 186 S.W.3d at 666–67 ("Rule 503(b)(1)(C) appears to attach the common interest 'privilege' to confidential communications disclosed in the course of legal services rendered during some *'pending action'* and *'concerning a matter of common interest therein.'* ... Here, ... this contractual relinquishment of Citibank's confidential or proprietary information to Universal did not occur during any 'pending action' and therefore could not concern 'a matter of common interest therein.' " (emphasis in original) (citations omitted)).

10. *See* Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 77–78 (2005) (noting that the pending action requirement is redundant of other safeguards and harmful because it fails to protect communications shared between those with a common legal interest unrelated to litigation).

11. A leading federal law treatise suggests that the appropriate moniker is the "allied lawyer doctrine." 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5493 (1986). Other sources refer to a "joint litigant" exception. *See, e.g.*, James M. Fischer, *The Attorney–Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 633–34 (1997); *see also Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 347 (N.D.Ohio 1999) ("Where several parties, though represented by separate counsel, are on the same side of a legal dispute and share information for their mutual benefit in that dispute, the *'joint litigant'* privilege protects 'attorney-client privileged matters when they are shared with co-parties, even though those parties are represented by separate counsel.' ") (emphasis added) (citation omitted); *In re Sandwich Islands Distilling Corp.*, No. 07–01029, 2009 WL 3055199, at *2 (Bankr.D.Haw. Sept. 21, 2009) ("Under Hawaii law, contrary to federal common law, the joint litigant common interest privilege is limited to co-parties and their counsel in pending litigation."). Because the Texas rule has both a pending action and a common interest requirement, however, the "allied litigant" doctrine more accurately describes our law.

the client's lawyer, to another party's lawyer, not to the other party itself. *See, e.g., Robert Bosch, LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 146 (D.Del.2009) ("[T]o qualify for and to maintain continued protection [under the common interest privilege], the communication must be shared between counsel."); WALKOWIAK, at 18 (noting that the joint defense doctrine "does not apply to ... communications [made directly to] other parties themselves").[12] This attorney-sharing requirement makes clear that the privilege applies only when the parties have separate counsel. *See, e.g., In re Teleglobe*, 493 F.3d at 365 ("[T]he [common interest] privilege only applies when clients are represented by separate counsel."); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D.Cal.1995) ("The [joint defense] doctrine applies where parties are represented by separate counsel but engage in a common legal enterprise.").

IV. XL has failed to show that the communications between Strandwitz and Cintas are privileged.

[7, 8] XL argues that the communications between Strandwitz and Cintas are protected by the attorney-client privilege, and more generally, the insurer—insured relationship. We have not recognized a general insurer-insured privilege.[13] Nevertheless, we agree that, under certain circumstances, communications between an insurer and its insured may be shielded from discovery by the attorney-client privilege. That appears to be the majority rule. *See, e.g.*, 17A LEE R. RUSS ET AL., COUCH ON INSURANCE § 250:19 (3d ed.2005) (noting that majority view is that the attorney-client privilege applies to communications between an insured and its liability insurer when they concern a potential suit and communications are predominantly intended to be transmitted to the attorney hired by insurer to defend insured). But for us to reach that conclusion here, XL must show that its lawyer's communications are among those protected by Rule 503,[14] and it has not done so.

A. Rule 503(b)(1)(C)'s allied litigant doctrine is inapplicable.

[9] Here, XL is the client, and the communications were between XL's lawyer and a third party, Cintas, who was not represented by XL's lawyer (or any other lawyer) and was not a party to the litigation or any other related pending action. We recognize that Cintas, having contract-

12. *See also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364–65 (3d Cir.2007) ("[T]o be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest.... The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies." (citation omitted)); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989) ("[The joint defense privilege] serves to protect the confidentiality of communications passing from *one party to the attorney for another party* where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.") (emphasis added).

13. *See, e.g., In re Ford Motor Co.*, 988 S.W.2d 714, 719 (Tex.1998) (declining to extend the attorney-client privilege to communications between an insured and liability insurer where "at the time [the insured] made her statements, there was no attorney-client relationship" between her and her insurer); *see also In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 341 (Tex.App.-Texarkana 1999, pet. denied) (holding that if counsel retained by an insurer acts as an "investigator," and not as an attorney, then the communications between the insured and insurer are not privileged).

14. Our evidentiary rules have the force and effect of statutes and should be construed accordingly. *See In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex.2001).

ed for a substantial deductible, may have shared a joint interest with XL during the administrative proceedings in the outcome of the claim. But no matter how common XL's and Cintas's interests might have been, our rule requires that the communication be made to a *lawyer or her representative* representing another party in a *pending action*. TEX.R. EVID. 503(b)(1)(C) (protecting certain communications "by ... the client's lawyer ... to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein"). Those requirements were not met here.

Part of XL's difficulty in proving a privilege stems from the fact that, in Texas, workers' compensation claims are brought directly against a workers' compensation carrier, with limited involvement of the employer in the adjudication of the rights to benefits. The insurer, not the employer, is directly responsible for paying benefits. *See* TEX. LAB.CODE § 406.031(a) (making the insurance carrier and not the employer directly "liable for compensation for an employee's injury without regard to fault or negligence").[15] Thus, the insurer, not the insured, is the client and party to the pending action, and it retains counsel on its own behalf. In contrast, in a lawsuit involving a standard liability insurance policy, only the insured is a party to the case, and the insurer typically retains counsel on its insured's behalf.[16] Often, as outlined below, those communications fall within one of Rule 503(b)'s subsections. But in a case in which the communications were not made to the insured's lawyer, and the insured is not a party to a pending action, as required by the rule, the allied litigant privilege does not apply.

B. XL and Cintas were not joint clients.

[10, 11] For similar reasons, the joint client rule of privilege is inapplicable. XL, and XL alone, was Strandwitz's client. XL does not argue, nor is there any evidence, that Strandwitz also represented Cintas. We do not exclude the possibility that an insured and insurer may have a common lawyer in the workers' compensation context. "[W]e have never held that

15. Under the insurance policy, XL is primarily responsible for the payment of benefits as well as legal fees that arise out of any claim or suit it defends, while Cintas reimburses it for such expenses:

> In consideration of a reduced premium, you have agreed to reimburse us up to the deductible amounts stated in the Schedule at the end of this endorsement for all payments legally required, including Allocated Loss Adjustment Expense(s), where you have elected to include such expense as indicated in the Schedule, which arises out of any claim or suit we defend.
>
> We will remain responsible for the full payment of all claims under this policy without regard to your ability or intention to reimburse us for the deductible amount, provided that this does not release you from your obligation to reimburse us.

16. *See, e.g., Raymond v. N.C. Police Benevolent Ass'n, Inc.*, 365 N.C. 94, 721 S.E.2d 923, 926 (2011) ("The most common scenario involving a tripartite attorney-client relationship occurs when an insurance company employs counsel to defend its insured against a claim.... In the insurance context, courts find that the attorney defending the insured and receiving payment from the insurance company represents both the insured and the insurer, providing joint representation to both clients.... Under these circumstances, notwithstanding that usually only the insured has been sued, a tripartite attorney-client relationship exists because the interests of both the insured and the insurer in prevailing against the plaintiff's claim are closely aligned." (citations omitted)); *see also Metroflight, Inc. v. Argonaut Ins. Co.*, 403 F.Supp. 1195, 1197 (N.D.Tex.1975) ("Liability insurance policies ... commonly obligate the insurer to defend actions against the insured within the policy coverage.").

an insurance defense lawyer *cannot* represent both the insurer and the insured, only that the lawyer *must* represent the insured and protect his interests from compromise by the insurer." *Unauthorized Practice of Law Comm. v. Am. Home Assurance Co.*, 261 S.W.3d 24, 42 (Tex.2008) (emphasis in original); *see also id.* (noting that "[w]hether defense counsel also represents the insurer is a matter of contract between them"); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 (allowing a lawyer to represent more than one client in a matter if not precluded by conflicts between them), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A. We recognize that Texas law assumes that workers' compensation insurers and employers will converse about workers' compensation claims. *See* TEX. LAB.CODE § 415.002(b) (providing that an insurance carrier does not commit an administrative violation by allowing an employer to freely discuss a claim, assist in the investigation and evaluation of a claim, or attend and participate in a division proceeding); TEX. ADMIN. CODE § 65.10 (same). But before those communications are privileged, parties must show that the communications come within the ambit of Rule 503, and XL has failed to make such a showing here.

[12] Nor do we rule out the possibility that an insurer can be a representative of the insured under Rule 503, making some of its communications privileged. *See Unauthorized Practice of Law*, 261 S.W.3d at 43 (noting that " 'an insurer's right of control generally includes the authority to make defense decisions *as if it were the client* "where no conflict of interest exists" ' " (emphasis in original) (citation omitted)); *see also* TEX.R. EVID. 503(a)(2), 503(b)(1)(A), (C), (D). But XL has neither pleaded nor proved that this is the case.

Both sides argue forcefully that sound policy favors their position. Whether recognizing a privilege here is good policy is another matter; we conclude only that the communications here are not within the allied litigant or joint client privileges.

C. The communications are not privileged under subsections (A), (B), (D), or (E).

[13] XL also argues that the communications are privileged under Rule 503(b)(1)(A), which protects communications "between the client or a representative of the client and the client's lawyer or a representative of the lawyer." TEX.R. EVID. 503(b)(1)(A). According to XL, the insurer and insured are "representatives" of each other. Texas Rule of Evidence 503(a)(2) defines "representative of the client" as:

> (A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or
>
> (B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

TEX.R. EVID. 503(a)(2).

Cintas could not have been a "representative of the client," as it did not have the authority to obtain legal services for its insurer, XL. For the same reason, Cintas could not act, on XL's behalf, on any advice "thereby rendered"—that is, rendered as a result of it having obtained counsel for XL. XL does not contend, nor is there any proof, that Strandwitz represented both XL and Cintas, so Cintas does not qualify as a "client," either. Thus, neither subsections (A) nor (D) protects the communications. *See* TEX.R. EVID. 503(b)(1)(D) (shielding communications "between representatives of the client or between the client and a representative of

the client"). XL does not contend that any other provision applies. Subsection B, which involves communications between the lawyer and the lawyer's representative, is inapposite,[17] as is subsection E, which pertains to multiple lawyers representing the same client.[18]

D. XL's affidavit does not support a privilege for communications to Cintas.

[14] To support its privilege claim, XL submitted the claims adjuster's affidavit. Martinez stated that Cambridge retained Strandwitz on XL's behalf and that Strandwitz would:

> [P]rovide communication to *Cambridge* relating to their professional services, their opinions associated with those professional services and also provide information necessary to the proper rendition of those services.... [T]he records are not disclosed to anyone who is not an employee of *Cambridge, XL* or in furtherance of the provision of the professional legal services.

(emphasis added). This affidavit speaks only to communications between XL's law firm and its clients, not to communications between XL's law firm and the employer Cintas. Furthermore, the affidavit does not purport to establish any privilege extending to the communications between Strandwitz and Cintas. The trial court noted this and ordered production of only those documents.[19] We conclude that the trial court acted within its discretion.

V. Conclusion

The attorney-client privilege shields otherwise relevant information from discovery. As a result, we construe it narrowly[20] to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). While XL asserts that the attorney-client privilege protects communications between an insurer and its insured, it has not brought the relevant communications within Rule 503's parameters. Because the documents are not protected from discovery under the allied litigant doctrine or any other part of Rule 503, we deny relief. TEX. R.APP. P. 52.8(a).

Justice WILLETT delivered a dissenting opinion.

Justice WILLETT, dissenting.

Just seven days ago, this Court held that a common-law "bad faith" claim (and certain statutory claims) are inconsistent with the Legislature's hermetic workers' compensation regime.[1] Today the Court

17. *See* TEX.R. EVID. 503(a)(4) (defining "representative of the lawyer" as either a lawyer's employee or an accountant).

18. *See id.* R. 503(b)(1)(E) (protecting communications "among lawyers and their representatives representing the same client").

19. After reviewing the documents in camera, the trial court stated that it had determined some were not privileged "mainly because they are communications with a Kelli Green who is the representative for Cintas, which I believe was the employer." The court continued: "And they do not appear to be documents as described by Ms. Martinez in the affidavit ... I think there is no evidence to support that communications with Ms. Green from Cintas are privileged, and so I'm going to order those produced but only those produced."

20. *See Hyman v. Grant*, 102 Tex. 50, 112 S.W. 1042, 1044 (1908) ("As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave it birth.").

1. *Tex. Mut. Ins. Co. v. Ruttiger*, — S.W.3d —, 2012 WL 2361697 (Tex.2012).

answers a vexing question of attorney-client privilege—a question I concede is important (after all, we granted the petition)—but the question, albeit weighty, arises possibly from a claim that no longer exists.

I say "arises possibly" because it's impossible to tell really, as the *mandamus* record before the Court is not the *full* record. So we really have no idea if Jerome Wagner has any viable claim(s) remaining post-*Ruttiger*—for example, an Insurance Code claim for misrepresenting the comp policy.[2]

Today's decision is undeniably instructive and finely reasoned. But I respectfully take issue with issuing something on a non-issue. Rather than venture what may be a purely advisory opinion springing from a now-defunct lawsuit, I would instead simply have the parties advise the Court on whether Wagner has any actionable claims remaining.

Since 1793, when Chief Justice Jay declined President Washington's request for advice on twenty-nine questions regarding America's duties under various treaties, the bar on advisory opinions has become firmly embedded in American law.[3] Two hundred and nineteen years later, and lacking ample assurance that any live controversy exists here, I respectfully dissent.

2. *See* TEX. INS. CODE § 541.061.

3. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (6th ed.2009); *see also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex.2000) (per curiam) ("Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions.").

MARIN REAL ESTATE PARTNERS, L.P., Derra Edwards, Hugh L. Lam, James P. Shee, Cheng-Lein C. Shee, Ricardo Velasquez, Gary M. Maganaris, Robin K. Pang-Maganaris, Dennis E. Gauthier, Cecilia G. Gauthier, Leal Urgin, Dresden & Goldberg Invesco, LLC, Maganaris Family Trust, and Boerne Trust's, G2 Assets, LLC, Appellants

v.

John E. VOGT and Nelda L. Vogt, Appellees.

No. 04-10-00602-CV.

Court of Appeals of Texas, San Antonio.

Nov. 23, 2011.

Background: Dominant estate owners brought action against servient estate owners for injunctive relief and damages for easement encroachment, diversion of surface water, and malicious prosecution. Servient estate owners brought counterclaim for declaratory relief, specific performance, and promissory estoppel. Following jury trial, the 216th Judicial District Court, Kendall County, N. Keith Williams, J., entered judgment in favor of dominant estate owners. Servient estate owners appealed.

Holdings: The Court of Appeals, Marialyn Barnard, J., held that:

(1) Court of Appeals' holding that dominant estate owners failed to establish a sufficient probability of irreparable injury was not the law of the case;

(2) there was no double recovery by dominant estate owners;

whether evidence admissible under these rules was subject to [FRE] 403's balancing test.... [¶] Some appellate courts have imposed external, judicially crafted rules as to district judges' consideration of evidence under Rule 415. [¶] [But we] have no reason to adopt special rules constraining district courts' usual exercise of discretion under Rule 403 when considering evidence under Rule 415.... [¶] Of course district courts must apply Rule 403 with awareness that Rule 415 reflects a congressional judgment to remove the propensity bar to admissibility of certain evidence. That awareness includes the fact that the Rule 403 analysis also applies. Nothing in the text of Rules 413-415 suggests these rules somehow change Rule 403."

Seeley v. Chase, 443 F.3d 1290, 1294 (10th Cir. 2006). "This court has not addressed at length the requirements for admitting prior sexual assault testimony under [FRE] 415. We have, however, discussed these requirements in the context of [FRE] 413, which covers admission of prior sexual assaults in the context of a criminal trial. *At 1295:* Although we have not specifically stated that a district court must follow these procedures when applying Rule 415, we have stated that [a court] must 'make a reasoned, recorded statement of its [FRE] 403 decision when it admits evidence under [FRE] 413-415.' Moreover, we have noted that Rule 413 and Rule 415 are 'companion' rules. As such, ... a district court must follow the same procedure for determining whether evidence is admissible under Rule 415 as it would when admitting evidence under Rule 413." *See also* annotation under FRE 413, p. 1118; ***Johnson v. Elk Lake Sch. Dist.***, 283 F.3d 138, 143-44 (3d Cir.2002).

FRE 415

ARTICLE V. PRIVILEGES

FRE 501. PRIVILEGE IN GENERAL

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

History of FRE 501: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Apr. 26, 2011, eff. Dec. 1, 2011.

See *Commentaries*, "What Is Not Discoverable?," ch. 6-B, §3, p. 507.

ANNOTATIONS

Generally

University of Pa. v. EEOC, 493 U.S. 182, 189 (1990). "We do not create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to outweigh the need for probative evidence....' [¶] [A]lthough Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, ... we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. The balancing of conflicting interests of this type is particularly a legislative function."

Carman v. McDonnell Douglas Corp., 114 F.3d 790, 794 (8th Cir.1997). "To justify the creation of a privilege, [the proponent of the privilege] must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information."

Hancock v. Hobbs, 967 F.2d 462, 466-67 (11th Cir. 1992). "Rule 501 is not clear as to which rule of decision should be followed when the federal and state laws of privilege are in conflict. ... We therefore hold that the federal law of privilege provides the rule of decision in a civil proceeding where the court's jurisdiction is premised upon a federal question, even if the witness-testimony is relevant to a pendent state law count which may be controlled by a contrary state law of privilege." *See also* ***Agster v. Maricopa Cty.***, 422 F.3d 836, 839 (9th Cir.2005); ***EEOC v. Illinois Dept. of Empl. Sec.***, 995 F.2d 106, 107 (7th Cir.1993).

Attorney-Client Privilege

Swidler & Berlin v. U.S., 524 U.S. 399, 407 (1998). "Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes alto-

gether. ... Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."

U.S. v. Zolin, 491 U.S. 554, 562 (1989). "We have recognized the attorney-client privilege under federal law, as 'the oldest of the privileges for confidential communications known to the common law.' [The privilege's] central concern [is] 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' That purpose ... requires that clients be free to 'make full disclosure to their attorneys' of past wrongdoings ... in order that the client may obtain 'the aid of persons having knowledge of the law and skilled in its practice....' *At 563:* It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy[]' ... between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime."

Journalist's Privilege

McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003). "A large number of cases conclude ... that there is a reporter's privilege, though they do not agree on its scope. A few cases refuse to recognize the privilege.... Our court has not taken sides."

von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). "We hold that the individual claiming the [journalist's] privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process. This requires an intent-based factual inquiry to be made by the district court. [¶] The intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like...."

Marital-Communications Privilege

Trammel v. U.S., 445 U.S. 40, 50-51 (1980). "Testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence. As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. Here we must decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice. *At 53:* [W]e conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." (Internal quotes omitted.) *See also U.S. v. Acker*, 52 F.3d 509, 514 (4th Cir.1995).

U.S. v. Breton, 740 F.3d 1, 10 (1st Cir.2014). "The marital communications privilege exists to promote marital harmony and stability by 'ensur[ing] that spouses ... feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law.' [¶] However, this privilege, like others, 'is not limitless, and courts must take care to apply it only to the extent necessary to achieve its underlying goals.' Accordingly, courts have long recognized an exception to the privilege when one spouse commits an offense against the other, thereby harming the marital relationship and thwarting the privilege's purpose. [¶] Two of our sister circuits have expanded this 'offense against spouse' exception to include an offense against a child of either spouse. Another has gone further, finding the exception covers offenses against a child-relative visiting in the home. *At 12:* [W]e agree with our sister circuits and the vast majority of states that the 'offense against spouse' exception to the marital communications privilege must be read to cover an offense against a child of either spouse in order to further the privilege's underlying goals of promoting marital and family harmony."

U.S. v. Hamilton, 701 F.3d 404, 407 (4th Cir.2012). "'Communications between ... spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged.' [T]o be covered by the privilege, a communication between spouses must be confidential; 'voluntary disclosure' of a communication waives the privilege. *At 408-09:* [E]mails ... 'in common experience,' are confidential. [¶] But ... spouses can ... 'conveniently communicate without' using a work email account on an office computer. ... Accordingly, that one may generally have a reasonable expectation of privacy in email, at least before [an office] policy is in place indicating otherwise, does not end [the] inquiry. [¶] [W]e have held that a defendant did not have an 'objectively reasonable' belief in the privacy of files on an office computer after

his employer's policy put him 'on notice' that 'it would be overseeing his Internet use.'" Held: When D did not take any steps to protect his emails, even after he was on notice of employer's policy permitting inspection of emails stored on employer's computer system, emails were not subject to marital-communications privilege.

U.S. v. Singleton, 260 F.3d 1295, 1300 (11th Cir. 2001). The marital-communications "privilege is not available when the parties are permanently separated; that is, living separately with no reasonable expectation of reconciliation."

Psychotherapist-Patient Privilege

Jaffee v. Redmond, 518 U.S. 1, 8-9 (1996). FRE 501 "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.' *At 15:* [W]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501.... [¶] [T]he federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy."

Miscellaneous Privileges

U.S. v. Weber Aircraft Corp., 465 U.S. 792, 796 (1984). "Confidential statements made to air crash safety investigators [are] privileged with respect to pretrial discovery [under the *Machin v. Zukert*, 316 F.2d 336 (D.C.Cir.1963), privilege]. *At 803 n.25:* Congressional refusal to codify the *Machin* privilege [does not limit] the power of courts to recognize the privilege under Rule 501. Indeed, Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them."

FRE 502. ATTORNEY-CLIENT PRIVILEGE & WORK PRODUCT; LIMITATIONS ON WAIVER

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) **Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) **Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) **Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) **Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

TRE 203

ROBIN MALONE DARR
District Judge
385th Judicial District Court
500 N. Loraine, Ste. 801
Midland, TX 79701

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

August 6, 2015

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

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

Dear Chief Justice Hecht and Mr. Lowe:

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

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

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

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

Sincerely,

Robin Malone Darr
Chair, Administrative Rules of Evidence Committee

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

Rule 203. Determining Foreign Law

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

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

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

matters in someone's personal knowledge, but they are not necessarily matters subject to judicial review).

In re Sigmar, 270 S.W.3d 289, 302 (Tex.App.—Waco 2008, orig. proceeding). "[M]atters of legislative fact or of other non-adjudicative fact are subject to judicial notice but are not governed by Rule 201."

Barnard v. Barnard, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied). "A court may take judicial notice of its own files and the fact that a pleading has been filed in a case. 'A court may not ... take judicial notice of the truth of allegations in its records.'"

Apostolic Ch. v. American Honda Motor Co., 833 S.W.2d 553, 555-56 (Tex.App.—Tyler 1992, writ denied). "Highway nomenclature and designations within the trial court's jurisdiction are matters of common knowledge and proper subjects for judicial notice. ... In matters involving geographical knowledge, it is not necessary that a formal request for judicial notice be made by a party."

Marble Slab Creamery, Inc. v. Wesic, Inc., 823 S.W.2d 436, 439 (Tex.App.—Houston [14th Dist.] 1992, no writ). "The trial court is entitled to take judicial notice of its own records where the same subject matter between the same parties is involved. [W]e may presume that the trial court took such judicial notice of the record without any request being made and without any announcement that it has done so." *See also* ***Sierad v. Barnett***, 164 S.W.3d 471, 481 (Tex.App.—Dallas 2005, no pet.) (trial court does not need to announce it is taking judicial notice). *But see* ***In re C.L.***, 304 S.W.3d 512, 515-16 (Tex.App.—Waco 2009, no pet.) (appellate court held that trial court did not take judicial notice when party did not request it and trial court did not announce in open court it was taking judicial notice).

TRE 202. DETERMINATION OF LAW OF OTHER STATES

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 202 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxv). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxi): Language was added and deleted to make it clear that all parties are entitled to notice and hearing of the court's taking judicial notice of the law of other states; the last four sentences were added. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCP 184, 184a, TRCS art. 3731a (repealed). Former TRCP 184a, re judicial notice, was originally adopted eff. Feb. 1, 1946, by order of Oct. 10, 1945 (8 Tex.B.J. 533 [1945]).

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 128.

ANNOTATIONS

Daugherty v. Southern Pac. Transp., 772 S.W.2d 81, 83 (Tex.1989). "The failure to plead sister-state law does not preclude a court from judicially noticing that law. ... Rule 202 requires the moving party to furnish sufficient information to the trial court for it to determine the foreign law's applicability to the case and to furnish all parties any notice that the court finds necessary." *See also* ***Colvin v. Colvin***, 291 S.W.3d 508, 514 (Tex.App.—Tyler 2009, no pet.) (preliminary motion required to assure application of laws from another jurisdiction).

Burlington N. & Santa Fe Ry. v. Gunderson, Inc., 235 S.W.3d 287, 292 (Tex.App.—Fort Worth 2007, no pet.). "Rule 202 simply provides a mechanism by which a party may compel the trial court to judicially notice the law of another state; it does not force a party to make a definitive declaration as to which state's law applies."

TRE 203. DETERMINATION OF THE LAWS OF FOREIGN COUNTRIES

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may

Effective April 1, 2015, the TREs will be restyled. For a note about the proposed changes, see p. 1178.

consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 203 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii): The words "all parties" were substituted for "to the opposing party or counsel" in the first and second sentences; in the fourth sentence, "all" was substituted for "the"; in the last sentence, "The court's" was substituted for "Its"; and the words "on appeal" were deleted. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxviii). Source: TRCS art. 3718; FRCrP 26.1; FRCP 44.1.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 131.

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Long Distance Int'l v. Telefonos de Mexico, S.A. de C.V., 49 S.W.3d 347, 351 (Tex.2001). "Rule 203 has been aptly characterized as a hybrid rule by which the presentation of the foreign law to the court resembles the presentment of evidence but which ultimately is decided as a question of law. Summary judgment is not precluded when experts disagree on the law's meaning if, as here, the parties do not dispute that all the pertinent foreign law was properly submitted in evidence. When experts disagree on how the foreign law applies to the facts, the court is presented with a question of law."

PennWell Corp. v. Ken Assocs., 123 S.W.3d 756, 760-61 (Tex.App.—Houston [14th Dist.] 2003, pet. denied). "Although appearing under the subtitle 'Judicial Notice' in the [TREs], the procedure established under Rule 203 for presentment of foreign law is not considered a judicial notice procedure because that term refers only to adjudicative facts and not to matters of law. Thus, the specific procedures set forth in Rule 203 must be followed for the determination of foreign law. [A] party requesting judicial notice must furnish the court with sufficient information to enable it to properly comply with the request; otherwise, the failure to provide adequate proof results in a presumption that the law of the foreign jurisdiction is identical to that of Texas." *See also Gerdes v. Kennamer*, 155 S.W.3d 541, 548 (Tex.App.—Corpus Christi 2004, no pet.).

TRE 204. DETERMINATION OF TEXAS CITY & COUNTY ORDINANCES, THE CONTENTS OF THE TEXAS REGISTER, & THE RULES OF AGENCIES PUBLISHED IN THE ADMINISTRATIVE CODE

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. The court's determination shall be subject to review as a ruling on a question of law.

History of TRE 204 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxvi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] lxxxvii): Judicial notice upon motion of a party is made mandatory rather than discretionary. Adopted eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxii). Source: New rule.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-M, p. 438; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 134.

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Office of Pub. Util. Counsel v. Public Util. Comm'n, 878 S.W.2d 598, 600 (Tex.1994). "The court of appeals ... erred by refusing to take judicial notice of the published order of [respondent]. ... The authenticity and contents of [respondent's] ratemaking order are capable of accurate and ready determination by resort to a published record whose accuracy cannot reasonably be questioned."

Eckmann v. Des Rosiers, 940 S.W.2d 394, 399 (Tex.App.—Austin 1997, no writ). "[T]he duty [to take judicial notice is] mandatory, even in the absence of a request under Rule 204, respecting administrative agency regulations published in the Texas Register and Texas Administrative Code. ... They are legislative facts, or a part of the body of law a court is required to apply in reasoning toward a decision."

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

History of TRE 1008 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxxiii). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lxvii). Source: FRE 1008.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 1030.

TRE 1009. TRANSLATION OF FOREIGN LANGUAGE DOCUMENTS

(a) Translations. A translation of foreign language documents shall be admissible upon the affidavit of a qualified translator setting forth the qualifications of the translator and certifying that the translation is fair and accurate. Such affidavit, along with the translation and the underlying foreign language documents, shall be served upon all parties at least 45 days prior to the date of trial.

(b) Objections. Any party may object to the accuracy of another party's translation by pointing out the specific inaccuracies of the translation and by stating with specificity what the objecting party contends is a fair and accurate translation. Such objection shall be served upon all parties at least 15 days prior to the date of trial.

(c) Effect of Failure to Object or Offer Conflicting Translation. If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.

(d) Effect of Objections or Conflicting Translations. In the event of conflicting translations under paragraph (a) or if objections to another party's translation are served under paragraph (b), the court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trier of fact.

(e) Expert Testimony of Translator. Except as provided in paragraph (c), this Rule does not preclude the admission of a translation of foreign language documents at trial either by live testimony or by deposition testimony of a qualified expert translator.

(f) Varying of Time Limits. The court, upon motion of any party and for good cause shown, may enlarge or shorten the time limits set forth in this Rule.

(g) Court Appointment. The court, if necessary, may appoint a qualified translator, the reasonable value of whose services shall be taxed as court costs.

Comment to 1998 change: This is a new rule.

History of TRE 1009 (civil): Adopted eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxxiv). Source: New rule.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 1032.

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In re DC, No. 01-11-00387-CV (Tex.App.—Houston [1st Dist.] 2012, pet. denied) (memo op.; 3-1-12). Father "complains that the initial return was in Spanish, and because it was not translated into English until after trial, it violated [TRE] 1009, which requires that all foreign documents to be admitted at trial must be translated 45 days before trial and be accompanied by an affidavit from a qualified translator. [¶] However, rule 1009 is a rule of evidence governing the admission of foreign documents of trial. [Father] has cited no cases in which rule 1009 requires the translation of foreign returns of service into English, or that such a translation could not be done in an amended return while the trial court still had plenary power. We have found no authority holding that rule 1009 trumps [TRCP] 118, which permits amended returns of service '[a]t any time.'"

Doncaster v. Hernaiz, 161 S.W.3d 594, 601 (Tex. App.—San Antonio 2005, no pet.). "[P] did file a copy of the [foreign-language document] with a translation with her initial summary judgment motion, but failed to attach the translator's affidavit. Later, [P] supplemented her motion with an affidavit from the translator.... Because of [P's] late supplementation, the trial court provided [D] a one-week continuance before conducting the summary judgment hearing. Rule 1009 provides the court with authority to lengthen or shorten the time limits set by the rule. [A]ny error in failing to initially provide the affidavit of the translator was cured by its inclusion in the supplement, and it was therefore within the court's discretion to admit [the document]."

only that immigration forms be authenticated through some recognized procedure, such as those required by [government] regulations or by the [FRCPs]."

AMFAC Distrib. v. Harrelson, 842 F.2d 304, 306-07 (11th Cir.1988). "Under [FRCP] 44(a)(1), two things are required to authenticate a copy of a state court judgment. First, the copy must be attested to by the officer having the legal custody of the judgment or by his deputy. Second, there must be a certificate that the attesting officer has legal custody; this certificate is to be made by a judge of a court of record of the district or political subdivision in which the judgment is kept and must be authenticated by the seal of the court. [¶] [If P] did not substantially comply with Rule 44(a), ... the Texas judgment is admissible under the [FREs]. [FRE] 902 provides for authentication by certificate when a copy of the judgment bears a seal purporting to be that of a state court and a signature purporting to be an attestation of the custodian of the original judgment."

FRCP 44.1. DETERMINING FOREIGN LAW

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

See selected Notes of Advisory Committee to FRCP 44.1, p. 1289.

History of FRCP 44.1: Adopted Feb. 28, 1966, eff. July 1, 1966. Amended Nov. 20, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.

See *Commentaries*, "Motion for Judicial Notice," ch. 5-N, p. 411; *O'Connor's Federal Civil Forms* (2014), FORMS 5M.

See also FRE 201 (judicial notice).

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In re Griffin Trading Co., 683 F.3d 819, 822 (7th Cir.2012). "Although it is true that Rule 44.1 requires any party who intends to present evidence of foreign law to 'give notice by a pleading or other writing,' the language of the rule itself reveals that no particular formality is required. Any 'other writing' will do, as long as it suffices to give proper notice of an intent to rely on foreign law. *At 823:* 'If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.'"

Northrop Grumman Ship Sys. v. Ministry of Def. of the Republic of Venez., 575 F.3d 491, 496-97 (5th Cir. 2009). FRCP 44.1 "is intended to 'avoid unfair surprise,' not to 'set any definite limit on the party's time for giving the notice of an issue of foreign law....' When the applicability of foreign law is not obvious, notice is sufficient if it allows the opposing party time to research the foreign rules. Some of the factors that should be considered in determining whether notice is reasonable include '[t]he stage which the case had reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised....'" *See also* ***APL Co. Pte. Ltd. v. UK Aerosols Ltd.***, 582 F.3d 947, 955-56 (9th Cir.2009).

Mutual Serv. Ins. v. Frit Indus., 358 F.3d 1312, 1321 (11th Cir.2004). "The district court is not required to conduct its own research into the content of foreign law if the party urging its application declines to do so." *See also* ***Grand Entm't Grp. v. Star Media Sales, Inc.***, 988 F.2d 476, 488 (3d Cir.1993) (court may conduct its own supplemental research).

DP Aviation v. Smiths Indus. Aerospace & Def. Sys., 268 F.3d 829, 848 (9th Cir.2001). "Absent extenuating circumstances, notice of issues of foreign law that reasonably would be expected to be part of the proceedings should be provided in the pretrial conference and contentions about applicability of foreign law should be incorporated in the pretrial order. This gives parties ample opportunity to marshal resources pertinent to foreign law, which normally will not be as well known as domestic law to parties and courts."

Republic of Turk. v. OKS Partners, 146 F.R.D. 24, 27 (D.Mass.1993). "'Statutes, administrative material, and judicial decisions can be established most easily by introducing an official or authenticated copy of the applicable provisions or court reports supported by expert testimony as to their meaning...[.] In addition ... a litigant may present any other information concerning foreign law he believes will further his cause, including secondary sources such as texts, learned journals, and a wide variety of unauthenticated documents relating to foreign law.'"

FRCP 45. SUBPOENA

(a) In General.

(1) *Form and Contents.*

(A) *Requirements—In General.* Every subpoena must:

to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.' [¶] However, personal knowledge of a fact 'is not an absolute' to Rule 602's foundational requirement, which 'may consist of what the witness thinks he knows from personal perception.' Similarly, a witness may testify to the fact of what he did not know and how, if he had known that independently established fact, it would have affected his conduct or behavior."

Payne v. Pauley, 337 F.3d 767, 772 (7th Cir.2003). "[A]lthough personal knowledge may include reasonable inferences, those inferences must be 'grounded in observation or other first-hand personal experience. They must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.'"

U.S. v. Sinclair, 109 F.3d 1527, 1536 (10th Cir. 1997). "Although Rule 602 provides that a witness's testimony must be based on personal knowledge, it 'does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible ... only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.'" *See also* ***U.S. v. Brown***, 669 F.3d 10, 22 (1st Cir. 2012).

SEC v. Singer, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992). "Testimony is admissible even though the witness is not positive about what he perceived, provided the witness had an opportunity to observe and obtained some impressions based on his observations. [¶] Testimony can be admissible under Rule 602 even if the witness has only a broad general recollection of the subject matter. [¶] [A] witness' *conclusion based on personal observations over time* may constitute personal knowledge despite the witness' inability to recall the specific incidents upon which he based his conclusions."

FRE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

History of FRE 603: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

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U.S. v. IMM, 747 F.3d 754, 770 (9th Cir.2014). FRE 603 "'is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and *children*.' '[A]ffirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.'" *See also* ***Doe v. Phillips***, 81 F.3d 1204, 1211 (2d Cir.1996); ***U.S. v. Saget***, 991 F.2d 702, 710 (11th Cir.1993).

U.S. v. Mensah, 737 F.3d 789, 806 (1st Cir.2013). FRE 603 "provides that the requisite declaration 'must be in a form designed to impress that duty on the witness's conscience'—but does not say that only a verbal warning or response suffices. Hence, it appears that the inquiry into whether an oath has been given is routinely treated as a question of substance rather than form: '[it] turns on whether the declarant expressed the fact that ... she is impressed with the solemnity and importance of ... her words and of the promise to be truthful, in moral, religious, or legal terms.'"

U.S. v. Solorio, 669 F.3d 943, 950 (9th Cir.2012). See annotation under FRE 604, this page.

U.S. v. Frazier, 469 F.3d 85, 92 (3d Cir.2006). "Oaths are administered to witnesses as a reminder to them of their obligation to testify *truthfully*. They are not intended to guarantee *accuracy*. The fact that a witness is under oath has no bearing on the quality of a witness' memory (such that one is more or less likely to make a mistake under oath)." *See also* ***U.S. v. Zizzo***, 120 F.3d 1338, 1348 (7th Cir.1997) (idea of oath is to make witness amenable to perjury prosecution if he lies).

FRE 604. INTERPRETER

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

History of FRE 604: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

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U.S. v. Solorio, 669 F.3d 943, 950 (9th Cir.2012). FRE 604 "does not ... indicate whether ... an oath must be administered in any particular manner or at any specified time, including whether the oath must be administered for each trial. ... Although some courts administer oaths to interpreters each day, or once for an entire case, others 'administer the oath to staff and contract interpreters once, and keep it on file.' [¶] We

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Lovelace v. Sabine Consol., Inc., 733 S.W.2d 648, 656 (Tex.App.—Houston [14th Dist.] 1987, writ denied). "The audit report ... contains no such affidavit as is required by [TRCP] 172. ... Further, six days before trial [P] filed an objection to the audit. Therefore, the trial court did not err in admitting evidence that contradicted and supplemented the auditor's report."

ARTICLE VIII. HEARSAY

TRE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Matter Asserted. "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.

(d) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(e) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding except a grand jury proceeding in a criminal case, or in a deposition;

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;

(C) one of identification of a person made after perceiving the person; or

(D) taken and offered in a criminal case in accordance with Code of Criminal Procedure article 38.071.

(2) *Admission by party-opponent.* The statement is offered against a party and is:

(A) the party's own statement in either an individual or representative capacity;

(B) a statement of which the party has manifested an adoption or belief in its truth;

(C) a statement by a person authorized by the party to make a statement concerning the subject;

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(3) *Depositions.* In a civil case, it is a deposition taken in the same proceeding, as same proceeding is defined in Rule of Civil Procedure 203.6(b). Unavailability of deponent is not a requirement for admissibility.

History of TRE 801 (civil): Amended eff. Jan. 1, 1999, by order of Dec. 31, 1998 (981-82 S.W.2d [Tex.Cases] xxxviii). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] xc): Amended (c)(3). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lvi): The definitions in TRE 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct; these are described and illustrated below.

(1) A verbal (oral or written) explicit assertion. Illustration. Witness testifies that declarant said "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease, witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The testimony is to a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. In a rape prosecution to prove that Richard, the defendant, was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration. W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and so is a statement. The matter asserted is that X went north because that is implied from the statement and the probative value of the statement as offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

Source: FRE 801.

See *Commentaries*, "Admissibility," ch. 6-F, §12.1, p. 583; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 784; *O'Connor's Texas Forms*, FORM 5E:1.

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) **Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.

(e) **Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

History of FRE 706: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

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Quiet Tech. DC-8, Inc. v. Hurel-DuBois UK Ltd., 326 F.3d 1333, 1348-49 (11th Cir.2003). "[W]e are unfamiliar with any set of circumstances under which a district court bears an affirmative obligation to appoint an independent expert [under FRE 706(a)]. Quite the contrary, as long as the district court thoroughly considers a request for the appointment of such an expert and reasonably explains its ultimate decision thereon, that decision is vested in the sound discretion of the trial court." *See also* ***Gaviria v. Reynolds***, 476 F.3d 940, 945 (D.C.Cir.2007); ***Walker v. American Home Shield Long Term Disability Plan***, 180 F.3d 1065, 1071 (9th Cir.1999).

Techsearch L.L.C. v. Intel Corp., 286 F.3d 1360, 1378 (Fed.Cir.2002). "A district court's appointment of a technical advisor, outside of the purview of Rule 706 ..., falls within the district court's inherent authority, and the Ninth Circuit has held that district courts may use technical advisors when desirable and necessary. It also implicitly recognized that district courts should use this inherent authority sparingly and then only in exceptionally technically complicated cases. *At 1379:* [I]n appointing a technical advisor[, the court] must: use a 'fair and open procedure for appointing a neutral technical advisor ... addressing any allegations of bias, partiality or lack of qualifications' in the candidates; clearly define and limit the technical advisor's duties, presumably in a writing disclosed to all parties; guard against extra-record information; and make explicit, perhaps through a report or record, the nature and content of the technical advisor's tutelage concerning the technology. The fact that the use of a technical advisor is permissible under such guidelines does not mean that it is invariably desirable or that safeguards are not required. As a practical matter, there is a risk that some of the judicial decision-making function will be delegated to the technical advisor. District court judges need to be extremely sensitive to this risk and minimize the potential for its occurrence." *See also* ***In re Joint E.&S. Dist. Asbestos Litig.***, 830 F.Supp. 686, 693 (E.D.N.Y.1993) (work of appointed experts is especially critical in dealing with complex mass-tort problems).

Ledford v. Sullivan, 105 F.3d 354, 361 (7th Cir. 1997). "In this case, when the district court stated that no funds existed to pay for the appointment of an expert, it failed to recognize that it had the discretion [under FRE 706(b), now FRE 706(c),] to apportion all the costs to one side. We caution against reading Rule 706(b) [now Rule 706(c)] in such a narrow fashion that the rule would allow for court-appointed experts only when *both* sides are able to pay their respective shares. Read in such a restrictive way, Rule 706(b) [now Rule 706(c)] would hinder a district court from appointing an expert witness whenever one of the parties is indigent, even when that expert's testimony would substantially aid the court."

ARTICLE VIII. HEARSAY

FRE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

(a) **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant.** "Declarant" means the person who made the statement.

(c) **Hearsay.** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of per-

jury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rebutt the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

2014 Notes of Advisory Committee

[¶1] Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

[¶2] Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

[¶3] The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.

[¶4] The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

History of FRE 801: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Oct. 16, 1975, P.L. 94-113, §1, 89 Stat. 576, eff. Oct. 31, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 25, 2014, eff. Dec. 1, 2014.

See *Commentaries*, "Hearsay exceptions," ch. 8-C, §4.3, p. 755.

ANNOTATIONS

Definition – Statement

U.S. v. Waters, 627 F.3d 345, 358 (9th Cir.2010). "'Tell the truth' is an imperative and not an assertion of fact. It therefore does not fall within the meaning of 'statement' in Rule 801(a) and cannot be hearsay, because a nonassertion cannot have been offered to prove the truth of the matter asserted." *See also* ***Katzenmeier v. Blackpowder Prods.***, 628 F.3d 948, 951 (8th Cir. 2010) (instruction to someone to do something is not hearsay).

U.S. v. Pang, 362 F.3d 1187, 1192 (9th Cir.2004). "[O]ut-of-court statements that are offered as evidence of legally operative verbal conduct are not hearsay. They are considered 'verbal acts.' Checks [written on a bank account] fall squarely in this category of legally-operative verbal acts that are not barred by the hearsay rule."

Definition – Hearsay

U.S. v. Benitez-Avila, 570 F.3d 364, 367-68 (1st Cir. 2009). "The principal vice of hearsay is the inability of the opponent of the evidence to cross-examine the person who made the out-of-court statement (the 'declarant'). The opponent of the evidence is thus unable to get the declarant's testimony as to whether in fact the declarant said what has been attributed to him, what he meant by it, whether he had a reliable basis for the assertion, and whether he might have been influenced by a bias which undermines his reliability."

Restyled 2015

(c) **Admissibility of Opinion.** An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) **When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury.** If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Comment to 2015 restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

History of TRE 705 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lx). Amended eff. Nov. 1, 1984, by order of June 25, 1984 (669-70 S.W.2d [Tex.Cases] xxxviii): Added "disclose on direct examination, or" and "on cross-examination" to last sentence. Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 705.

See *O'Connor's Texas Rules * Civil Trials* (2015), "Motion to Exclude Expert," ch. 5-N, p. 447; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 733.

ANNOTATIONS

Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd., 249 S.W.3d 380, 389-90 (Tex.2008). "[E]xperts are not required to introduce ... foundational data at trial unless the opposing party or the court insists."

Kerr-McGee Corp. v. Helton, 133 S.W.3d 245, 252 (Tex.2004). "[B]ecause Rule 705(a) contemplates that the party against whom the evidence is offered may elicit testimony regarding the underlying facts or data on cross-examination, a motion to strike the testimony after such cross-examination is timely."

Weiss v. Mechanical Associated Servs., 989 S.W.2d 120, 124-25 (Tex.App.—San Antonio 1999, pet. denied). "The non-exclusive list of factors the court may consider in deciding admissibility [under TRE 705(c)] includes the extent to which the theory has been or can be tested, the extent to which the technique relies upon the subjective interpretation of the expert, whether the theory has been subjected to peer review and/or publication, the technique's potential rate of error, whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and the non-judicial uses that have been made of the theory or technique."

TRE 706. AUDIT IN CIVIL CASES

Notwithstanding any other evidence rule, the court must admit an auditor's verified report prepared under Rule of Civil Procedure 172 and offered by a party. If a party files exceptions to the report, a party may offer evidence supporting the exceptions to contradict the report.

History of TRE 706 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxi). Adopted eff. Jan. 1, 1988, by order of July 15, 1987 (733-34 S.W.2d [Tex.Cases] xcvii): To conform to TRCP 172. Source: New rule.

See Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 749.

ANNOTATIONS

Lovelace v. Sabine Consol., Inc., 733 S.W.2d 648, 656 (Tex.App.—Houston [14th Dist.] 1987, writ denied). "The audit report ... contains no such affidavit as is required by [TRCP] 172. ... Further, six days before trial [P] filed an objection to the audit. Therefore, the trial court did not err in admitting evidence that contradicted and supplemented the auditor's report."

ARTICLE VIII. HEARSAY

TRE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

(a) **Statement.** "Statement" means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.

(b) **Declarant.** "Declarant" means the person who made the statement.

(c) **Matter Asserted.** "Matter asserted" means:
  (1) any matter a declarant explicitly asserts; and
  (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter.

(d) **Hearsay.** "Hearsay" means a statement that:
  (1) the declarant does not make while testifying at the current trial or hearing; and
  (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(e) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and:

(i) when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding—except a grand jury proceeding—or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

(3) *A Deponent's Statement.* In a civil case, the statement was made in a deposition taken in the same proceeding. "Same proceeding" is defined in Rule of Civil Procedure 203.6(b). The deponent's unavailability as a witness is not a requirement for admissibility.

Comment to 2015 restyling: Statements falling under the hearsay exclusion provided by Rule 801(e)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 803(24) exception for declarations against interest. No change in application of the exclusion is intended.

The deletion of former Rule 801(e)(1)(D), which cross-references Code of Criminal Procedure art. 38.071, is not intended as a substantive change. Including this cross-reference made sense when the Texas Rules of Criminal Evidence were first promulgated, but with subsequent changes to the statutory provision, its inclusion is no longer appropriate. The version of article 38.071 that was initially cross-referenced in the Rules of Criminal Evidence required the declarant-victim to be available to testify at the trial. That requirement has since been deleted from the statute, and the statute no longer requires either the availability or testimony of the declarant-victim. Thus, cross-referencing the statute in Rule 801(e)(1), which applies only when the declarant testifies at trial about the prior statement, no longer makes sense. Moreover, article 38.071 is but one of a number of statutes that mandate the admission of certain hearsay statements in particular circumstances. *See, e.g.*, Code of Criminal Procedure art. 38.072; Family Code §§54.031, 104.002, 104.006. These statutory provisions take precedence over the general rule excluding hearsay, see Rules 101(c) and 802, and there is no apparent justification for cross-referencing article 38.071 and not all other such provisions.

History of TRE 801 (civil): Amended eff. Apr. 1, 2015, by order of Mar. 10, 2015 (Tex.Sup.Ct. Order, Misc. Docket No. 15-9048). Amended eff. Jan. 1, 1999, by order of Dec. 31, 1998 (981-82 S.W.2d [Tex.Cases] xxxviii). Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lxi). Amended eff. Jan. 1, 1988, by order of Nov. 10, 1986 (733-34 S.W.2d [Tex.Cases] xc): Amended (c)(3). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lvi): The definitions in TRE 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct; these are described and illustrated below.

(1) A verbal (oral or written) explicit assertion. Illustration. Witness testifies that declarant said "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease, witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The testimony is to a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration. In a rape prosecution to prove that Richard, the defendant, was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration. W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and so is a statement. The matter asserted is that X went north because that is implied from the statement and the probative value of the statement as offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

Source: FRE 801.

See *O'Connor's Texas Rules * Civil Trials* (2015), "Admissibility," ch. 6-F, §12.1, p. 583; Brown & Rondon, *Texas Rules of Evidence Handbook* (2015), p. 784; *O'Connor's Texas Civil Forms* (2014), FORM 5E:1.

ANNOTATIONS

TRE 801(d)

In re M.S., 115 S.W.3d 534, 543 (Tex.2003). "[T]he Agreement [between D and Child Protective Services]

ROBIN MALONE DARR

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

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

June 10, 2014

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

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

Dear Chief Justice Hecht and Mr. Lowe:

A proposal to amend Rule 801(e)(1)(B) is being presented only on behalf of the Administrative Rules of Evidence Committee of the State Bar of Texas and should not be construed as representing the position of the Board of Directors, the Executive Committee or the general membership of the State Bar of Texas. The Administrative Rules of Evidence Committee is a volunteer standing committee of the State Bar of Texas. This proposed amendment has been approved by the membership of the Administrative Rules of Evidence Committee pursuant to applicable procedures and represents the views of a majority of the members of the Committee.

Sincerely,

Robin Malone Darr
Chair Rules of Evidence Committee

RMD/hlh

MOTION: That Rule 801(e)(1)(B) be amended to read as follows:

(e) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

* * *

(B) consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground;

MOTION: That the proposed restyled version of Rule 801(e)(1)(B) be revised to read as follows:

(e) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground;

Notes Of Advisory Committee (2014 Amendment)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States* [24], 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

Legislative History: *(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1938; Oct. 16, 1975, P.L. 94-113, § 1, 89 Stat. 576.) 1975. Act Oct. 16, 1975 (effective on the fifteenth day after the*

Kristal Voth

From: Kristal Voth
Sent: Tuesday, November 03, 2015 2:45 PM
To: lbenton@levibenton.com; harvey.brown@1stcoa.courts.state.tx.us; 'harvey.brown@txcourts.gov'; ecarlson@stcl.edu; Hoffman, Lonny; 'Roger Hughes'; 'pkelly@texasappeals.com'
Subject: RE: 801(e)(1)(B)
Attachments: TRE 801 Original.pdf; Notes of Advisory Committee on FRE 801.pdf; FRE 801.pdf; TRE 801 Restyled 2015.pdf

Dear Committee Members:

I am enclosing herein the following:

1. TRE 801 in effect prior to 2015;
2. TRE 801 after the restyling in 2015;
3. FRE 801 as amended effective December 1, 2014; and
4. Notes of advisory committee concerning 2014 amendment to FRE 801(d)(1)(B).

Note: FRE 801(d)(1)(B) is actually TRE 801(e)(1)(B). FRE has three definitions (a), (b), and (c). TRE has four definitions, (a), (b), (c), and (d). That is the reason and the difference between the numbers.

I have talked to professor Stave Goode and Judge Robin Malone Darr, chair of the Rules of Evidence Committee for the Administration Rules of Evidence Committee of the State Bar of Texas. The recommended amendment is for two reasons. First, is style but secondly, and most importantly, is for substance. You will see from the notes of the advisory committee concerning the 2014 amendment of FRE, that substantive changes were made and you can see the reasons for such changes. The State Bar Committee felt that that was a valid reasoning and to be consistent with the federal rule they made their recommendation.

Please let me have your thoughts and views on this.

Sincerely,
Buddy Low

Kristal C. Voth
Legal Assistant to Attorneys Gilbert I. Low and Donean Surratt
Orgain Bell & Tucker, LLP
470 Orleans Street
Beaumont, Texas 77701
(409) 838-6412 ext.332
Fax (409) 838-6959

From: Kristal Voth
Sent: Thursday, October 29, 2015 1:27 PM
To: lbenton@levibenton.com; harvey.brown@1stcoa.courts.state.tx.us; 'harvey.brown@txcourts.gov' <harvey.brown@txcourts.gov>; ecarlson@stcl.edu; Hoffman, Lonny <LHoffman@Central.UH.EDU>; 'Roger Hughes' <rhughes@adamsgraham.com>; 'pkelly@texasappeals.com' <pkelly@texasappeals.com>
Subject: Re: 801(e)(1)(B)

Dear Committee Members:

I am enclosing herein a proposed revision to TRE 801(e)(1)(B), which is made for purposes of clarity and does not include any substantive changes. Please let me have your views on this.

Thank you,
Buddy Low

PE – You will notice the language is verbatim, the same language used in the federal rule.

Kristal C. Voth
Legal Assistant to Attorneys Gilbert I. Low and Donean Surratt
Orgain Bell & Tucker, LLP
470 Orleans Street
Beaumont, Texas 77701
(409) 838-6412 ext.332
Fax (409) 838-6959

Item 5 – Time Standards for the Disposition of Criminal Cases

Walker, Marti

From: Walker, Marti
Sent: Thursday, December 10, 2015 2:44 PM
To: 'aalbright@law.utexas.edu'; 'adawson@beckredden.com'; Babcock, Chip; 'brett.busby@txcourts.gov'; 'cristina.rodriguez@hoganlovells.com'; 'csoltero@mcginnislaw.com'; 'cwatson@lockelord.com'; 'd.b.jackson@att.net'; 'dpeeples@bexar.org'; 'ecarlson@stcl.edu'; 'elsa.alcala@txcourts.gov'; 'errodriguez@atlashall.com'; 'esteveza@pottercscd.org'; 'evan.young@bakerbotts.com'; 'evansdavidl@msn.com'; 'fgilstrap@hillgilstrap.com'; 'fuller@namanhowell.com'; 'harvey.brown@txcourts.gov'; 'Honorable Robert H. Pemberton'; 'jane.bland@txcourts.gov'; 'jperduejr@perdueandkidd.com'; Sullivan, Kent; 'kvoth@obt.com'; 'LJefferson@JeffersonCano.com'; 'lbenton@levibenton.com'; 'lhoffman@central.uh.edu'; 'Linda Riley'; 'lisa@kuhnhobbs.com'; 'mahatchell@lockelord.com'; 'martha.newton@txcourts.gov'; 'mgreer@adjtlaw.com'; 'nathan.hecht@txcourts.gov'; 'nina.cortell@haynesboone.com'; 'och@atlashall.com'; 'pkelly@texasappeals.com'; 'psbaron@baroncounsel.com'; 'pschenkkan@gdhm.com'; 'rhardin@rustyhardin.com'; 'rhughes@adamsgraham.com'; 'rhwallace@tarrantcounty.com'; 'richard@ondafamilylaw.com'; 'rmeadows@kslaw.com'; 'rmun@scotthulse.com'; 'robert.l.levy@exxonmobil.com'; 'Scott Stolley'; 'shanna.dawson@txcourts.gov'; 'stephen.yelenosky@co.travis.tx.us'; 'tom.gray@txcourts.gov'; 'tracy.christopher@txcourts.gov'; 'triney@rineymayfield.com'; 'wdorsane@mail.smu.edu'; 'coliden@lockelord.com'; 'wshelton@shelton-valadez.com'; 'Justice Boyd (jeff.boyd@txcourts.gov)'; 'Elaine Carlson (elainecarlson@comcast.net)'; 'Viator, Mary (MViator@kslaw.com)'; 'bill.boyce@txcourts.gov'
Subject: FW: Subcommittee on Time Standards for Criminal Cases
Attachments: Hecht letter and speedy trial statutes.pdf

Committee Members:
On behalf of the 166-166a Sub-Committee, please see the attachment and below email (which will serve as item "N") on the Agenda. Thank you for your attention to this matter.

From: Peeples, David [mailto:dpeeples@bexar.org]
Sent: Thursday, December 10, 2015 2:37 PM
To: Walker, Marti
Subject: Subcommittee on Time Standards for Criminal Cases

To the SCAC:

The Subcommittee on Time Standards for Criminal Cases recommends that a task force be created to draft a set of time standards. Then, at a later meeting, the SCAC could consider the three options stated below. The task force would consist of a few members of the SCAC and other members chosen by the Court of Criminal Appeals. Here is some background and further information.

Chief Justice Hecht's October 9 letter to the SCAC asked our subcommittee to recommend language for Administrative Rule 6.1(a). That rule reads as follows:

Rule 6.1 District and Statutory County Courts.

District and statutory county court judges of the county in which cases are filed should, so far as reasonably possible, ensure that all cases are brought to trial or final disposition in conformity with the following time standards:

(a) Criminal Cases. As provided by Article 32A.02, Code of Criminal Procedure.

As the Chief's letter says, in 1987 the Court of Criminal Appeals held that article 32A.02 violates the separation of powers and is unconstitutional. In 2005 the Legislature repealed article 32A.02. Yet Administrative Rule 6.1 still refers to it. What should the Supreme Court do?

I have attached copies of three parts of the Code of Criminal Procedure that deal with speedy trial principles. They are: (1) article 17.151 (delay when accused has been indicted and is in custody or out on bail), (2) article 32.01 (delay when person is in custody but not yet officially charged), and (3) article 32A.01 (trial priorities).

The Sixth Amendment to the U.S. Constitution says in part, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . ." This command has been incorporated and it applies to the states.

The subcommittee has identified the following three options:

(1) Simply delete the section on time standards for criminal cases.

(2) Delete the reference to art. 32A.02 and replace it with the three CCP articles mentioned above.

(3) Delete the reference to art. 32A.02, draft time standards, and perhaps refer to the three CCP articles mentioned above.

We have not yet drafted time standards for option three because we feel that this group of primarily civil lawyers and judges should seek input from the Court of Criminal Appeals. After the meeting on December 11, we should be in communication with the CCA through Judge Alcala.

For the December 11 meeting we recommend that a joint subcommittee (or task force) be created to draft time standards for the full SCAC's consideration. The full committee would then have a tangible option three to evaluate when it decides, at a later meeting, which of the three options to recommend to the court.

I add that there is no real support for option one. The real decision seems to be whether the committee should recommend option two or three.

Thanks,
David Peeples

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

October 9, 2015

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

Re: Referral of Rules Issues

Dear Chip:

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

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

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

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

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

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

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

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

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

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

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

ANNOTATIONS

Ludwig v. State, 812 S.W.2d 323, 325 (Tex.Crim. App.1991). "We are not inclined to read 'victim' in [art. 17.15(5)] to cover anyone not actually a complainant in the charged offense."

Ex parte Brooks, 376 S.W.3d 222, 223 (Tex.App.—Fort Worth 2012, pet. ref'd). "In addition to [the rules listed in art. 17.15,] the Texas Court of Criminal Appeals [in *Ex parte Rubac*, 611 S.W.2d 848 (Tex.Crim. App.1981),] stated that the court should also weigh the following factors: (1) the accused's work record; (2) the accused's family ties; (3) the accused's length of residence; (4) the accused's prior criminal record, if any; (5) the accused's conformity with the conditions of any previous bond; (6) the existence of outstanding bonds, if any; and (7) aggravating circumstances alleged to have been involved in the charged offense."

Montalvo v. State, 315 S.W.3d 588, 592-93 (Tex. App.—Houston [1st Dist.] 2010, no pet.). "A defendant carries the burden of proof to establish that bail is excessive. In reviewing a trial court's ruling for an abuse of discretion, an appellate court will not intercede as long as the trial court's ruling is at least within the zone of reasonable disagreement. We acknowledge, however, that an abuse-of-discretion review requires more of the appellate court than simply deciding that the trial court did not rule arbitrarily or capriciously. The appellate court must instead measure the trial court's ruling against the relevant criteria by which the ruling was made."

Perez v. State, 897 S.W.2d 893, 898 (Tex.App.—San Antonio 1995, no pet.). "[T]he court of criminal appeals has considered the nonviolent aspect of an offense as a factor favorable to a bond reduction."

ART. 17.151 RELEASE BECAUSE OF DELAY

Sec. 1. A defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within:

(1) 90 days from the commencement of his detention if he is accused of a felony;

(2) 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;

(3) 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or

(4) five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.

Sec. 2. The provisions of this article do not apply to a defendant who is:

(1) serving a sentence of imprisonment for another offense while the defendant is serving that sentence;

(2) being detained pending trial of another accusation against the defendant as to which the applicable period has not yet elapsed;

(3) incompetent to stand trial, during the period of the defendant's incompetence; or

(4) being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community under this article.

Sec. 3. Repealed by Acts 2005, 79th Leg., ch. 110, §2, eff. Sept. 1, 2005.

History of CCP art. 17.151: Arts 1977, 65th Leg., ch. 787, §2, eff. July 1, 1978. Amended by Acts 2005, 79th Leg., ch. 110, §§1, 2, eff. Sept. 1, 2005.
See also CCP art. 29.12.

ANNOTATIONS

Rowe v. State, 853 S.W.2d 581, 582 (Tex.Crim.App. 1993). "Article 17.151 provides that if the State is not ready for trial within 90 days after commencement of detention for a felony, the accused 'must be released either on personal bond or by reducing the amount of bail required[.]' Thus the trial court has two options: release upon personal bond or reduce the bail amount. However, there is nothing in the statute indicating that the provisions do not apply if the delay was based upon the accused's request to testify before the grand jury. Article 17.151 contains no provisions excluding certain periods from the statutory time limit to accommodate exceptional circumstances." *But see Ex Parte Matthews*, 327 S.W.3d 884, 888 (Tex.App.—Beaumont 2010, no pet.) (because CCP art. 17.15 applies to CCP art. 17.151, trial court may consider victim and community safety concerns in determining amount of bail under art. 17.151).

Ex parte Shaw, ___ S.W.3d ___ (Tex.App.—Fort Worth 2012, pet. ref'd) (No. 02-12-00116-CR; 12-21-12). Held: D was charged with three offenses. Although one offense had an indictment returned within 90 days, the

other two offenses had no indictments returned, and D continued to be jailed longer than 90 days. Appellate court held D must either be released on personal bond or have bail reduced on the unindicted charges.

Ex parte Okun, 342 S.W.3d 184, 185-86 (Tex. App.—Beaumont 2011, no pet.). "A habeas applicant has the burden of proving bail is excessive. [D] did not present any evidence about any discussions with bail bondsmen or any evidence regarding the maximum amount of bail that [D] believed he could satisfy. [¶] [D] sought a reduction in the bail amount. The trial court granted a substantial reduction in the bail amount. Under the circumstances, given the trial court's grant of [D's] motion, it was incumbent upon [D] to inform the trial court before filing this appeal that the reduced bail was not affordable, or that his request was not for a reduction in bail but for a release on personal bond."

Ex parte Castellano, 321 S.W.3d 760, 764 (Tex. App.—Fort Worth 2010, no pet.). "The stipulated evidence demonstrates that the trial court released [D] on personal bond pursuant to art. 17.151 after he had remained continuously incarcerated on the possession charge for more than 90 days without being indicted. The State thereafter rearrested [D] after he was indicted for the same possession offense. [T]he return of the indictment is the only evidence in the record that supports the trial court's decisions to revoke [D's] personal bond, to set the bond at $100,000, and to deny his requested relief to reinstate the personal bond. Article 17.151, however, 'does not permit the State to obtain an indictment, rearrest [D,] and begin the 90 day period anew from the date of the indictment or rearrest.'"

Vargas v. State, 109 S.W.3d 26, 29 (Tex.App.—Amarillo 2003, no pet.). "The courts of appeals have split over whether appellate jurisdiction exists in regard to direct appeals from pretrial bail rulings such as the one before us. [¶] We lack a statutory grant of jurisdiction over this appeal. And, although TRAP 31 addresses, in part, appeals from bail proceedings, we note that the [TRAPs] do not establish jurisdiction of courts of appeals, and cannot create jurisdiction where none exists. [¶] We lack jurisdiction over this direct appeal from interlocutory pretrial orders refusing to lower bail pursuant to CCP [art.] 17.151." *See also Sanchez v. State*, 340 S.W.3d 848, 850-52 (Tex.App.—San Antonio 2011, no pet.) (no appellate jurisdiction); *Keaton v. State*, 294 S.W.3d 870, 872-73 (Tex.App.—Beaumont 2009, no pet.) (same); *Benford v. State*, 994 S.W.2d 404, 409 (Tex.App.—Waco 1999, no pet.) (same); *Ex parte Shumake*, 953 S.W.2d 842, 846-47 (Tex.App.—Austin 1997, no pet.) (same). *But see Ramos v. State*, 89 S.W.3d 122, 124-26 (Tex.App.—Corpus Christi 2002, no pet.) (TRAP 31.1 contemplates appeals of orders in bail proceedings); *Saliba v. State*, 45 S.W.3d 329, 329 (Tex.App.—Dallas 2001, no pet.) (same); *McKown v. State*, 915 S.W.2d 160, 161 (Tex.App.—Fort Worth 1996, no pet.) (same); *Clark v. Barr*, 827 S.W.2d 556, 556-57 (Tex.App.—Houston [1st Dist.] 1992, no pet.) (same).

Ramos v. State, 89 S.W.3d 122, 128 (Tex.App.—Corpus Christi 2002, no pet.). "Article 17.151 does not require the State to 'announce ready.' The question of the State's 'readiness' within the statutory limits refers to the preparedness of the prosecution for trial. We hold that the State made a *prima facie* showing that it was ready for trial within the statutory period. Accordingly, it became [D's] burden to rebut the State's showing of readiness."

Ex parte McNeil, 772 S.W.2d 488, 489 (Tex.App.—Houston [1st Dist.] 1989, orig. proceeding). "Readiness for trial should be determined [by] the existence of a charging instrument [as] an element of preparedness. Where there is no indictment, the State cannot announce ready for trial." *See also Ex parte Craft*, 301 S.W.3d 447, 449 (Tex.App.—Fort Worth 2009, no pet.); *Ex parte Avila*, 201 S.W.3d 824, 826-27 (Tex.App.—Waco 2006, no pet.).

ART. 17.152. DENIAL OF BAIL FOR VIOLATION OF CERTAIN COURT ORDERS OR CONDITIONS OF BOND IN A FAMILY VIOLENCE CASE

(a) In this article, "family violence" has the meaning assigned by Section 71.004, Family Code.

(b) Except as otherwise provided by Subsection (d), a person who commits an offense under Section 25.07, Penal Code, related to a violation of a condition of bond set in a family violence case and whose bail in the case under Section 25.07, Penal Code, or in the family violence case is revoked or forfeited for a violation of a condition of bond may be taken into custody and, pending trial or other court proceedings, denied release on bail if following a hearing a judge or magistrate determines by a preponderance of the evidence that the person violated a condition of bond related to:

ART. 31.08. RETURN TO COUNTY OF ORIGINAL VENUE

Sec. 1. (a) On the completion of a trial in which a change of venue has been ordered and after the jury has been discharged, the court, with the consent of counsel for the state and the defendant, may return the cause to the original county in which the indictment or information was filed. Except as provided by Subsection (b) of this section, all subsequent and ancillary proceedings, including the pronouncement of sentence after appeals have been exhausted, must be heard in the county in which the indictment or information was filed.

(b) A motion for new trial alleging jury misconduct must be heard in the county in which the cause was tried. The county in which the indictment or information was filed must pay the costs of the prosecution of the motion for new trial.

Sec. 2. (a) Except as provided by Subsection (b), on an order returning venue to the original county in which the indictment or information was filed, the clerk of the county in which the cause was tried shall:

(1) make a certified copy of the court's order directing the return to the original county;

(2) make a certified copy of the defendant's bail bond, personal bond, or appeal bond;

(3) gather all the original papers in the cause and certify under official seal that the papers are all the original papers on file in the court; and

(4) transmit the items listed in this section to the clerk of the court of original venue.

(b) This article does not apply to a proceeding in which the clerk of the court of original venue was present and performed the duties as clerk for the court under Article 31.09.

Sec. 3. Except for the review of a death sentence under Section 2(h), Article 37.071, or under Section 2(h), Article 37.072, an appeal taken in a cause returned to the original county under this article must be docketed in the appellate district in which the county of original venue is located.

History of CCP art. 31.08: Acts 1989, 71st Leg., ch. 824, §1, eff. Sept. 1, 1989. Amended by Acts 1995, 74th Leg., ch. 651, §1, eff. Sept. 1, 1995; Acts 2007, 80th Leg., ch. 593, §3.17, eff. Sept. 1, 2007.

ART. 31.09. CHANGE OF VENUE; USE OF EXISTING SERVICES

(a) If a change of venue in a criminal case is ordered under this chapter, the judge ordering the change of venue may, with the written consent of the prosecuting attorney, the defense attorney, and the defendant, maintain the original case number on its own docket, preside over the case, and use the services of the court reporter, the court coordinator, and the clerk of the court of original venue. The court shall use the courtroom facilities and any other services or facilities of the district or county to which venue is changed. A jury, if required, must consist of residents of the district or county to which venue is changed.

(b) Notwithstanding Article 31.05, the clerk of the court of original venue shall:

(1) maintain the original papers of the case, including the defendant's bail bond or personal bond;

(2) make the papers available for trial; and

(3) act as the clerk in the case.

History of CCP art. 31.09: Acts 1995, 74th Leg., ch. 651, §2, eff. Sept. 1, 1995.

CHAPTER 32. DISMISSING PROSECUTIONS

ART. 32.01 DEFENDANT IN CUSTODY & NO INDICTMENT PRESENTED

When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

History of CCP art. 32.01: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966. Amended by Acts 1997, 75th Leg., ch. 289, §2, eff. May 26, 1997; Acts 2005, 79th Leg., ch. 743, §6, eff. Sept. 1, 2005.

See also CCP art. 15.14.

ANNOTATIONS

Ex parte Countryman, 226 S.W.3d 435, 436 (Tex. Crim.App.2007). "Because the State had not obtained an indictment by the next term of court, [D] filed an application for writ of habeas corpus to have the case dismissed. After [D] filed the application, but before the trial court held a hearing, the grand jury returned an indictment. The trial court denied the application and [D]

appealed. The court of appeals reversed the trial court's order denying habeas relief and ordered that the indictment be dismissed. We granted the State's petition for discretionary review to determine whether a speedy-indictment claim is moot when it is filed before the indictment, but not heard until after the indictment is returned." Held: The court of appeals erred. The claim was moot because even a determination that the State did not show good cause would not provide a remedy to D.

Ex parte Seidel, 39 S.W.3d 221, 223-24 (Tex.Crim. App.2001). "[A] district court lacks jurisdiction over a case when an information or indictment has not yet been filed in that court. In this case, an information or indictment had not yet been filed when the trial judge dismissed the bail and prosecution against [D]. The district court, however, had proper jurisdiction to act under the Speedy Trial Act because [D] was 'held to bail for his appearance to answer any criminal accusation before the district court.' [¶] Generally, a trial court does not have the power to dismiss a case unless the prosecutor so requests. A trial court does, however, have the power to dismiss a case without the State's consent under [CCP] art. 32.01. [CCP] art. 28.061, which bars further prosecution for a discharged offense ... no longer applies to a discharge under Art. 32.01. Therefore, even if a defendant is entitled to discharge from custody under Art. 32.01, that defendant is not free from subsequent prosecution."

Author's comment: The dismissal cannot be with prejudice.

Ex parte Martin, 6 S.W.3d 524, 528 (Tex.Crim.App. 1999). "In *Barker v. Wingo*, the [U.S.] Supreme Court set out a balancing test with four factors to determine when pretrial delay denies an accused of his right to a speedy trial.... Today we adopt a *Barker*-like, totality-of-circumstances test for the determination of good cause under art. 32.01. The habeas court should consider, among other things, the length of the delay, the State's reason for delay, whether the delay was due to lack of diligence on the part of the State, and whether the delay caused harm to the accused. [¶] Another relevant inquiry is whether the grand jury has voted not to present an indictment. *At 529:* By adopting this test, we are not adding constitutional, speedy-trial rights to art. 32.01. We are adopting a test for a fact-based situation."

Cameron v. State, 988 S.W.2d 835, 843 (Tex. App.—San Antonio 1999, pet. ref'd). "[A] defendant cannot complain of the timeliness of a second or other indictment under art. 32.01 once a valid and timely indictment is secured by the State. For timeliness purposes, we hold that art. 32.01 is satisfied once the State secures a timely indictment arising out of the same criminal transaction or occurrence. The defendant suffers no due process violation if he continues under a valid indictment, although it is not the indictment he is ultimately prosecuted and convicted for, so long as the indictment arises out of the same criminal transaction or occurrence. ... Article 32.01 should not be read to preclude the State from advancing alternative theories or charges arising out of the same criminal transaction once the State has acted within the timetable prescribed by art. 32.01 for initially securing a timely indictment. If the State is dilatory in prosecuting the case, the defendant may invoke his speedy trial right."

Soderman v. State, 915 S.W.2d 605, 608 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). "[T]his provision applies only to district courts. Absent any language in the statute or case law to support applying this provision to county courts, we are without authority to do so."

Uptergrove v. State, 881 S.W.2d 529, 531 (Tex. App.—Texarkana 1994, pet. ref'd). Article 32.01 "does not apply to a juvenile proceeding to determine whether a juvenile is to be transferred to district court to be tried as an adult."

ART. 32.02. DISMISSAL BY STATE'S ATTORNEY

The attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.

History of CCP art. 32.02: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966.

ANNOTATIONS

Smith v. State, 70 S.W.3d 848, 850-51 (Tex.Crim. App.2002). "The authority to grant immunity derives from the authority of a prosecutor to dismiss prosecutions. The authority to dismiss a case is governed by [art.] 32.02. A grant of immunity from prosecution is, conceptually, a prosecutorial promise to dismiss a case. Article 32.02 directs that a dismissal made by the prosecutor must be approved by the trial court. Therefore, a District Attorney has no authority to grant immunity

without court approval, for the approval of the court is 'essential' to establish immunity. *At 855:* Provided the judge approves the dismissal that results from an immunity agreement, and is aware that the dismissal is pursuant to an immunity agreement, the judge does not have to be aware of the specific terms of that immunity agreement for it to be enforceable."

CHAPTER 32A. SPEEDY TRIAL

ART. 32A.01 TRIAL PRIORITIES

Insofar as is practicable, the trial of a criminal action shall be given preference over trials of civil cases, and the trial of a criminal action against a defendant who is detained in jail pending trial of the action shall be given preference over trials of other criminal actions.

History of CCP art. 32A.01: Acts 1977, 65th Leg., ch. 787, §1, eff. July 1, 1978.

ART. 32A.02. REPEALED

Repealed by Acts 2005, 79th Leg., ch. 1019, §2, eff. June 18, 2005.

CHAPTER 33. THE MODE OF TRIAL

ART. 33.01. JURY SIZE

(a) Except as provided by Subsection (b), in the district court, the jury shall consist of twelve qualified jurors. In the county court and inferior courts, the jury shall consist of six qualified jurors.

(b) In a trial involving a misdemeanor offense, a district court jury shall consist of six qualified jurors.

History of CCP art. 33.01: Acts 1965, 59th Leg., ch. 722, §1, eff. Jan. 1, 1966. Amended by Acts 2003, 78th Leg., ch. 466, §1, eff. Jan. 1, 2004.

See also Tex. Const. art. 5, §13; Gov't Code §62.201.

ANNOTATIONS

Roberts v. State, 957 S.W.2d 80, 81 (Tex.Crim.App. 1997). "[A] defendant may waive his statutory right to a jury of 12 members."

ART. 33.011. ALTERNATE JURORS

(a) In district courts, the judge may direct that not more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. In county courts, the judge may direct that not more than two jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

(b) Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury renders a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties or are found by the court on agreement of the parties to have good cause for not performing their duties. Alternate jurors shall be drawn and selected in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, security, and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury has rendered a verdict on the guilt or innocence of the defendant and, if applicable, the amount of punishment.

History of CCP art. 33.011: Acts 1983, 68th Leg., ch. 775, §2, eff. Aug. 29, 1983. Amended by Acts 2007, 80th Leg., ch. 846, §1, eff. Sept. 1, 2007.

ANNOTATIONS

Trinidad v. State, 312 S.W.3d 23, 24 (Tex.Crim.App. 2010). "In 2007, the Texas Legislature amended art. 33.011(b).... According to the amendment, an alternate juror in a criminal case tried in the district court, if not called upon to replace a regular juror, shall no longer be discharged at the time that the jury retires to deliberate, but shall now be discharged after the jury has rendered a verdict. Unfortunately, the amended statute does not indicate whether the alternate juror should be allowed to be present for, and to participate in, the jury's deliberations or, instead, whether he should be sequestered from the regular jury during its deliberations until such time as the alternate's services might be required by the disability of a regular juror. In the instant cases, the trial court opted for the former contingency. The court of appeals held in each case that, in doing so, the trial court violated the constitutional requirement of a jury composed of 12 persons, or, alternatively, that the trial court violated the statutory prohibition against permitting any person not a juror into the jury deliberation room. We granted the State's

Item 6 – Three-Judge District Court; and ADR and Constitutional County Court Judges

Proposed Texas Rule of Judicial Administration, Rule 14 (changes since 10/11/15 meeting are tracked)

[Rule 14 is currently blank, as it was repealed by Tex. Sup. Ct. Misc. Docket No. 14-9168)

Transition language for order giving final approval to rule:

Rule of Judicial Administration 14 governs all cases to which Rule 14.1 applies that are filed or otherwise pending in the district court on or after the effective date of this rule. For cases that were filed before the effective date, including any that are remanded to the district court on or after that date, the attorney general may file a petition to convene under Rule 14.2(b) within 60 days after the date the district court acquires jurisdiction over the case.

14.1 Applicability

This rule applies to cases filed in a district court in this state in which the State of Texas or a Texas state officer or agency is a defendant in a claim that:

(a) challenges the finances or operations of this state's public school system; or

(b) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts.

14.2 Procedure for Petition to Convene a Special Three-Judge District Court in Applicable Cases

(a) The attorney general may petition the chief justice of the Supreme Court to convene a special three-judge district court in any case to which Rule 14.1 applies.

(b) A petition under this rule must be filed with the Supreme Court clerk within 60 days[1] after the State of Texas or a Texas state officer or agency is first served with a petition or intervenes as a

[1] The law is silent regarding the time of filing a petition to convene the three-judge court, but it recognizes the Supreme Court's authority to adopt rules for the procedures and operation of the three-judge court, which in the subcommittee's view includes establishing filing deadlines. *See* Tex. Gov't Code §§ 22A.001, 22A.004(b).

The issue was discussed on the House floor, and the sponsor confirmed his understanding that setting deadlines would be within the Supreme Court's rulemaking authority:

"MOODY: So the attorney general could actually go through some of these litigations and then, as a delay tactic, wait to ask for this and then bring in a three-judge panel as requested of the Supreme Court justice. So it cuts both ways, there's no time requirement here.

"SCHOFIELD: The bill allows the Supreme Court, as they do in many of the bills we send them regarding litigation, to set the rules under which both the three-judge panel would operate and under which any appeal from the three-judge panel would operate up until the point that the timelines for litigation would be included in that rule.

"MOODY: But up until that point at which we have a three-judge panel, there's nothing here that requires the attorney general to request this option within a certain amount of time of the petition being filed.

"SCHOFIELD: Again, I anticipate without being able to—I won't, I'm sure, be sitting on the Supreme Court's committee that will draft the rules, but I would assume that the timetable for litigation would be included in the rules. That would be left up to the Supreme Court to determine."

H.J. of Tex., 84th Leg., R.S 3338-39 (2015).

defendant in a case alleging a claim to which Rule 14.1 applies. A copy of the Petition to Convene must be filed with the district court in which the original case is pending and service of the Petition to Convene must be made on all parties in the original case.

(c) Upon the filing of the petition under this rule, all proceedings in the original district court are stayed until the chief justice acts on the petition.

14.3 Form of Petition to Convene

(a) Notwithstanding other rules governing original proceedings in the Supreme Court, the attorney general may file with the Supreme Court clerk a "Petition to Convene a Special Three-Judge District Court."

(b) The Petition to Convene must contain:

(1) the cause number, style, district court, name of the judge, and name of the clerk of the court in which the original case is pending;

(2) the names of the parties to the original case, together with the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel;

(3) the date the State of Texas or a Texas state officer or agency was first served with a petition alleging a claim to which this rule applies;

(4) a summary of the dispute and the claims made against the State of Texas or a Texas state officer or agency in the original case; and

(5) any argument that a claim made in the original case qualifies under Rule 14.1.

(c) The attorney general must attach as exhibits to the Petition to Convene all pleadings on file in the original case and the docket sheet. The attorney general may attach to the Petition to Convene such other exhibits as are relevant under the standards of this rule.

(d) The Petition to Convene must include a certificate of service on the district court in which the original case is pending and all parties to the original case.

14.4 Response to Petition to Convene

Any party to the original case wishing to respond to a Petition to Convene filed by the attorney general under this rule may file a Response with the Supreme Court clerk within 10 days of the filing of the Petition to Convene.

14.5 Creation of Special Three-Judge District Court

(a) Within a reasonable time after receipt of a Petition to Convene and any responses filed under this Rule, the chief justice will consider the filings. If the Petition to Convene establishes the applicability of this rule, the chief justice must grant the petition.

(b) The order granting a Petition to Convene under this rule will include:

(1) an order transferring the original case to a special three-judge district court; and

(2) the appointment of three persons to serve on the court:

(A) the district judge of the judicial district to which the original case was assigned;

(B) one district judge who serves a judicial district in a different county from the judicial district to which the original case was assigned; and

(C) one justice of a court of appeals who serves a court of appeals district:

(1) different from the one in which the original case was assigned; and

(2) different from the one in which the district judge appointed under Rule 14.5(b)(2)(B) sits.

(c) A judge or justice appointed under Rule 14.5(b)(2)(B) or (C) must have been elected to that office and may not be serving an appointed term of office.

Rule 14.6 Rules Governing Proceedings in a Special Three-Judge District Court

(a) Except as provided by this rule, the Texas Rules of Civil Procedure and all other statutes and rules applicable to civil litigation in a district court in this state apply to proceedings before a special three-judge district court.

(b) A special three-judge district court convened under this rule will conduct all hearings and trial in the original district court and may use the courtroom, other facilities, and administrative support of the district court.

~~(c) The Office of Court Administration of the Texas Judicial System shall pay the travel expenses and other incidental costs related to convening a special three-judge district court under this rule.~~[2]

14.7 Actions by Judge or Justice Serving on a Special Three-Judge District Court

(a) With the unanimous consent of the three judges sitting on a special three-judge district court, a judge or justice of the court may:

(1) independently conduct pretrial proceedings; and

(2) sign interlocutory orders before trial.

(b) A judge or justice of a special three-judge district court may not independently order a temporary restraining order, temporary injunction, or an order that finally disposes of a claim before the court.

(c) Any independent action taken by one judge or justice of a special three-judge district court related to a claim before the court may be reconsidered by the entire court at any time before final judgment.

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[2] The House sponsor of the three-judge district court law intends to introduce legislation next session to remove the statutory requirement that OCA pay these costs. Because it is not necessary to address the payment of these costs by rule, and given that payment responsibility may change, the subcommittee no longer recommends including part (c).

(d) The judges and justice of a special three-judge district court must decide among them who will serve as a presiding judge over trial or over contested hearings not conducted by a single judge or justice under Rule 14.7(a). A presiding judge will be named by a special three-judge district court before the commencement of a trial or hearing in the matter and may not be changed during the trial or hearing.

14.8 Transfer and Consolidation of Related Cases

(a) "Related case" means any case in which the State of Texas or a Texas state officer or agency is a defendant that is pending in any district court or other court in this state and arises from the same nucleus of operative facts as the claim before a special three-judge district court convened under this Rule, regardless of the legal claims or causes of action asserted in the related case.

(b) Any party to a case assigned to a special three-judge district court under Rule 14.5 may file a "Motion to Transfer Related Case" with the special three-judge district court within 45 days after (1) the State of Texas or a Texas state officer or agency is first served with a petition in a related case, or (2) the order granting a petition to convene a special three-judge district court.

(c) Upon the filing of a Motion to Transfer Related Case under this rule, the special three-judge district court or the district court in which the allegedly related case is pending may stay all or part of any court proceedings pending a ruling on the motion by the special three-judge district court.

(d) A Motion to Transfer Related Case must be in writing and must contain:

(1) the cause number, style, court, name of the judge, and name of the clerk of the court in which the allegedly related case is pending;

(2) the names of the parties to the allegedly related case, together with the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel;

(3) a statement of the operative facts involved in the case before the special three-judge district court and the allegedly related case;

(4) an explanation of how the nucleus of operative facts is the same in those cases;

(5) a clear and concise explanation of the reasons that transfer is appropriate under this rule;

(6) a clear and concise statement of the reasons that consolidation is appropriate under this rule; and

(6) a statement whether all parties in the case before the special three-judge district court and the allegedly related case agree to the motion.

(e) The movant must attach as an exhibit to the motion the operative petition on file in the allegedly related case. The movant may attach to the motion such other exhibits as are relevant under the standards of this rule.

(f) Any party to the case assigned to the special three-judge district court or the allegedly related case may file a Response in Opposition to the Motion to Transfer Related Case with the special three-judge district court. Any response must:

(1) be filed within 20 days after the party filing a Response is served with a Motion to Transfer; and

(2) be filed in writing and address directly why the allegedly related case does not meet the definition of "related case" under this rule.

(g) After consideration of a Motion to Transfer Related Case, Response, if any, and oral hearing, if any, the special three-judge district court by written order must grant the motion if it concludes that the case is related. If the court grants the motion, it will consolidate the related case with the case before the court.

(h) A case consolidated under Rule 14.8(g) must be transferred to the special three-judge district court if the court finds that transfer is necessary.[3] The transfer may occur without the consent of the parties to the related case or of the court in which the related case is pending.

Rule 14.9 Appeals and Original Proceedings

An appeal from an appealable interlocutory order or final judgment of a special three-judge district court is to the Supreme Court under Texas Rule of Appellate Procedure 57. An original appellate proceeding seeking extraordinary relief from an action of a three-judge district court must be filed with the Supreme Court under Texas Rule of Appellate Procedure 52.

Corresponding amendment to Texas Rule of Appellate Procedure

Rule 57. Direct Appeals to the Supreme Court

57.2. Jurisdiction

The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court, a special three-judge district court, or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

[Note: The other revisions to Rule 57 suggested at the last meeting are being discussed by the Appellate Rules Subcommittee. If a new version of Rule 57 is adopted based on that subcommittee's work, the addition to Rule 57.2 proposed above may no longer be necessary.]

[3] Rules 14.8(g) and (h) track the statute, which provides that a related case pending in another court must first be consolidated with the cause of action before the three-judge court, but consolidated cases must then be transferred to the three-judge court only if that court finds the transfer is necessary. *See* Tex. Gov't Code § 22A.003(b)-(c). Because it is difficult to understand how cases in two different courts could be consolidated without a transfer, the terms transfer and consolidate may have inadvertently been transposed in the statute. If the committee is inclined to require a three-judge court to decide transfer first and give the court discretion to order consolidation as necessary following transfer, the highlighted terms could be switched in Rules 14.8(g) and (h).

BILL ANALYSIS

Senate Research Center

S.B. 455
By: Creighton
State Affairs
6/4/2015
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Under current Texas law, legal cases against the state that are of significant statewide importance are tried like other cases, in a county district court of original jurisdiction. The problem with this system for these select kinds of cases is that review on appeal is bound by the findings and scope of the trial court. One county district court is able to set the tone for an entire case with statewide impact.

S.B. 455 addresses this issue by creating a three-judge district court for certain cases if requested by the attorney general. One judge on the panel would automatically be the district court judge from the court where the case was originally filed, ensuring that the original court's jurisdiction is protected. The other two judges would be appointed by the chief justice of the Texas Supreme Court and would consist of another district court judge from elsewhere in the state and an appellate court judge from an appellate district not represented by either of the first two judges. By creating these courts, Texas would give much greater representation to opinions and concerns from around the entire state when deciding a case of large statewide impact.

S.B. 455 requires the chief justice to empanel the three-judge district court in cases related to school finance and redistricting. In cases involving other state finances, impacting state policies or operations, or consisting of matters involving exceptional statewide importance, the chief justice would have discretion whether to empanel a three-judge district court. All appeals from decisions of a three-judge district court would be directly to the Texas Supreme Court.

As Texas continues to grow, all constituencies from around the state should have representation and a voice in cases of such a large magnitude. To do otherwise is an effective disenfranchisement of Texans who live in every other county of the state outside the county where the case was filed. (Original Author's/Sponsor's Statement of Intent)

S.B. 455 amends current law relating to special three-judge district courts convened to hear certain cases.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Supreme Court of the State of Texas in SECTION 1 (Sections 22A.004 and 22A.006, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle A, Title 2, Government Code, by adding Chapter 22A, as follows:

CHAPTER 22A. SPECIAL THREE-JUDGE DISTRICT COURT

Sec. 22A.001. ELIGIBLE PROCEEDINGS. (a) Authorizes the attorney general of the State of Texas (attorney general) to petition the chief justice of the Supreme Court of Texas (chief justice) to convene a special three-judge district court in any suit filed in a district court in this state in which this state or a state officer or agency is a defendant in a claim that:

(1) challenges the finances or operations of this state's public school system; or

(2) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education (SBOE), or the United States Congress, or state judicial districts.

(b) Provides that a petition filed by the attorney general under this section stays all proceedings in the district court in which the original case was filed until the chief justice acts on the petition.

(c) Requires the chief justice, within a reasonable time after receipt of a petition from the attorney general under Subsection (a), to grant the petition and issue an order transferring the case to a special three-judge district court convened as provided by Section 22A.002.

Sec. 22A.002. SPECIAL THREE-JUDGE DISTRICT COURT. (a) Requires the chief justice, on receipt of a petition under Section 22A.001, to order a special three-judge district court to convene and to appoint three persons to serve on the court as follows:

(1) the district judge of the judicial district to which the original case was assigned;

(2) one district judge of a judicial district other than a judicial district in the same county as the judicial district to which the original case was assigned; and

(3) one justice of a court of appeals other than:

(A) the court of appeals in the court of appeals district in which the original case was assigned; or

(B) a court of appeals district in which the district judge appointed under Subdivision (2) sits.

(b) Requires a judge or justice appointed under Subsection (a)(2) or (3) to have been elected to that office and not be serving an appointed term of office.

(c) Requires a special three-judge district court convened under this section to conduct all hearing in the district court to which the original case was assigned and to use the courtroom, other facilities, and administrative support of the district court.

(d) Requires the Office of Court Administration of the Texas Judicial System to pay the travel expenses and other incidental costs related to convening a special three-judge district court under this chapter.

Sec. 22A.003. CONSOLIDATION OF RELATED ACTIONS. (a) Defines "related case" for purposes of this section.

(b) Requires the court by order, on the motion of any party to a case assigned to a special three-judge district court under Section 22A.002, to consolidate with the cause of action before the court any related case pending in any district court or other court in this state.

(c) Requires that a case consolidated under Subsection (b) be transferred to the special three-judge district court if the court finds that transfer is necessary. Authorizes the transfer to occur without the consent of the parties to the related case or of the court in which the related case is pending.

Sec. 22A.004. APPLICATION OF TEXAS RULES OF CIVIL PROCEDURE. (a) Provides that, except as provided by this section, the Texas Rules of Civil Procedure and all other statutes and rules applicable to civil litigation in a district court in this state apply to proceedings before a special three-judge district court.

(b) Authorizes the Supreme Court of Texas (supreme court) to adopt rules for the operation of special three-judge district court convened under this chapter and for the procedures of the court.

Sec. 22A.005. ACTIONS BY JUDGE OR JUSTICE. (a) Authorizes a judge or justice of the court, with the unanimous consent of the three judges sitting on a special three-judge district court, to:

(1) independently conduct pretrial proceedings; and

(2) enter interlocutory orders before trial.

(b) Prohibits a judge or justice of a special three-judge district court from independently entering a temporary restraining order, temporary injunction, or any order that finally disposes of a claim before the court.

(c) Authorizes any independent action taken by one judge or justice of a special three-judge district court related to a claim before the court to be reviewed by the entire court at any time before final judgment.

Sec. 22A.006. APPEAL. (a) Provides that an appeal from an appealable interlocutory order or final judgment of a special three-judge district court is to the supreme court.

(b) Authorizes the supreme court to adopt rules for appeals from a special three-judge district court.

SECTION 2. Effective date: upon passage or September 1, 2015.

AN ACT

relating to special three-judge district courts convened to hear certain cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle A, Title 2, Government Code, is amended by adding Chapter 22A to read as follows:

CHAPTER 22A. SPECIAL THREE-JUDGE DISTRICT COURT

Sec. 22A.001. ELIGIBLE PROCEEDINGS. (a) The attorney general may petition the chief justice of the supreme court to convene a special three-judge district court in any suit filed in a district court in this state in which this state or a state officer or agency is a defendant in a claim that:

(1) challenges the finances or operations of this state's public school system; or

(2) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts.

(b) A petition filed by the attorney general under this section stays all proceedings in the district court in which the original case was filed until the chief justice of the supreme court acts on the petition.

(c) Within a reasonable time after receipt of a petition from the attorney general under Subsection (a), the chief justice of the supreme court shall grant the petition and issue an order

transferring the case to a special three-judge district court convened as provided by Section 22A.002.

Sec. 22A.002. SPECIAL THREE-JUDGE DISTRICT COURT. (a) On receipt of a petition under Section 22A.001, the chief justice shall order a special three-judge district court to convene and shall appoint three persons to serve on the court as follows:

(1) the district judge of the judicial district to which the original case was assigned;

(2) one district judge of a judicial district other than a judicial district in the same county as the judicial district to which the original case was assigned; and

(3) one justice of a court of appeals other than:

(A) the court of appeals in the court of appeals district in which the original case was assigned; or

(B) a court of appeals district in which the district judge appointed under Subdivision (2) sits.

(b) A judge or justice appointed under Subsection (a)(2) or (3) must have been elected to that office and may not be serving an appointed term of office.

(c) A special three-judge district court convened under this section shall conduct all hearings in the district court to which the original case was assigned and may use the courtroom, other facilities, and administrative support of the district court.

(d) The Office of Court Administration of the Texas Judicial System shall pay the travel expenses and other incidental costs related to convening a special three-judge district court under this chapter.

Sec. 22A.003. CONSOLIDATION OF RELATED ACTIONS. (a) In this section, "related case" means any case in which this state or a state officer or agency is a defendant that arises from the same nucleus of operative facts as the claim before a special three-judge district court under this chapter, regardless of the legal claims or causes of action asserted in the related case.

(b) On the motion of any party to a case assigned to a special three-judge district court under Section 22A.002, the court by order shall consolidate with the cause of action before the court any related case pending in any district court or other court in this state.

(c) A case consolidated under Subsection (b) must be transferred to the special three-judge district court if the court finds that transfer is necessary. The transfer may occur without the consent of the parties to the related case or of the court in which the related case is pending.

Sec. 22A.004. APPLICATION OF TEXAS RULES OF CIVIL PROCEDURE. (a) Except as provided by this section, the Texas Rules of Civil Procedure and all other statutes and rules applicable to civil litigation in a district court in this state apply to proceedings before a special three-judge district court.

(b) The supreme court may adopt rules for the operation of a special three-judge district court convened under this chapter and for the procedures of the court.

Sec. 22A.005. ACTIONS BY JUDGE OR JUSTICE. (a) With the unanimous consent of the three judges sitting on a special three-judge district court, a judge or justice of the court may:

(1) independently conduct pretrial proceedings; and

(2) enter interlocutory orders before trial.

(b) A judge or justice of a special three-judge district court may not independently enter a temporary restraining order, temporary injunction, or any order that finally disposes of a claim before the court.

(c) Any independent action taken by one judge or justice of a special three-judge district court related to a claim before the court may be reviewed by the entire court at any time before final judgment.

Sec. 22A.006. APPEAL. (a) An appeal from an appealable interlocutory order or final judgment of a special three-judge district court is to the supreme court.

(b) The supreme court may adopt rules for appeals from a special three-judge district court.

SECTION 2. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 455 passed the Senate on May 4, 2015, by the following vote: Yeas 20, Nays 11.

Secretary of the Senate

I hereby certify that S.B. No. 455 passed the House on May 19, 2015, by the following vote: Yeas 95, Nays 50, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Texas House of Representatives

MIKE SCHOFIELD
DISTRICT 132

December 8, 2015

Chairman Charles Babcock
Jackson Walker, LLP
1401 McKinney Street, Suite 1900
Houston, TX 77010

Dear Chairman Babcock,

We wanted to extend our sincere appreciation to you, the Supreme Court Advisory Committee and specifically, the Subcommittee members charged with proposing rules to implement Senate Bill 455, which created a Three-Judge District Court to hear the important matters of school finance and redistricting. We are truly grateful for the attention the Committee has given this issue.

After hearing some of the proposed rules at the October 16 meeting of the Committee, we wanted to take this opportunity as authors of this bill to voice some of our concerns. Firstly, we believe that the proposed 60-day deadline for the Attorney General to file a petition with the Chief Justice for creation of a three-judge district court is arbitrary and insufficient. As the legal representative of the state, the Attorney General must carefully determine if the case as filed would warrant a three-judge district court. As discussed at the Committee meeting on October 16, the Attorney General may decide that it is appropriate for the case to begin discovery and the motions process before seeking consolidation. A longer deadline may be more feasible and is not inconsistent with statute.

Secondly, we wanted to address the concern raised by the subcommittee over the drafting language that seems to confuse the terms "consolidation" and "transfer". The authors intent and legislative intent were certainly to allow the logical transfer of cases that would then be consolidated under one case to be heard by the three-judge district court. However, transfer may not be necessary in all cases. For example, if multiple suits are filed in the same county, transfer would be unnecessary and a motion to consolidate could be made without transfer. We support the proposed rule 14.8 (g) and (h) as they mirror the statute. This rule reiterates that if the court receives a motion to transfer, the court shall grant that motion and consolidate the related case.

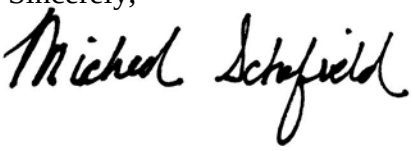
CAPITOL: P.O. BOX 2910 • AUSTIN, TEXAS 78768-2910 • (512) 463-0528
DISTRICT: 1550 FOXLAKE DRIVE, SUITE 120 • HOUSTON, TEXAS 77084 • (281) 578-8484
MIKE.SCHOFIELD@HOUSE.STATE.TX.US

Several SCAC members raised concerns over whether or not more than one three-judge district court could be empaneled simultaneously. We feel that if the cases are properly transferred and then consolidated, the necessity of multiple three-judge district courts is improbable. However, the decision to petition for a three judge district court still rests with the Attorney General, and there is no requirement for these cases to be heard in three judge district court.

Finally, the intent of this bill as approved by the Legislative and Executive branches was to require that a three-judge district court be empaneled for all cases of school finance and redistricting in which the Attorney General seeks such a court. This most certainly includes any pending litigation that may be remanded to the district court level. The Legislature often includes language that would allow for a bill to only apply to suits filed after a certain date. However, this was not our intent on this specific piece of legislation and no such language was included in SB 455. We intended for these courts to be available for all pending and future litigation on school finance and redistricting. We appreciate your expeditious action in advising the Supreme Court on these proposed rules, as our State continues our decades long litigation on school finance.

Thank you again for all of your work on this important issue. As always, we are available and at your service should you require additional information or assistance.

Sincerely,



State Representative Mike Schofield Senator Brandon Creighton

CC: Supreme Court Advisory Committee Members

Rule 13. Multidistrict Litigation
Vernon's Texas Statutes and Codes Annotated | Government Code *(Approx. 6 pages)*

Vernon's Texas Statutes and **Codes** Annotated
Government (Refs & Annos)
Title _. Judicial Branch (Refs & Annos)
Subtitle F. Court Administration
Title _, Subtitle F--Appendix
Rules of Judicial Administration

V.T.C.A., **Govt. Code** T. **2**, **Subt.** F **App.**, **Jud.Admin.**, **Rule 13**

Rule 13. Multidistrict Litigation

Currentness

13.1 Authority and Applicability.

(a) *Authority*. This rule is promulgated under sections 74.161-.164 of the Texas Government **Code** and chapter 90 of the Texas Civil Practices[1] and Remedies **Code**.

(b) *Applicability*. This rule applies to:

(1) civil actions that involve one or more common questions of fact and that were filed in a constitutional county court, county court at law, probate court, or district court on or after September 1, 2003;

(2) civil actions filed before September 1, 2003, that involve claims for asbestos- or silica-related injuries, to the extent permitted by chapter 90 of the Texas Civil Practice and Remedies **Code**.

(c) *Other Cases*. Cases to which this rule does not apply are governed by Rule 11 of these rules.

13.2 Definitions. As used in this rule:

(a) *MDL Panel* means the judicial panel on multidistrict litigation designated pursuant to section 74.161 of the Texas Government **Code**, including any temporary members designated by the Chief Justice of the Supreme Court of Texas in his or her discretion when regular members are unable to sit for any reason.

(b) *Chair* means the chair of the MDL Panel, who is designated by the Chief Justice of the Supreme Court of Texas.

(c) *MDL Panel Clerk* means the Clerk of the Supreme Court of Texas.

(d) *Trial court* means the court in which a case is filed.

(e) *Pretrial court* means the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under this rule.

(f) *Related* means that cases involve one or more common questions of fact.

(g) *Tag-along case* means a case related to cases in an MDL transfer order but not itself the subject of an initial MDL motion or order.

13.3 Procedure for Requesting Transfer.

(a) *Motion for Transfer; Who May File; Contents*. A party in a case may move for transfer of the case and related cases to a pretrial court. The motion must be in writing and must:

(1) state the common question or questions of fact involved in the cases;

(2) contain a clear and concise explanation of the reasons that transfer would be for the convenience of the parties and witnesses and would promote the just and efficient conduct of the cases;

(3) state whether all parties in those cases for which transfer is sought agree to the

NOTES OF DECISIONS (42)

motion; and

(4) contain an appendix that lists:

(A) the cause number, style, and trial court of the related cases for which transfer is sought; and

(B) all parties in those cases and the names, addresses, telephone numbers, fax numbers, and email addresses of all counsel.

(b) *Request for Transfer by Judges*. A trial court or a presiding judge of an administrative judicial region may request a transfer of related cases to a pretrial court. The request must be in writing and must list the cases to be transferred.

(c) *Transfer on the MDL Panel's Own Initiative*. The MDL Panel may, on its own initiative, issue an order to show cause why related cases should not be transferred to a pretrial court.

(d) *Response; Reply; Who May File; When to File*. Any party in a related case may file:

(1) a response to a motion or request for transfer within twenty days after service of such motion or request;

(2) a response to an order to show cause issued under subparagraph (c) within the time provided in the order; and

(3) a reply to a response within ten days after service of such response.

(e) *Form of Motion, Response, Reply, and Other Documents*. A motion for transfer, response, reply, or other document addressed to the MDL Panel must conform to the requirements of Rule 9.4 of the Texas Rules of Appellate Procedure. Without leave of the MDL Panel, the following must not exceed 20 pages: the portions of a motion to transfer required by subparagraphs (a)(1)-(**2**); a response; and a reply. The MDL Panel may request additional briefing from any party.

(f) *Filing*. A motion, request, response, reply, or other document addressed to the MDL Panel must be filed with the MDL Panel Clerk. The MDL Panel Clerk may require that all documents also be transmitted to the clerk electronically. In addition, a party must send a copy of the motion, response, reply, or other document to each member of the MDL Panel.

(g) *Filing Fees*. The MDL Panel Clerk may set reasonable fees approved by the Supreme Court of Texas for filing and other services provided by the clerk.

(h) *Service*. A party must serve a motion, response, reply, or other document on all parties in related cases in which transfer is sought. The MDL Panel Clerk may designate a party or parties to serve a request for transfer on all other parties. Service is governed by Rule 9.5 of the Texas Rules of Appellate Procedure.

(i) *Notice to Trial Court*. A party must file in the trial court a notice -- in the form prescribed by the MDL Panel -- that a motion for transfer has been filed. The MDL Panel Clerk must cause such notice to be filed when a request for transfer by a judge has been filed.

(j) *Evidence*. The MDL Panel will accept as true facts stated in a motion, response, or reply unless another party contradicts them. A party may file evidence with the MDL Panel Clerk only with leave of the MDL Panel. The MDL Panel may order parties to submit evidence by affidavit or deposition and to file documents, discovery, or stipulations from related cases.

(k) *Hearing*. The MDL Panel may decide any matter on written submission or after an oral hearing before one or more of its members at a time and place of its choosing. Notice of the date of submission or the time and place of oral hearing must be given to all parties in all related cases.

(l) *Decision*. The MDL Panel may order transfer if three members concur in a written order finding that related cases involve one or more common questions of fact, and that transfer to a specified district court will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the related cases.

(m) *Orders Signed by Chair or Clerk; Members Identified*. Every order of the MDL Panel

must be signed by either the chair or by the MDL Panel Clerk, and must identify the members of the MDL Panel who concurred in the ruling.

(n) *Notice of Actions by MDL Panel*. The MDL Panel Clerk must give notice to all parties in all related cases of all actions of the MDL Panel, including orders to show cause, settings of submissions and oral arguments, and decisions. The MDL Panel Clerk may direct a party or parties to give such notice. The clerk may determine the manner in which notice is to be given, including that notice should be given only by email or fax.

(o) *Retransfer*. On its own initiative, on a party's motion, or at the request of the pretrial court, the MDL Panel may order cases transferred from one pretrial court to another pretrial court when the pretrial judge has died, resigned, been replaced at an election, requested retransfer, recused, or been disqualified, or in other circumstances when retransfer will promote the just and efficient conduct of the cases.

13.4 Effect on the Trial Court of the Filing of a Motion for Transfer.

(a) *No Automatic Stay*. The filing of a motion under this rule does not limit the jurisdiction of the trial court or suspend proceedings or orders in that court.

(b) *Stay of Proceedings*. The trial court or the MDL Panel may stay all or part of any trial court proceedings until a ruling by the MDL Panel.

13.5 Transfer to a Pretrial Court.

(a) *Transfer Effective upon Notice*. A case is deemed transferred from the trial court to the pretrial court when a notice of transfer is filed with the trial court and the pretrial court. The notice must:

(1) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address, and phone number;

(2) list those parties who have not yet appeared in the case; and

(3) attach a copy of the MDL transfer order.

(b) *No Further Action in Trial Court*. After notice of transfer is filed in the trial court, the trial court must take no further action in the case except for good cause stated in the order in which such action is taken and after conferring with the pretrial court. But service of any process already issued by the trial court may be completed and the return filed in the pretrial court.

(c) *Transfer of Files; Master File and New Files in the Pretrial Court*. If the trial court and pretrial court are in the same county, the trial court must transfer the case file to the pretrial court in accordance with local rules governing the courts of that county. If the trial court and pretrial court are not in the same county, the trial court clerk must transmit the case file to the pretrial court clerk. The pretrial court clerk, after consultation with the judge of the pretrial court, must establish a master file and open new files for each case transferred using the information provided in the notice of transfer. The pretrial court may direct the manner in which pretrial documents are filed, including electronic filing.

(d) *Filing Fees and Costs*. Unless the MDL Panel assesses costs otherwise, the party moving for transfer must pay the cost of refiling the transferred cases in the pretrial court, including filing fees and other reasonable costs.

(e) *Transfer of Tag-along Cases*. A tag-along case is deemed transferred to the pretrial court when a notice of transfer -- in the form described in **Rule 13**.5(a) -- is filed in both the trial court and the pretrial court. Within 30 days after service of the notice, a party to the case or to any of the related cases already transferred to the pretrial court may move the pretrial court to remand the case to the trial court on the ground that it is not a tag-along case. If the motion to remand is granted, the case must be returned to the trial court, and costs including attorney fees may be assessed by the pretrial court in its remand order. The order of the pretrial court may be appealed to the MDL Panel by a motion for rehearing filed with the MDL Panel Clerk.

13.6 Proceedings in Pretrial Court.

(a) *Judges Who May Preside*. The MDL Panel may assign as judge of the pretrial court any active district judge, or any former or retired district or appellate judge who is

approved by the Chief Justice of the Supreme Court of Texas. An assignment under this rule is not subject to objection under chapter 74 of the Government **Code**. The judge assigned as judge of the pretrial court has exclusive jurisdiction over each related case transferred pursuant to this rule unless a case is retransferred by the MDL Panel or is finally resolved or remanded to the trial court for trial.

(b) *Authority of Pretrial Court*. The pretrial court has the authority to decide, in place of the trial court, all pretrial matters in all related cases transferred to the court Those matters include, for example, jurisdiction, joinder, venue, discovery, trial preparation (such as motions to strike expert witnesses, preadmission of exhibits, and motions in limine), mediation, and disposition by means other than conventional trial on the merits (such as default judgment, summary judgment, and settlement). The pretrial court may set aside or modify any pretrial ruling made by the trial court before transfer over which the trial court's plenary power would not have expired had the case not been transferred.

(c) *Case Management*. The pretrial court should apply sound judicial management methods early, continuously, and actively, based on its knowledge of each individual case and the entire litigation, in order to set fair and firm time limits tailored to ensure the expeditious resolution of each case and the just and efficient conduct of the litigation as a whole. After a case is transferred, the pretrial court should, at the earliest practical date, conduct a hearing and enter a case management order. The pretrial court should consider at the hearing, and its order should address, all matters pertinent to the conduct of the litigation, including:

(1) settling the pleadings;

(2) determining whether severance, consolidation, or coordination with other actions is desirable and whether identification of separable triable portions of the case is desirable;

(3) scheduling preliminary motions;

(4) scheduling discovery proceedings and setting appropriate limitations on discovery, including the establishment and timing of discovery procedures;

(5) issuing protective orders;

(6) scheduling alternative dispute resolution conferences;

(7) appointing organizing or liaison counsel;

(8) scheduling dispositive motions;

(9) providing for an exchange of documents, including adopting a uniform numbering system for documents, establishing a document depository, and determining whether electronic service of discovery materials and pleadings is warranted;

(10) determining if the use of technology, videoconferencing, or teleconferencing is appropriate;

(11) considering such other matters the court or the parties deem appropriate for the just and efficient resolution of the cases; and

(12) scheduling further conferences as necessary.

(d) *Trial Settings*. The pretrial court, in conjunction with the trial court, may set a transferred case for trial at such a time and on such a date as will promote the convenience of the parties and witnesses and the just and efficient disposition of all related proceedings. The pretrial court must confer, or order the parties to confer, with the trial court regarding potential trial settings or other matters regarding remand. The trial court must cooperate reasonably with the pretrial court, and the pretrial court must defer appropriately to the trial court's docket. The trial court must not continue or postpone a trial setting without the concurrence of the pretrial court.

13.7 Remand to Trial Court.

(a) *No Remand If Final Disposition by Pretrial Court*. A case in which the pretrial court has rendered a final and appealable judgment will not be remanded to the trial court.

(b) *Remand*. The pretrial court may order remand of one or more cases, or separable triable portions of cases, when pretrial proceedings have been completed to such a

degree that the purposes of the transfer have been fulfilled or no longer apply.

(c) *Transfer of Files*. When a case is remanded to the trial court, the clerk of the pretrial court will send the case file to the trial court without retaining a copy unless otherwise ordered. The parties may file in the remanded case copies of any pleadings or orders from the pretrial court's master file. The clerk of the trial court will reopen the trial court file under the cause number of the trial court, without a new filing fee.

13.8 Pretrial court orders binding in the trial court after remand.

(a) *Generally*. The trial court should recognize that to alter a pretrial court order without a compelling justification would frustrate the purpose of consolidated and coordinated pretrial proceedings. The pretrial court should recognize that its rulings should not unwisely restrict a trial court from responding to circumstances that arise following remand.

(b) *Concurrence of the Pretrial Court Required to Change Its Orders*. Without the written concurrence of the pretrial court, the trial court cannot, over objection, vacate, set aside, or modify pretrial court orders, including orders related to summary judgment, jurisdiction, venue, joinder, special exceptions, discovery, sanctions related to pretrial proceedings, privileges, the admissibility of expert testimony, and scheduling.

(c) *Exceptions*. The trial court need not obtain the written concurrence of the pretrial court to vacate, set aside, or modify pretrial court orders regarding the admissibility of evidence at trial (other than expert evidence) when necessary because of changed circumstances, to correct an error of law, or to prevent manifest injustice. But the trial court must support its action with specific findings and conclusions in a written order or stated on the record.

(d) *Unavailability of Pretrial Court*. If the pretrial court is unavailable to rule, for whatever reason, the concurrence of the MDL Panel Chair must be obtained.

13.9 Review.

(a) *MDL Panel Decision*. An order of the MDL Panel, including one granting or denying a motion for transfer, may be reviewed only by the Supreme Court in an original proceeding.

(b) *Orders by the Trial Court and Pretrial Court*. An order or judgment of the trial court or pretrial court may be reviewed by the appellate court that regularly reviews orders of the court in which the case is pending at the time review is sought, irrespective of whether that court issued the order or judgment to be reviewed. A case involving such review may not be transferred for purposes of docket equalization among appellate courts.

(c) *Review Expedited.* An appellate court must expedite review of an order or judgment in a case pending in a pretrial court.

13.10 MDL Panel Rules.

The MDL Panel will operate at the direction of its Chair in accordance with rules prescribed by the panel and approved by the Supreme Court of Texas.

13.11 Civil Actions Filed Before September 1, 2003, Involving Claims for Asbestos- and Silica-Related Injuries.

(a) *Applicability*. To the extent permitted by chapter 90 of the Texas Civil Practice and Remedies **Code**, **Rule 13**.11 applies to civil actions filed before September 1, 2003, that involve claims for asbestos- or silica-related injuries.

(b) *Statutory References; Definitions*. Statutory references in **Rule 13**.11 are to chapter 90 of the Texas Civil Practice and Remedies **Code**. “Claimant” has the meaning assigned in section 90.001(6). “Report” has the meaning assigned in section 90.001(24).

(c) *Notice of Transfer Under Section 90.010(b)*. A notice of transfer under section 90.010(b) must be filed in the trial court and the pretrial court and must:

(1) be titled “Notice of Transfer Under Section 90.010(b)”;

(2) list all parties who have appeared and remain in the case, and the names, addresses, phone numbers, and bar numbers of their attorneys or, if a party is pro se, the party's name, address and phone number;

(3) state the name of each claimant transferred;

(4) attach to the notice filed in the pretrial court a copy of the claimant's live petition; and

(5) if filed by a defendant, contain a certificate stating that the filing party conferred, or at least made a reasonable attempt to confer, with opposing counsel about whether the notice of transfer is appropriate as to each individual claimant transferred.

(d) *Effect on Pending Motion for Severance*. If, when a notice of transfer is filed in the trial court, a motion for severance has been filed but the trial court has not ruled, the trial court must rule on the motion within 14 days of the date the notice of transfer is filed, or the motion is deemed granted by operation of law.

(e) *When Transfer Effective*. A case is deemed transferred from the trial court to the pretrial court when a notice of transfer is filed with the trial court unless a motion for severance is pending. If a motion for severance is pending when a notice of transfer is filed with the trial court, a case is deemed transferred when the trial court rules on the motion or the motion is deemed granted by operation of law.

(f) *Further Action in Trial Court Limited*. After a notice of transfer is filed, the trial court must take no further action in the case except:

(1) to rule on a motion for severance pending when the notice of transfer was filed, or

(2) for good cause stated in the order in which such action is taken and after conferring with the pretrial court.

But service of any process already issued by the trial court may be completed and the return filed in the pretrial court.

(g) *Severed Case File*. If a claim is severed from a case that includes one or more claimants covered by section 90.010(a), the file for the severed claims in the trial court should be numerically linked to the original case file and should contain only the live petition containing the severed claim. The severed case file is deemed to include all papers in the original case file. The pretrial court may require a different procedure in the interests of justice and efficiency.

(h) *Transfer of Files*. The pretrial court may order the trial court clerk to transfer a case file to the pretrial court. A case file must not be transferred to the pretrial court except as ordered by that court.

(i) *Filing Fees and Costs*. A defendant who files a notice of transfer must pay the cost of filing the case in the pretrial court, including filing fees and other reasonable costs. If the pretrial court remands the case to the trial court, the pretrial court may order that costs be allocated between the parties in a way that encourages just and efficient compliance with this rule, and may award appropriate and reasonable attorney fees.

Credits

Adopted by order of Aug. 29, 2003, eff. Sept. 1, 2003; **rule 13**.9 amended by order of Jan. 27, 2005, eff. March 1, 2005; **rule 13**.1 amended and **rule 13**.11 adopted by order of Nov. 29, 2005, eff. Nov. 29, 2005.

<Effective February 4, 1987>
<These rules were adopted by order of the Supreme Court February 4, 1987>

Editors' Notes

COMMENT--2005

2013 Main Volume

Subsections [13.1](a) and (b) are amended and subsection (c) is added to provide procedures for cases covered by chapter 90 of the Texas Civil Practices and Remedies **Code**, enacted effective September 1, 2005.

COMMENT--2005

2013 Main Volume

Subsection [13.9](b) is amended and subsection (c) is added to clarify the handling of appeals by appellate courts. Subsection (b) forbids transfer for

docket equalization but not for other purposes that might arise. Subsection (c) does not require that an appeal from an order or judgment of a case pending in a pretrial court be treated as an accelerated appeal under the Texas Rules of Appellate Procedure if it would otherwise not be accelerated. Rather, subsection (c) requires expedited consideration by the appellate court regardless of whether review is sought by an appeal that is or is not accelerated, or by mandamus.

COMMENT--2005

2013 Main Volume

1. **Rule 13**.11 is added to provide procedures for cases covered by chapter 90 of the Texas Civil Practice and Remedies **Code**, enacted effective September 1, 2005.

2. The rule does not require a statement in the notice of transfer that no report has been served under chapter 90, or that a report has been served but does not comply with the provisions of that statute. The omission of such a requirement in the notice of transfer is not intended to limit the pretrial court's authority under Rule 166 of the Texas Rules of Civil Procedure to employ appropriate procedures to ascertain a party's position on the issue.

3. It is anticipated that the party filing a notice of transfer will usually be a defendant, and that the party filing a motion for severance will usually be a claimant. Ordinarily, a party filing the notice of transfer is responsible for filing fees and costs in the pretrial court, although there may be exceptions. See **Rule 13**.5(d). Also, a party who successfully moves to sever a claim into a separate proceeding in the trial court is customarily responsible for filing fees and costs, although severance is “on such terms as are just”, Tex. R. Civ. P. 41, and again, there may be exceptions. The intent of this rule is that severance and transfer procedures minimize costs and burdens on parties and the courts.

4. A pretrial court has discretion under **Rule 13**.11(g)-(i) to order the maintenance and transfer of physical case files and to allocate costs and fees so as to minimize costs and burdens on parties and the courts.

Redistricting Litigation

An Overview of Legal, Statistical, and Case-Management Issues

Bruce M. Clarke & Robert Timothy Reagan

Federal Judicial Center
2002

III. Case-Management Issues in Redistricting Litigation

This chapter focuses on case-management issues in redistricting cases, including cases in which 28 U.S.C. § 2284 (1994) requires a three-judge district court.

Redistricting litigation is complex and time-consuming, and thus many of the case-management techniques used by judges in handling complex civil cases are applicable in the redistricting context. *See Manual for Complex Litigation, Third* (Federal Judicial Center 1995). But redistricting cases also are characterized by unique features that require appropriate management responses. The suggestions presented in this chapter are based on Center staff's conversations with a sampling of district and appellate judges who have recent experience handling redistricting cases.

A. Managing Voting Rights Act and Equal Protection Clause Cases

1. Schedule the case with pending election dates in mind

In most cases plaintiffs will be asking the court to remedy an alleged violation before the next election in the challenged district. If the case is filed shortly before an election, plaintiffs may ask the court to enjoin the election until a new redistricting plan is developed. One of the first things the court must do upon receiving the case is find out when the next election will be held. It should then work back in time from that date, identifying earlier dates that establish deadlines for other significant aspects of the election process, such as the date by which candidates are required to file and the date when ballots must be ready. The court should then work back in time from the earliest relevant date in the election process to establish a final date by which the case must be resolved in order to permit the election to proceed. Although the election at issue may seem far away at the time the case is filed, the time frame for deciding the case may actually be much shorter, because there may be a need to develop and order implementation of a new districting plan months in advance of the election.

Given that election-related dates drive redistricting litigation, the court should meet with attorneys in the case early on, in order to become aware of all dates relevant to the pending election. It may also be helpful to meet with other stakeholders in the election process, such as election

officials and other representatives of the state, in order to obtain information about election dates and procedures.

2. Manage the case aggressively

Several judges expressed the opinion that redistricting cases need aggressive case management. One reason for this is that these cases are likely to involve multiple parties and many lawyers. Indeed, because it takes a good deal of resources to litigate a redistricting case, plaintiffs sometimes bring in large law firms on a pro bono basis to help them with the discovery and expert costs involved in the litigation. Moreover, the number of parties and lawyers may increase as the case proceeds. For example, a case that starts out as a vote dilution case may later become a racial gerrymandering case as well, increasing the number of parties to the point where ten or more attorneys may be present at routine status hearings.

Redistricting cases also generate a substantial amount of paperwork, including lengthy expert reports based on statistical evidence. Thus, the court should oversee the case carefully, making sure to meet with the parties regularly and review the case file frequently. As a practical, time-saving matter, the court should consider requiring executive summaries of all expert reports.

3. Consider using special masters or court-appointed experts

Some judges have used special masters or court-appointed experts under Federal Rule of Evidence 706 to assist them with particularly complex aspects of redistricting cases. In *Dillard v. City of Greensboro*, 956 F. Supp. 1576 (M.D. Ala. 1997), the court appointed a special master to draft a remedial redistricting plan and provided the special master "with explicit instructions on the legal standards and criteria to be used in drawing up a redistricting plan and directed the special master to adhere closely to those instructions." *Id.* at 1577.

Similarly, in *Anthony v. Michigan*, 35 F. Supp. 2d 989 (E.D. Mich. 1999), the court appointed a law professor pursuant to Federal Rule of Evidence 706 to serve as an independent expert and directed the professor to evaluate the statistical evidence on racial bloc voting proffered by the parties in the reports of their experts. The court's expert was directed to "express an opinion in the form of a written report as to whether there is a genuine issue as to any material fact with respect to plaintiffs' claim[ed section 2 violation.]" *Id.* at 1000.

4. Make detailed findings of fact and fully explain conclusions of law

Appellate courts have required detailed findings of fact in redistricting cases. As the Fifth Circuit stated with respect to vote dilution cases in *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989):

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning. Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts.

Id. at 1203 (quotation marks and quotation history omitted).

Thus, courts of appeals have remanded vote dilution cases when they were dismissed by the district court without written findings of fact or conclusions of law, *Westwego Citizens*, 872 F.2d at 1204, and when the district court failed to take note of substantial evidence contrary to the evidence supporting its conclusions, *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984). *See also Overton v. City of Austin*, 871 F.2d 529, 530–31 (5th Cir. 1989) (district court must perform a "searching and practical evaluation of past and present reality.")

B. Managing Three-Judge District Courts Convened Pursuant to 28 U.S.C. § 2284

Title 28, section 2284(a) of the United States Code requires that a three-judge district court be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" (1994).

1. Statutory requirements

The initial responsibilities of the district judge receiving a request for a three-judge court, as well as those of the chief judge of the circuit, are stated in 28 U.S.C. § 2284(b):

> In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composi-

tion . . . of the court shall be as follows:

> (1) Upon filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

As the statute makes clear, the district judge initially receiving the case should determine whether a three-judge court is required, and upon deciding that one is required, must "immediately" notify the chief judge of the circuit. This can be done by personal notice and by forwarding a copy of the complaint to the chief judge. Given that three-judge court cases are relatively rare, and that one of the purposes of the legislation creating such courts was to expedite important litigation, *see Swift v. Wickham*, 382 U.S. 111, 119–20 (1965) (direct review by the Supreme Court accelerates final determination on the merits), procedures should be in place to flag these cases in the district court clerk's office so that they are not given routine treatment.

2. Compose the three-judge court with the partisan nature of redistricting cases in mind

The statute assigns the chief judge of the circuit the duty of selecting the circuit judge and the third judge who will sit on the panel in a redistricting case, but does not place any restrictions on the chief judge's discretion in this regard. That discretion may be exercised with a view toward limiting the forum shopping that often occurs in redistricting cases. The parties are often political partisans, representatives of political parties or candidates for office, and their efforts to gain what they perceive as an advantage in the litigation may result in multiple filings on the federal level in addition to competing state court filings. Thus, for example, if Party A files a case in a given district on the assumption that there is a strong chance of obtaining a judge who is considered to be sympathetic to the Republican Party, Party B may well file a case in a district in which there is deemed to be a strong chance of obtaining a judge considered to be sympathetic to the Democratic Party. Rules designating the district that receives the first filing as the forum may solve the forum-

shopping problem, but if they do not, the chief circuit judge can also resolve it in the way he or she composes the three-judge court. For example, forum-shopping incentives may be reduced if the chief judge in the above example assigns the same two judges to both panels.

In composing three-judge panels, chief judges also have opportunities to insulate assigned judges from the politics of the state in which they are sitting. Thus, a district judge assigned to the case need not be from the same district as the judge who initially received it, and a circuit judge assigned to the case need not be from the same state as the district court in which the case was originally filed.

3. Schedule the case with the requirements of parallel state court proceedings in mind

Title 28, section 2284(a) of the United States Code requires the convening of a three-judge court when "the constitutionality of the apportionment of congressional districts or the apportionment of any statewide body" is challenged. Thus, a request for a three-judge district court often occurs when there is litigation in the state court on the same subject. In addition, the state legislature may be involved in the process of the redistricting plan at issue. Three-judge district courts should therefore manage their cases with federalism and comity concerns in mind.

In scheduling the case, for example, three-judge courts should be mindful of the teaching of *Growe v. Emison,* 507 U.S. 25, 32–34 (1993), that when parallel redistricting litigation is under way in both state and federal courts, the federal court must defer to the timely efforts of the state, including its courts, to redraw legislative districts. In *Growe,* the three-judge district court stayed all proceedings in a parallel Minnesota state court proceeding shortly before the state court issued its own redistricting plan. *Id.* at 30. The district court later issued an order adopting its own legislative and congressional districting plans and permanently enjoining interference with implementation of those plans. *Id.* at 31. Its justification for doing so was that, in its view, the state court's modification of the state legislature's plan failed to cure an alleged violation of the VRA. *Id.* On appeal, the Supreme Court held that the district court had erred in not deferring to the state court proceedings. *Id.* at 32. Citing *Scott v. Germano,* 381 U.S. 407 (1965), the Supreme Court reiterated that "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that

highly political task itself." *Growe*, 507 U.S. at 33. The *Growe* Court noted that the principles expressed in *Germano* derive from a recognition that the Constitution gives the states primary responsibility for apportionment of their federal congressional and state legislative districts. "[T]he doctrine of *Germano* prefers ***both*** state branches [legislative and judicial] to federal courts as agents of apportionment." *Growe*, 507 U.S. at 34.

In *Germano,* the Supreme Court had remanded the case with directions that the district court enter an order fixing a reasonable time within which the appropriate agencies of the state, including its highest court, might validly accomplish the redistricting and still leave ample time to permit the redistricting plan to be used in the next election. 381 U.S. at 409. The *Growe* Court quoted these directions with approval, 507 U.S. at 35, and thus the implications for scheduling three-judge court cases are clear.

When there is parallel state litigation, at the first pretrial conference, the district court should arrive at a date by which the matter must be resolved in the state in order to allow for potential litigation in federal court if the state does not successfully resolve the matter. The court should, without dismissing the case, defer to the state during this period of time. Since the possibility remains that the state will not be able to resolve the matter, scheduling should also allow time for the three-judge court to recommence active consideration of the case and resolve any federal questions, and permit state officials to implement the federal court decision and begin the election process in a timely fashion. The notion is to find and set workable final dates for conclusion of state activity in the case and ultimate resolution of the case in federal court if need be. This should be done early in the case, in order to avoid having to postpone the election. The court might also consider requiring the parties to file a copy of every pleading filed in state court during the period in which it is deferring to state court proceedings, so that it remains aware of developments in the case.

4. Decide which judge will take the lead in managing the case

Once the three judges are selected, they—not the chief circuit judge—should decide who will take the lead in managing the case. One judge experienced in these matters suggests that the district judge initially assigned the case should take the lead. The judge who takes the lead should handle routine pretrial matters; the three judges should con-

vene only for such matters as dispositive motions and the final pretrial conference. Nevertheless, coordination among the three judges on the panel will be important, and thus the lead judge should require the parties to file their pleadings with all judges on the court. Work schedules of circuit and district court judges are different, and coordination will require ongoing communication between members of the court.

5. Require judges and parties to use the same computer program

The parties in redistricting cases ordinarily make use of computer programs in drawing district lines and gathering demographic data, and those programs and data are likely to be admitted as evidence and reviewed by the court. *See, e.g., Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (discussing REDAPPL software). It is therefore important to agree on a common computer program early in the case—perhaps at the first pretrial conference. Of course, if questions about the reliability and admissibility of competing computer programs are involved in the litigation, this may not be possible.

It also is important to ensure that the court has access to the computer program when it needs it. Access to the program must be secure, so that the data are confidential and so that the parties or other interested persons cannot alter the data. To avoid the appearance of impropriety, the program used by the court and the parties should, if at all possible, not be the same as that used by any state politicians likely to be affected by the outcome of the case.

6. Decide which judge will preside at trial

Members of the three-judge court should also decide early on who will preside at trial in the case. If the judge initially assigned to the case takes the lead in managing it, it may make sense for that judge to handle the trial as well. Redistricting cases are bench trials replete with data and expert witnesses. One appellate judge observed that although such cases are somewhat more informal than jury trials, they are best handled by an experienced trial judge.

There is no statutory presumption that a circuit judge will preside at trial in a three-judge redistricting case. Although there is nothing wrong with having a circuit judge preside over the trial, is it not uncommon for a circuit judge to defer to an experienced trial judge on the panel.

About the Federal Judicial Center

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By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

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Memorandum

To: SCAC
From: Jim M. Perdue,Jr.
Date: October 8, 2015
Re: Report to Supreme Court Advisory Committee re Deliberations of Subcommittee re: Decision on Judge Tom Pollard's Request Concerning Compensated ADR for Constitutional and County Court Judges

This report is an outline of the information to help the committee prepare for the analysis of issue number 4 in the "Referral of Rules Issues" letter. Issue 4 is entitled "ADR and the Constitutional County Judges." There is no conclusion section as this is a conglomeration of research to help best prepare the SCAC in arriving at their own independent opinion and conclusion concerning these issues. The subcommittee did not vote on the issue and does not bring any recommendation forth. It appears there are potential stake holders in the issue that may merit input into the consideration by the entire committee.

Issue #4 for 10/16/15 Meeting: ADR and Constitutional County Court Judges

The Court has received the attached letter from the Hon. Tom Pollard, county judge of Kerr County. Judge Pollard points out that under Canons 4(F)-(G) and 6(B)(3) of the Code of Judicial Conduct, a constitutional county court judge is permitted to maintain a private law practice but is prohibited from acting as an arbitrator or mediator for compensation. Judge Pollard asks the Court to revise the Code of Judicial Conduct to permit a constitutional county court judge to serve as an arbitrator or mediator for compensation in a case that is not pending before the judge. The Court requests the Advisory Committee's recommendations on whether and how the Code should be amended to permit a constitutional county court judge to serve as a private arbitrator or mediator.

Judge Pollard's Specific Request

Judge Pollard requests an update to canon 4F by adding: "Constitutional County Judges may be mediators and/or arbitrators for compensation SO LONG AS the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court."

Discussion on the Relevant Code of Judicial Conduct Sections and any other applicable and relevant legal research

Canon 4(F) states the following: "An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties." TEX.CODE JUD. CONDUCT, CANON 4(F). Canon 4(G) states: "A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family." *Id.* at 4(G)

Canon 6(B)(3) lays out an exception for county judges concerning Canon 4(G), and states the following:

> A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:
> . . .
> (3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.
> *Id.* at 6(B)(3).

Judge Pollard is asking the advisory committee to take note of Canon 4(G) and the exception given to county judges outlined in Canon 6(B)(3), and then try to apply a similar sort of exception to Canon 4(F) to allow judges to also mediate and arbitrate for compensation.

In brief, Canon 4F prohibits a judge from acting as an arbitrator or mediator. However, it contains qualifications not in Canon 4F of the Model Code. Texas Canon 4F begins by including only active full-time judges (which seems like overkill, since Canon 6 specifies the applicability of all of the Canons), while the Model Code does not (apparently relying on its Canon 6 to address the applicability of various sections to retired judges). The Texas version specifies that the judge is not to act as an arbitrator or mediator for compensation outside the judicial system, while the

Model Code version does not (its reference to "private capacity" seems a synonym for "outside the judicial system"). Texas' Canon 4F provides that a judge may encourage settlement in the performance of official duties; the Model Code says that in commentary.

Texas Judicial Ethics Advisory Opinions make clear that the permission to encourage settlement does not include the judge actually mediating cases in order to expedite the settlement process or conducting settlement conferences for cases filed in his court or in other courts in which he conveys settlement offers and asks questions. Op. No. 120 (1988); *Compare* Op. No. 62 (1982) (serving as consultant for compensation for private nonprofit corporation probably would not contravene Canon 4F); Op. No. 212 (1988), http://www.txcourts.gov/media/678096/JudicialEthicsOpinions.pdf. These advisory opinions tend to allude to the idea focused around compensation for such mediation or arbitration as being at the forefront of the disallowance. However, Judge Pollard did specifically request that part of the amendment read "*so long as* the matters being mediated and/or arbitrated are not, and never have been, pending in said Judge's Court " (emphasis added).

In deciding in an early opinion that a trial judge may not appoint another sitting judge to serve pro bono as a mediator of a dispute that is the subject of a pending case, the Judicial Ethics Committee looked to the language of the 1990 Model Code:

> Texas Canon 5E [now Canon 4F], which prohibits an active full-time judge from acting as a mediator for compensation outside the judicial system but permits a judge to encourage settlement in the performance of official duties, should be construed to have the meaning stated by the corresponding ABA Code provision, which provides that a judge shall not act as a mediator in a private capacity. ABA Canon 4F. Texas Canon 5E [now Canon 4F] does not permit a judge to be a mediator without compensation outside the judicial system. A judge's statutory duty to encourage parties to attempt out of court procedures to resolve a dispute does not imply authority to act as a statutory mediator.
> Op. No. 161 (1993).

The Committee revisited that topic five years later and concluded that a sitting judge may, without compensation, serve as a mediator:

> In light of this growing reliance on ADR procedures as an adjunct to traditional forms of adjudication, and in light of the favorable experience of many judges in encouraging and participating in alternative dispute resolution procedures, we withdraw in its entirety our former Opinion 161 and find in the Code no prohibition against an active judge serving as a mediator or arbitrator without compensation so long as the judge follows the guidelines of Canon 3B(8)(b).
> Op. No. 233 (1998). Canon 3(B)(8)(b) states:
>
> > A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:
> >
> > > . . .
> > > (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
>
> TEX. CODE JUD. CONDUCT, CANON 3(B)(8)(b).

One of the main arguments against allowing judges to mediate and/or arbitrate for compensation seems to be that an active judge may have too much on his plate to give his most efficient attention to any ADR he or she is going to get involved in. The Canons, along with the stated advisory opinions, indicate that amendments have been made, and possibly will continue to be made, as the reliance on ADR continues to grow. Moreover, in accordance with Canon 3(B)(8)(b), so long as there is correct notice and consent in these forms of arbitrations and/or mediations, then each parties should be well aware of the conditions of having an active judge take on their ADR, of which little concerns compensation.

The Judicial Ethics Committee has twice been asked whether a former district judge, qualified to accept judicial assignments, may act as a mediator or arbitrator when not on judicial assignment. The Committee initially considered such a judge to be the same as a "retired judge subject to recall," and said the judge could act as a mediator or arbitrator so long as not on judicial assignment. Op. No. 99 (1987). A year later the Committee compared a former district judge with a senior judge and said she could act as a mediator or arbitrator as long as she refrained from performing judicial services at the time. Op. No. 124 (1988). These advisory opinions thus seem to be leaning towards disallowing an actively busy judge from engaging in ADR.

One argument to be made for amending Canon 4(F) in the manner Judge Pollard requests would be that Canon 6 exempts from Canon 4F "Justices of the Peace, unless the court on which the judge serves has jurisdiction of the matter or parties involved in the arbitration or mediation." TEX. CODE JUD. CONDUCT, CANON 6(C)(1)(c); *Compare* Op. No. 208 (1997). Opinion no. 208 states that a justice of peace may serve as a CASA (Court appointed special advocate) in the county in which she serves as a justice of the peace. However, he or she must always comply with Canon 3A (requiring that the judicial duties of a judge take precedence over the judge's other activities). So the argument can be made that there have been provisions to allow Justices of the Peace to be arbitrators and mediators, which the proposed amendment seeks for "Constitutional County Judges", so long as we make sure the court on which the judge serves does not have jurisdiction over the matter, which is also alluded to in Judge Pollard's amendment request.

Item 7 – Proposed Appellate Rule 57

Rule 57. *Direct Appeals to Texas Supreme Court*

57.1 (a) *Perfecting Direct Appeal.* A direct appeal to the Supreme Court permitted by law is perfected when a written notice of appeal is filed with the trial court clerk [within the time provided by Rule 26.1 or as extended by Rule 26.3]. If a notice of appeal is mistakenly filed with the clerk of the Supreme Court, the notice is deemed filed the same day with the trial court clerk and the Supreme Court clerk must immediately send the trial court clerk a copy of the notice.

(b) *Contents of Notice.* The notice of direct 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 take a direct appeal to the Supreme Court; and

(4) state the name of each party filing the notice.

(c) *Statement of Jurisdiction and Response.* In addition to perfecting the appeal, the petitioner must file with the clerk of the Supreme Court a statement of jurisdiction [on the same day the notice of appeal is filed with the trial court clerk or within ____ days thereafter]. The statement of jurisdiction must plainly state the basis for the exercise of the Supreme Court's direct appeal jurisdiction. A respondent may file a response to the petitioner's statement of jurisdiction challenging the exercise of direct appeal jurisdiction, [or a waiver of response], within ___ days after the statement of jurisdiction is filed with the clerk of the Supreme Court.

(d) *Other Requirements.* The petitioner must also file with the clerk of the Supreme Court a docketing statement as provided in Rule 32.1 and pay all required fees authorized to be collected by the clerk of the Supreme Court.

option one

[57.2 *When Filed.* The notice of appeal and statement of jurisdiction both must be filed within ___ days after the order to be appealed is signed, unless the Supreme Court extends the time for filing pursuant to Rule 10.5(b).]

option two

[57.2 *When filed.* The notice of appeal must be filed with the trial court clerk within the time provided by Rule 26.1 or as extended by Rule 263. The statement of jurisdiction [and a copy of the notice of appeal] must be filed with the clerk of the Supreme Court ____ [on the same day the notice of appeal is filed or within ____ days after the filing of the notice of appeal with the trial court clerk].

[57.3 *Discretionary Review.* The Supreme Court may decline to exercise jurisdiction over a direct appeal [of an interlocutory order] if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.]

57.4 (a) *Methods of Review*. The Supreme Court may consider whether the Court has probable jurisdiction based on the petitioner's statement of jurisdiction and any response and without first requesting the parties to obtain the appellate record. But if the Supreme Court cannot determine that it has probable jurisdiction from the petitioner's statement of jurisdiction and any response, the Court may order:

(1) the petitioner to file an amended statement of jurisdiction;

(2) the respondent to file a response to the petitioner's statement of jurisdiction;

(3) the parties to file briefing addressing whether the direct appeal meets the requirements for a direct appeal;

(4) the parties to file supporting evidence; or

(5) the parties to request preparation and filing of the appellate record in accordance with Appellate Rules 34 and 35.

(b) *The Appellate Record.*

(1) *Preparation and Filing of Record.* The parties should not request the preparation and filing of the clerk's record or the reporter's record until the Supreme Court directs them to do so. If the Supreme Court determines that it has probable jurisdiction, it will request the parties to obtain the preparation, certification and filing of the clerk's record and, if necessary to the appeal, the reporter's record in accordance with Appellate Rules 34 and 35 and specify the time in which the record must be filed.

(2) *Review of Appellate Record by Clerk.* On receipt of the record, the clerk of the Supreme Court must determine whether the record complies with the Supreme Court's order on preparation of the record. If it is defective, the clerk must specify the defects and instruct the responsible official to correct the defects and return the record to the Supreme Court for filing by a specified date. The clerk of the Supreme Court also must notify the parties of the date or dates of receipt and filing of the appellate record in the Supreme Court.

57.5 *No Probable Jurisdiction.* If the Supreme Court determines that it does not have [probable] jurisdiction [or that a direct appeal should not be allowed as a matter of judicial discretion], it may dismiss the appeal.

57.6 (a) *Determination of Direct Appeal.* If the Supreme Court determines that it has probable jurisdiction [and that a direct appeal should be allowed as a matter of judicial discretion], the Court:

(1) must request a response to the statement of jurisdiction if one has not been filed;

(2) may request full briefing under Rule 55;

(3) may set the case for submission and argument under Rule 59; and

(4) may render judgment under Rule 60.

(b) *Rehearing.* Any party may file a motion for rehearing within 15 days after the final order is rendered. The motion must clearly state the points or issues relied on for rehearing.

57.7 *Direct Appeal Exclusive While Pending*. If a direct appeal to the Supreme Court is filed, the parties to the appeal must not while the appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time the direct appeal was filed. The other appeal must be perfected within ten days after dismissal of the direct appeal.

57.__ *No Jurisdiction Over Questions of Fact.* The Supreme Court may not exercise direct appeal jurisdiction over questions of fact.

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

To: Members of the Appellate Rules Subcommittee: Pamela Baron, Hon. Bill Boyce, Hon. Brett Busby, Elaine Carlson, Frank Gilstrap, Chip Watson, Scott Stolley and Evan Young
From: Bill Dorsaneo
Date: December 2, 2015
Subject: Proposed Appellate Rule 57

As you probably know, a new version of Appellate Rule 57 is required because of the recent expansion of direct appeal jurisdiction by statute and because the current rule does a very poor and, in fact, misleading job of explaining how direct appeal jurisdiction operates. Pam Baron, Justice Brett Busby and I have been working with Blake Hawthorne on a proposal for revision of Appellate Rule 57, which is attached for your review. I am forwarding this draft to Marti for planning purposes. Please let us have your thoughts at your earliest convenience. I apologize for the shortness of notice.

cc: Chief Justice Nathan L. Hecht
Chip Babcock
Martha Newton
Blake Hawthorne

School of Law
Southern Methodist University PO Box 750116 Dallas TX 75275-0116
214-768-2626 Fax 214-768-4330 wdorsane@mail.smu.edu

William V. Dorsaneo III
Chief Justice John and Lena Hickman Distinguished Faculty Fellow
and Professor of Law

Memorandum

To: Members of the Supreme Court Advisory Committee
cc: Chief Justice Nathan L. Hecht, Chip Babcock, Blake Hawthorne, Martha Newton, Marti Walker
From: Bill Dorsaneo
Subject: Proposed Appellate Rule 57
Date: December 10, 2015

Summary of Constitutional Provisions

Art. V, Section 3-b, a 1940 constitutional provision provided and still provides for a direct appeal to the Texas Supreme Court "from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this state, or on the validity or invalidity of any administrative order issued by any state agency under any statute of this State." Tex. Const. Art. V § 3-b.

2/10/1943, 48th Leg. R.S. Ch. 14, § 1, 1943 Tex. Gen. Laws 14, 14-15 (eff. Jan. 1, 1944). Legislature enacted statute authorizing both types of direct appeals. Civil Procedure Rule 499a, promulgated, effective 12/31/1943. May 29, 1983, 68th Leg., R.S. Ch. 839, § 2, 1983 Tex. Gen. Laws 4767, 4768. Repealed part of statute permitting direct appeals of orders regarding the validity of "State Board or Commission."

Amendment to Art. V, § 3, amended in 1981 to broaden Legislature's ability to prescribe appellate jurisdiction of Texas Supreme Court to "extend to all cases except criminal law matters and as otherwise provided in this Constitution or by law" Tex. Const. art. V, § 3 (effective 1/1/1981; amended 11/6/2001). *See Perry v. Del Rio*, 67 S.W.3d 85, 98n. 4). (Tex. 2001). This probably makes Art V. § 3-b unnecessary.

School of Law
Southern Methodist University PO Box 750116 Dallas TX 75275-0116
214-768-2626 Fax 214-768-4330 wdorsane@mail.smu.edu

New Legislation

The Legislature has now provided for direct appeals to the Texas Supreme Court in cases that do not involve orders granting or denying injunctions on the ground of a statute's constitutionality as provided in Section 22.001(c) of the Government Code. In addition to newly enacted Chapter 22A (Special Three-Judge District Court) of the Government Code, providing a procedure for convening a "three-judge district court in any suit filed in a district court in this state in which this state or a state officer or agency is a defendant in a claim that:

(1) challenges the finances or operations of this state's public school system; or

(2) involves the apportionment of districts for the house of representatives, the senate, the State Board of Education, or the United States Congress, or state judicial districts," (*see* Tex. Gov't Code § 22A.001 (a)), various other direct appeal statutes have been enacted. *See* Rance Craft, "Go Directly to the Texas Supreme Court, Do Not Pass the Court of Appeals, Do Not Collect a Court of Appeals Disposition," 24th Annual Conference on State and Federal Appeals, UTLAW CLE, June 5-6, 2014; *see also* Appendix A.

Summary of Rule Changes

But like its predecessors, Appellate Rule 57 has been drafted as if section 22.001(c) is the only basis for the Supreme Court's direct appeal jurisdiction. Similarly, as explained in Justice Willett's dissenting opinion in the *Episcopal Diocese* case, "in the vast majority of cases where we have exercised direct appeal jurisdiction, it has been abundantly clear that the trial court issued or denied an injunction on the ground of a statute's constitutionality." *Episcopal Diocese v. Episcopal Church*, 422 S.W.3d 646 (Tex. 2013); *see also Del Rio*, 67 S.W.3d at 98-100 (Phillips, C.J., dissenting).

The following rules of procedure have dealt with the Texas Supreme Court's direct appeal jurisdiction over time. Copies of these rules are attached as Appendix B.

1. Tex. R. Civ. P. 499-a (Direct Appeals) (new rule eff. 12/31/43);
2. Tex. R. Civ. P. 140 (Direct Appeal) (9/1/86)
3. Tex. R. Civ. P. 140 (Direct Appeals) (rewritten in 1990);
4. Tex. R. Ap. P. 57 (current rule).

APPENDIX A

Sec. 1205.021. Authority to Bring Action.

An issuer may bring an action under this chapter to obtain a declaratory judgment as to:

(1) the authority of the issuer to issue the public securities;

(2) the legality and validity of each public security authorization relating to the public securities, including if appropriate:

(A) the election at which the public securities were authorized;

(B) the organization or boundaries of the issuer;

(C) the imposition of an assessment, a tax, or a tax lien;

(D) the execution or proposed execution of a contract;

(E) the imposition of a rate, fee, charge, or toll or the enforcement of a remedy relating to the imposition of that rate, fee, charge, or toll; and

(F) the pledge or encumbrance of a tax, revenue, receipts, or property to secure the public securities;

(3) the legality and validity of each expenditure or proposed expenditure of money relating to the public securities; and

(4) the legality and validity of the public securities.

Sec. 1205.068. Appeals.

(a) Any party to an action under this chapter may appeal to the appropriate court of appeals:

(1) an order entered by the trial court under Section 1205.103 or 1205.104; or

(2) the judgment rendered by the trial court.

(b) A party may take a direct appeal to the supreme court as provided by Section 22.001(c).

(c) An order or judgment from which an appeal is not taken is final.

(d) An order or judgment of a court of appeals may be appealed to the supreme court.

(e) An appeal under this section is governed by the rules of the supreme court for accelerated appeals in civil cases and takes priority over any other matter, other than writs of habeas corpus, pending in the appellate court. The appellate court shall render its final order or judgment with the least possible delay.

History

Enacted by *Acts 1999, 76th Leg., ch. 227 (H.B. 3157), § 1*, effective September 1, 1999; am. *Acts 1999, 76th Leg., ch. 1064 (H.B. 3224), § 6*, effective September 1, 1999.

Sec. 39.303. Financing Orders; Terms.

(a) The commission shall adopt a financing order, on application of a utility to recover the utility's regulatory assets and other amounts determined under Section 39.201 or 39.262, on making a finding that the total amount of revenues to be collected under the financing order is less than the revenue requirement that would be recovered over the remaining life of the regulatory assets or other amounts using conventional financing methods and that the financing order is consistent with the standards in Section 39.301.

(b) The financing order shall detail the amount of regulatory assets and other amounts to be recovered and the period over which the nonbypassable transition charges shall be recovered, which period may not exceed 15 years. If an amount determined under Section 39.262 is subject to judicial review at the time of the securitization proceeding, the financing order shall include an adjustment mechanism requiring the utility to adjust its rates, other than transition charges, or provide credits, other than credits to transition charges, in a manner that would refund over the remaining life of the transition bonds any overpayments resulting from securitization of amounts in excess of the amount resulting from a final determination after completion of all appellate reviews. The adjustment mechanism may not affect the stream of revenue available to service the transition bonds. An adjustment may not be made under this subsection until all appellate reviews, including, if applicable, appellate reviews following a commission decision on remand of its original orders, have been completed.

(c) Transition charges shall be collected and allocated among customers in the same manner as competition transition charges under Section 39.201.

(d) A financing order shall become effective in accordance with its terms, and the financing order, together with the transition charges authorized in the order, shall thereafter be irrevocable and not subject to reduction, impairment, or adjustment by further action of the commission, except as permitted by Section 39.307.

(e) The commission shall issue a financing order under Subsections (a) and (g) not later than 90 days after the utility files its request for the financing order.

(f) A financing order is not subject to rehearing by the commission. A financing order may be reviewed by appeal only to a Travis County district court by a party to the proceeding filed within 15 days after the financing order is signed by the commission. The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.

(g) At the request of an electric utility, the commission may adopt a financing order providing for retiring and refunding transition bonds on making a finding that the future transition charges required to service the new transition bonds, including transaction costs, will be less than the future transition charges required to service the transition bonds being refunded. On the retirement of the refunded transition bonds, the commission shall adjust the related transition charges accordingly.

History

Enacted by *Acts 1999, 76th Leg., ch. 405 (S.B. 7), § 39*, effective September 1, 1999; am. *Acts 2007, 80th Leg., ch. 1186 (H.B. 624), § 4*, effective June 15, 2007.

Sec. 36.405. Determination of System Restoration Costs.

(a) An electric utility is entitled to recover system restoration costs consistent with the provisions of this subchapter and is entitled to seek recovery of amounts not recovered under this subchapter, including system restoration costs not yet incurred at the time an application is filed under Subsection (b), in its next base rate proceeding or through any other proceeding authorized by Subchapter C or D.

(b) An electric utility may file an application with the commission seeking a determination of the amount of system restoration costs eligible for recovery and securitization. The commission may by rule prescribe the form of the application and the information reasonably needed to support the application; provided, however, that if such a rule is not in effect, the electric utility shall not be precluded from filing its application and such application cannot be rejected as being incomplete.

(c) The commission shall issue an order determining the amount of system restoration costs eligible for recovery and securitization not later than the 150th day after the date an electric utility files its application. The 150-day period begins on the date the electric utility files the application, even if the filing occurs before the effective date of this section.

(d) An electric utility may file an application for a financing order prior to the expiration of the 150-day period provided for in Subsection (c). The commission shall issue a financing order not later than 90 days after the utility files its request for a financing order; provided, however, that the commission need not issue the financing order until it has determined the amount of system restoration costs eligible for recovery and securitization.

(e) To the extent the commission has made a determination of the eligible system restoration costs of an electric utility before the effective date of this section, that determination may provide the basis for the utility's application for a financing order pursuant to this subchapter and Subchapter G, Chapter 39. A previous commission determination does not preclude the utility from requesting recovery of additional system restoration costs eligible for recovery under this subchapter, but not previously authorized by the commission.

(f) A rate proceeding under Subchapter C or D shall not be required to determine the amount of recoverable system restoration costs, as provided by this section, or for the issuance of a financing order.

(g) A commission order under this subchapter is not subject to rehearing. A commission order may be reviewed by appeal only to a Travis County district court by a party to the proceeding filed within 15 days after the order is signed by the commission. The judgment of the district court may be reviewed only by direct appeal to the Supreme Court of Texas filed within 15 days after entry of judgment. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall be based solely on the record before the commission and briefs to the court and shall be limited to whether the order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this chapter.

History

Enacted by *Acts 2009, 81st Leg., ch. 1 (S.B. 769), § 1*, effective April 16, 2009.

Sec. 2306.932. Injunctive Relief.

(a) A district court for good cause shown in a hearing and on application by the department, a migrant agricultural worker, or the worker's representative may grant a temporary or permanent injunction to prohibit a person, including a person who owns or controls a migrant labor housing facility, from violating this subchapter or a rule adopted under this subchapter.

(b) A person subject to a temporary or permanent injunction under Subsection (a) may appeal to the supreme court as in other cases.

History

Am. *Acts 2005, 79th Leg., ch. 60 (H.B. 1099), § 1*, effective September 1, 2005 (renumbered from *Health and Safety Code Sec. 147.012*).

Annotations

Notes

STATUTORY NOTES

Effect of amendments.

2005 amendment, in (a), added "a migrant agricultural worker, or the worker's representative" and "including a person who owns or controls a migrant labor housing facility," and twice substituted "subchapter" for "chapter."

Sec. 17.62. Penalties.

(a) Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with Section 17.60 or 17.61 of this subchapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material or merchandise or sample of merchandise is guilty of a misdemeanor and on conviction is punishable by a fine of not more than $5,000 or by confinement in the county jail for not more than one year, or both.

(b) If a person fails to comply with a directive of the consumer protection division under Section 17.60 of this subchapter or with a civil investigative demand for documentary material served on him under Section 17.61 of this subchapter, or if satisfactory copying or reproduction of the material cannot be done and the person refuses to surrender the material, the consumer protection division may file in the district court in the county in which the person resides, is found, or transacts business, and serve on the person, a petition for an order of the court for enforcement of Sections 17.60 and 17.61 of this subchapter. If the person transacts business in more than one county, the petition shall be filed in the county in which the person maintains his principal place of business, or in another county agreed on by the parties to the petition.

(c) When a petition is filed in the district court in any county under this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order required to carry into effect the provisions of Sections 17.60 and 17.61 of this subchapter. Any final order entered is subject to appeal to the Texas Supreme Court. Failure to comply with any final order entered under this section is punishable by contempt.

History

Enacted by Acts 1973, 63rd Leg., ch. 143 (H.B. 417), § 1, effective May 21, 1973.

Sec. 36.053. [Expires September 1, 2015] Investigation.

(a) The attorney general may take action under Subsection (b) if the attorney general has reason to believe that:

(1) a person has information or custody or control of documentary material relevant to the subject matter of an investigation of an alleged unlawful act;

(2) a person is committing, has committed, or is about to commit an unlawful act; or

(3) it is in the public interest to conduct an investigation to ascertain whether a person is committing, has committed, or is about to commit an unlawful act.

(b) In investigating an unlawful act, the attorney general may:

(1) require the person to file on a prescribed form a statement in writing, under oath or affirmation, as to all the facts and circumstances concerning the alleged unlawful act and other information considered necessary by the attorney general;

(2) examine under oath a person in connection with the alleged unlawful act; and

(3) execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying of the material under Section 36.054.

(c) The office of the attorney general may not release or disclose information that is obtained under Subsection (b)(1) or (2) or any documentary material or other record derived from the information except:

(1) by court order for good cause shown;

(2) with the consent of the person who provided the information;

(3) to an employee of the attorney general;

(4) to an agency of this state, the United States, or another state;

(5) to any attorney representing the state under Section 36.055 or in a civil action brought under Subchapter C;

(6) to a political subdivision of this state; or

(7) to a person authorized by the attorney general to receive the information.

(d) The attorney general may use documentary material derived from information obtained under Subsection (b)(1) or (2), or copies of that material, as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(e) If a person fails to file a statement as required by Subsection (b)(1) or fails to submit to an examination as required by Subsection (b)(2), the attorney general may file in a district court of Travis County a petition for an order to compel the person to file the statement or submit to the examination within a period stated by court order. Failure to comply with an order entered under this subsection is punishable as contempt.

(f) An order issued by a district court under this section is subject to appeal to the supreme court.

History

Enacted by *Acts 1995, 74th Leg., ch. 824 (H.B. 2523), § 1*, effective September 1, 1995; am. *Acts 1997, 75th Leg., ch. 1153 (S.B. 30), §§ 4.01(b)*, 4.05, effective September 1, 1997 (renumbered from Sec. 36.005); am. *Acts 2005, 79th Leg., ch. 806 (S.B. 563), § 8*, effective September 1, 2005.

Notes

STATUTORY NOTES

Editor's Notes.

See Tex. *Hum. Res. Code Ann. § 21.002* for sunset provision.

Effect of amendments.

2005 amendment, added (c) — (f).

Sec. 36.054. [Expires September 1, 2015] Civil Investigative Demand.

(a) An investigative demand must:

(1) state the rule or statute under which the alleged unlawful act is being investigated and the general subject matter of the investigation;

(2) describe the class or classes of documentary material to be produced with reasonable specificity to fairly indicate the documentary material demanded;

(3) prescribe a return date within which the documentary material is to be produced; and

(4) identify an authorized employee of the attorney general to whom the documentary material is to be made available for inspection and copying.

(b) A civil investigative demand may require disclosure of any documentary material that is discoverable under the Texas Rules of Civil Procedure.

(c) Service of an investigative demand may be made by:

(1) delivering an executed copy of the demand to the person to be served or to a partner, an officer, or an agent authorized by appointment or by law to receive service of process on behalf of that person;

(2) delivering an executed copy of the demand to the principal place of business in this state of the person to be served; or

(3) mailing by registered or certified mail an executed copy of the demand addressed to the person to be served at the person's principal place of business in this state or, if the person has no place of business in this state, to a person's principal office or place of business.

(d) Documentary material demanded under this section shall be produced for inspection and copying during normal business hours at the office of the attorney general or as agreed by the person served and the attorney general.

(e) The office of the attorney general may not produce for inspection or copying or otherwise disclose the contents of documentary material obtained under this section except:

(1) by court order for good cause shown;

(2) with the consent of the person who produced the information;

(3) to an employee of the attorney general;

(4) to an agency of this state, the United States, or another state;

(5) to any attorney representing the state under Section 36.055 or in a civil action brought under Subchapter C;

(6) to a political subdivision of this state; or

(7) to a person authorized by the attorney general to receive the information.

(e-1) The attorney general shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or by an authorized representative of that person. The attorney general may use the documentary material or copies of it as the attorney general determines necessary in the enforcement of this chapter, including presentation before a court.

(f) A person may file a petition, stating good cause, to extend the return date for the demand or to modify or set aside the demand. A petition under this section shall be filed in a district court of Travis County and must be filed before the earlier of:

(1) the return date specified in the demand; or

(2) the 20th day after the date the demand is served.

(g) Except as provided by court order, a person on whom a demand has been served under this section shall comply with the terms of an investigative demand.

(h) A person who has committed an unlawful act in relation to the Medicaid program in this state has submitted to the jurisdiction of this state and personal service of an investigative demand under this section may be made on the person outside of this state.

(i) This section does not limit the authority of the attorney general to conduct investigations or to access a person's documentary materials or other information under another state or federal law, the Texas Rules of Civil Procedure, or the Federal Rules of Civil Procedure.

(j) If a person fails to comply with an investigative demand, or if copying and reproduction of the documentary material demanded cannot be satisfactorily accomplished and the person refuses to surrender the documentary material, the attorney general may file in a district court of Travis County a petition for an order to enforce the investigative demand.

(k) If a petition is filed under Subsection (j), the court may determine the matter presented and may enter an order to implement this section.

(l) Failure to comply with a final order entered under Subsection (k) is punishable by contempt.

(m) A final order issued by a district court under Subsection (k) is subject to appeal to the supreme court.

History

Enacted by *Acts 1995, 74th Leg., ch. 824 (H.B. 2523), § 1*, effective September 1, 1995; am. *Acts 1997, 75th Leg., ch. 1153 (S.B. 30), § 4.01(b)*, effective September 1, 1997 (renumbered from Sec. 36.006); am. *Acts 2005, 79th Leg., ch. 806 (S.B. 563), § 9*, effective September 1, 2005.

Annotations

Notes

STATUTORY NOTES

Editor's Notes.

See Tex. *Hum. Res. Code Ann. § 21.002* for sunset provision.

Effect of amendments.

2005 amendment, in (e), deleted "Except as ordered by a court for good cause shown," in the beginning of the paragraph, substituted "except:" for "to a person other than an authorized employee of the attorney general without the consent of the person who produced the documentary material" in the first sentence, and added subparagraphs (1) through (7); and designated the last two sentences of former (e) as (e-1).

Rule 496. Brief

A party who elects to file in this court a brief in addition to the brief filed in the Court of Civil Appeals, shall comply as nearly as may be with the rules prescribed for briefing causes in the latter court and shall confine his briefs to the points raised in the motion for a rehearing and presented in the application for a writ of error. The clerk may receive amicus curiae briefs or arguments, provided it is shown that copies have been furnished to all attorneys of record in the case. As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.

Source: Texas Rule 14 (for Supreme Court), unchanged.

Rule 497. Order of Trial of Causes

Causes may be tried in such order as the justices of the Supreme Court may deem to the best interest and convenience of the parties or their attorneys.

Source: Art. 1755, with minor textual change.

Rule 498. Argument

In the argument of cases in the Supreme Court each side may be allowed thirty minutes in the argument at the bar, with fifteen minutes more in conclusion by the petitioner. In cases of very great importance, involving difficult questions, the time allotted herein may be extended by the court, provided application therefor is made before argument begins. Not more than two counsel on each side will be heard, except on leave of the court.

Source: Texas Rule 16 (for Supreme Court) in part, unchanged.

Rule 499. Correspondence

Correspondence relative to any matter before the court must be conducted with the clerk and shall not be addressed to any of the justices, or to any judge of the Commission of Appeals.

Source: Texas Rule 20 (for Supreme Court), unchanged.

Rule 499–a. Direct Appeals

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as Section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of Section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited,

and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of Sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State, when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the Court of Civil Appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the Courts of Civil Appeals shall, in so far as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder. Promulgated by order of June 16, 1943, effective December 31, 1943.

This is a new rule effective December 31, 1943.

SECTION 2. JUDGMENT

Rule 500. Judgments in Open Court

In all cases decided by the Supreme Court, its judgments or decrees will be pronounced in open court; and the opinion of the court will be reduced to writing in such cases as the court deems of sufficient importance to be reported. Where the court, after the submission of a case, is of the opinion that the Court of Civil Appeals has entered the correct judgment, and that the writ should not have been granted, the court may set aside the order granting the writ, and dismiss or refuse the application as though the writ had never been granted, without

Rule 136. Briefs of Respondents and Others

(a) Time and Place of Filing. Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error unless additional time is granted.

(b) Form. Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h).

(c) Objections to Jurisdiction. If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction.

(d) Reply and Cross-Points. Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross-points that respondent has preserved and that establish respondent's rights.

(e) Reliance on Prior Brief. If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief.

(f) Amendment. The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe.

SECTION TEN. DIRECT APPEALS

Rule 140. Direct Appeals

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the court of appeals shall, insofar as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder.

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

Rule 160. Form and Content of Motions for Extension of Time

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) The court of appeals and the date of its judgment, together with the number and style of the case;

Notes and Comments

Comment: New (e). Former (e) becomes new (f); former (f) becomes new (g).

SECTION TEN. DIRECT APPEALS

RULE 140. DIRECT APPEALS

In compliance with section 22.001(c) of the Government Code, the following rules of procedure for direct appeals to the Supreme Court are promulgated.

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court; authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as section 3-b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) When a trial court has granted or denied an interlocutory or permanent injunction and its decision is based on the grounds of the constitutionality or unconstitutionality of any statute of this State, the Supreme Court shall have jurisdiction of a direct appeal of the trial court's order when the appeal contests that court's holding regarding the constitutionality or unconstitutionality of the statute.

(c) Such appeal shall be in lieu of an appeal to the court of appeals and shall be upon such question or questions of law only. A statement of facts shall not be brought up except to the extent it is necessary to show that the appellant has an interest in the subject matter of the appeal. If the Supreme Court would be required to determine any contested issue of fact in order to rule on the constitutionality of the statute in question as ruled on by the trial court, the appeal will be dismissed.

(d) The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with Section 22.001 of the Government Code and with this rule.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989.)

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. A copy of the motion shall be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) The court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)

transmit to the court of appeals a certified copy of the orders denying, refusing or dismissing the application and of the order overruling the motion for rehearing and shall return all filed papers to the Clerk of the Court of Appeals, except the application for writ of error, any brief in response and any other briefs filed in the Supreme Court.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

RULE 135. NOTICE OF GRANTING, ETC.

When the Supreme Court grants, denies, refuses or dismisses an application for writ of error or a motion for rehearing, the clerk of the court shall notify the parties or their attorneys of record by letter.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

RULE 136. BRIEFS OF RESPONDENTS AND OTHERS

(a) Time and Place of Filing. Briefs in response to the application for writ of error shall be filed with the Clerk of the Supreme Court within fifteen days after the filing of the application for writ of error in the Supreme Court unless additional time is granted.

(b) Form. Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 131(b), (c), (e), (f), (g), and (h).

(c) Objections to Jurisdiction. If the petitioner fails to assert valid grounds for jurisdiction by the Supreme Court, the respondent shall state in the brief the reasons that the Supreme Court has no jurisdiction.

(d) Reply and Cross-Points. Respondent shall confine his brief to reply points that answer the points in the application for writ of error or that provide independent grounds for affirmance and to such cross points that respondent has preserved and that establish respondent's rights.

(e) Length of Briefs. A brief in response to the application, a brief of an amicus curiae as provided in Rule 20 and any other brief shall not exceed 50 pages in length, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion and order, permit a longer brief.

(f) Reliance on Prior Brief. If respondent relies upon his brief in the court of appeals, respondent shall file with the Clerk of the Supreme Court twelve legible copies of such brief.

(g) Amendment. The brief in response may be amended at any time when justice requires upon such reasonable notice as the court may prescribe.

(h) Service of Briefs. Any application filed in the court of appeals and all briefs filed in the Supreme Court shall at the same time be served on all parties to the trial court's final judgment.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988; amended by Court of Criminal Appeals effective Jan. 1, 1988; amended by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment: New (e). Former (e) becomes new (f); former (f) becomes new (g).

Comment to 1990 change: This amendment, together with other similar amendments conforming other appellate rules, requires the parties to any appeal to serve copies of all papers filed with the clerk of the appellate court (except the statement of facts and the transcript), and the clerk of the appellate court to mail notice and copies of all appellate court orders and opinions on all parties to the trial court's judgment.

SECTION TEN. DIRECT APPEALS TO THE SUPREME COURT

RULE 140. DIRECT APPEALS

(a) Application. This rule governs direct appeals to the Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.

(b) Jurisdiction. The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or of any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

(c) Statement of Jurisdiction. Appellant shall file with the record in the case a statement fully, clearly and plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after such statement is filed.

(d) Preliminary Ruling on Jurisdiction. If the Supreme Court notes probable jurisdiction over a direct appeal, the parties shall file briefs as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal shall be dismissed.

(e) Direct Appeal Exclusive While Pending. An appellant who has attempted to perfect a direct appeal to the Supreme Court may not, during the pendency of that appeal, pursue an appeal to the court of appeals. When a direct appeal is dismissed the appellant is not precluded from pursuing any other appeal available at the time the direct appeal was filed if the other appeal is pursued within time periods prescribed by these rules exclusive of the days during which the direct appeal was pending.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court effective Jan. 1, 1988, and by Court of Criminal Appeals effective Jan. 1, 1989; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To make express provisions for direct appeal proceedings, to make review discretionary in direct appeals, and within time limitations to permit other appeals in event a direct appeal is dismissed.

SECTION ELEVEN. MOTIONS IN THE SUPREME COURT

RULE 160. FORM AND CONTENT OF MOTIONS FOR EXTENSION OF TIME

All motions for extension of time for filing an application for writ of error shall be filed in, directed to, and acted upon by the Supreme Court. Twelve copies of the motion for extension of time shall be filed in the Supreme Court. A copy of the motion shall also be filed at the same time in the court of appeals and the Clerk of the Supreme Court shall notify the court of appeals of the action taken on the motion by the Supreme Court. Each such motion shall specify the following:

(a) the court of appeals and the date of its judgment, together with the number and style of the case;

(b) the date upon which the last timely motion for rehearing was overruled;

(c) the deadline for filing the application; and

(d) the facts relied upon to reasonably explain the need for an extension.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To provide that 12 copies of a motion for extension be filed.

SECTION TWELVE. SUBMISSION AND ORAL ARGUMENT IN THE SUPREME COURT

RULE 170. SUBMISSION

Causes may be heard and submitted in such order as the Supreme Court may deem to be in the best interest and convenience of the parties or their attorneys. The Supreme Court may determine that causes should be submitted without oral argument, upon the vote of at least six members.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: To provide that a vote of at least six of nine members of the Supreme Court is required to deny oral argument.

RULE 171. SUBMISSION DAY

(a) When Case Ready for Submission. A case shall stand for submission upon the first regular day of the submission of causes coming after the expiration of twenty days from the day on which the writ of error was granted; provided the notice of granting the writ shall have been given ten days before such submission day. If not so given, then the case shall be subject to submission on the first regular submission day which falls ten days after giving of notice.

(b) Regular Submission Day. Causes in the Supreme Court will be regularly submitted on Wednesday of each week, though a case may be set down for submission upon another day by the permission or direction of the court.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)

RULE 172. ARGUMENT

(a) Time. In the argument of cases in the Supreme Court, each side may be allowed such time as the court orders. The court may, upon application before the day of argument, extend the time for argument, and may also align the parties for purposes of presenting oral argument.

(b) Number of Counsel. Not more than two counsel on each side will be heard, except on leave of the court.

Rule 57. Direct Appeals to the Supreme Court.

57.1 ***Application.*** This rule governs direct appeals to the Supreme Court that are authorized by the Constitution and by statute. Except when inconsistent with a statute or this rule, the rules governing appeals to courts of appeals also apply to direct appeals to the Supreme Court.

57.2 ***Jurisdiction.*** The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or over any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed.

57.3 ***Statement of Jurisdiction.*** Appellant must file with the record a statement fully but plainly setting out the basis asserted for exercise of the Supreme Court's jurisdiction. Appellee may file a response to appellant's statement of jurisdiction within ten days after the statement is filed.

57.4 ***Preliminary Ruling on Jurisdiction.*** If the Supreme Court notes probable jurisdiction over a direct appeal, the parties must file briefs under Rule 38 as in any other case. If the Supreme Court does not note probable jurisdiction over a direct appeal, the appeal will be dismissed.

57.5 ***Direct Appeal Exclusive While Pending.*** If a direct appeal to the Supreme Court is filed, the parties to the appeal must not, while that appeal is pending, pursue an appeal to the court of appeals. But if the direct appeal is dismissed, any party may pursue any other appeal available at the time when the direct appeal was filed. The other appeal must be perfected within ten days after dismissal of the direct appeal.

Comment to 1997 change. — This is former Rule 140. The rule is amended without substantive change except subdivision 57.5 is amended to make clear that no party to the direct appeal may pursue the appeal in the court of appeals while the direct appeal is pending, but allowing 10 days to perfect a subsequent appeal.

Item 8 – Rules for Juvenile Certification Appeals; and Rules for Administration of a Deceased Lawyer's Trust Account

To: **The Texas Supreme Court Rules Advisory Committee**

From: **Subcommittee on Legislative Mandates**

Re: **Draft Revision to Rules Governing Appeals of Transfer Orders from Juvenile Courts.**

I. Amendments to Texas Rule of Appellate Procedure 25.1:

Texas Rule of Appellate Procedure 25.1

(a) *Notice of Appeal.* An appeal is perfected when a written notice of appeal is filed with the trial court clerk. 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 state whether it is a parental termination or child protection case or an appeal from an order transferring a child for prosecution in criminal court, as defined in Rule 28.4;

(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.

(8) state, if applicable, that the appellant is presumed indigent and may proceed without advance payment of costs as provided in Rule 20.1(a)(3).

(e) *Service of Notice*. 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.

(f) *Clerk's Duties*. The trial court clerk must immediately send a copy of the notice of appeal to the appellate court clerk and to the court reporter or court reporters responsible for preparing the reporter's record.

(g) *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.

(h) *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 24.1, or

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

(i) *Appeal Upon Transfer of Child for Prosecution in Criminal Court*. An appeal from an order transferring a child for prosecution in criminal court does not stay subsequent criminal proceedings in the transferee court.

(j) *Advice of Right of Appeal of Order Transferring Prosecution*. When a juvenile court certifies a child to stand trial as an adult, the court must inform the child and the child's attorney, orally on the record in open court and in writing in the certification order:

(1) that the child may immediately appeal the certification decision; and

(2) that the appeal is accelerated under Texas Rule of Appellate Procedure 28.1.

II. Amendments to Texas Rule of Appellate Procedure 28.4:

Texas Rule of Appellate Procedure 28.4. Accelerated Appeals in Parental Termination, ~~and~~ Child Protection, and Juvenile Certification Cases:

(a) *Application and Definitions*.

(1) Appeals in parental termination and child protection cases and from a discretionary transfer order transferring a child for prosecution in criminal court are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Rule 28.4.

(2) In Rule 28.4:

(A) a "parental termination case" means a suit in which termination of the parent-child relationship is at issue.

(B) a "child protection case" means a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

(C) a "discretionary transfer order" is an order waiving juvenile court jurisdiction and transferring a child for prosecution in criminal court.

(b) *Appellate Record*.

(1) Responsibility for Preparation of Reporter's Record. In addition to the responsibility imposed on the trial court in Rule 35.3(c), when the reporter's responsibility to prepare, certify and timely file the reporter's record arises under Rule 35.3(b) the trial court must direct the official or deputy reporter to immediately commence the preparation of the reporter's record. The trial court must arrange for a substitute reporter, if necessary.

(2) Extension of Time. The appellate court may grant an extension of time to file a record under Rule 35.3(c); however, the extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances.

(3) Restriction on Preparation Inapplicable. Section 13.003 of the Civil Practice & Remedies Code does not apply to an appeal from an order transferring a child for prosecution in criminal court, or in ~~a~~ parental termination ~~or~~ and child protection cases.

(c) *Remand for New Trial*. If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days after the mandate is issued by the appellate court.

III. Amendments to Texas Rule of Appellate Procedure 32, Docketing Statement:

* * *

(g) whether the appeal's submission should be given priority, whether the appeal is an accelerated one under Rule 28.1 or another rule or statute, and whether it is a parental termination or child protection case or an appeal from an order transferring a child for prosecution in criminal court, as defined in Rule 28.4;

IV. Amendments to Texas Rule of Judicial Administration 6.2:

Rule 6.2: Appeals in Certain Cases Involving the Parent-Child Relationship and From Orders Transferring a Child for Prosecution in Criminal Court.

In an appeal of a suit for termination of the parent-child relationship, ~~or~~ a suit affecting the parent-child relationship filed by a government entity for managing conservatorship, or an appeal from an order transferring a minor for prosecution in criminal court, appellate courts should, so far as reasonably possible, ensure that the appeal is brought to final disposition in conformity with the following time standards:

(a) Courts of Appeals. Within 180 days of the date the notice of appeal is filed.

(b) Supreme Court. Within 180 days of the date the petition for review is filed.

V. Amendments to Texas Rule of Civil Procedure 306:

Texas Rule of Civil Procedure 306, Recitation of Judgment:

The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. In a suit for termination of the parent-child relationship, ~~or~~ a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, or an appeal from an order transferring a minor for prosecution in criminal court, the judgment ~~-~~ or order must state the specific grounds for termination, ~~or for~~ appointment of the managing conservator, or transfer.

New Texas Rule of Civil Procedure 306.1: Advice of Right of Appeal

Rule 306.1. Advice of Right of Appeal

When a juvenile court certifies a child to stand trial as an adult, the court must inform the child and the child's attorney, orally on the record in open court and in writing in the certification order:

(1) that the child may immediately appeal the certification decision; and

(2) that the appeal is accelerated under Texas Rule of Appellate Procedure 28.1.

S.B. No. 888

AN ACT

relating to the appeal of waiver of jurisdiction and transfer to criminal court in juvenile cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 4.18(g), Code of Criminal Procedure, is amended to read as follows:

(g) This article does not apply to a claim of a defect or error in a discretionary transfer proceeding in juvenile court. A defendant may appeal a defect or error only as provided by Chapter 56, Family Code [~~Article 44.47~~].

SECTION 2. Section 51.041(a), Family Code, is amended to read as follows:

(a) The court retains jurisdiction over a person, without regard to the age of the person, for conduct engaged in by the person before becoming 17 years of age if, as a result of an appeal by the person or the state under Chapter 56 [~~or by the person under Article 44.47, Code of Criminal Procedure,~~] of an order of the court, the order is reversed or modified and the case remanded to the court by the appellate court.

SECTION 3. Section 56.01, Family Code, is amended by amending Subsections (c) and (h) and adding Subsections (g-1) and (h-1) to read as follows:

(c) An appeal may be taken:

(1) except as provided by Subsection (n), by or on

behalf of a child from an order entered under:

(A) Section 54.02 respecting transfer of the child for prosecution as an adult;

(B) Section 54.03 with regard to delinquent conduct or conduct indicating a need for supervision;

(C) [~~(B)~~] Section 54.04 disposing of the case;

(D) [~~(C)~~] Section 54.05 respecting modification of a previous juvenile court disposition; or

(E) [~~(D)~~] Chapter 55 by a juvenile court committing a child to a facility for the mentally ill or intellectually disabled [~~mentally retarded~~]; or

(2) by a person from an order entered under Section 54.11(i)(2) transferring the person to the custody of the Texas Department of Criminal Justice.

(g-1) An appeal from an order entered under Section 54.02 respecting transfer of the child for prosecution as an adult does not stay the criminal proceedings pending the disposition of that appeal.

(h) If the order appealed from takes custody of the child from the child's [~~his~~] parent, guardian, or custodian or waives jurisdiction under Section 54.02 and transfers the child to criminal court for prosecution, the appeal has precedence over all other cases.

(h-1) The supreme court shall adopt rules accelerating the disposition by the appellate court and the supreme court of an appeal of an order waiving jurisdiction under Section 54.02 and transferring a child to criminal court for prosecution.

SECTION 4. Article 44.47, Code of Criminal Procedure, is repealed.

SECTION 5. The change in law made by this Act applies only to an order of a juvenile court waiving jurisdiction and transferring a child to criminal court that is issued on or after the effective date of this Act. An order of a juvenile court waiving jurisdiction and transferring a child to criminal court that is issued before the effective date of this Act is governed by the law in effect on the date the order was issued, and the former law is continued in effect for that purpose.

SECTION 6. This Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 888 passed the Senate on April 23, 2015, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 888 passed the House on May 12, 2015, by the following vote: Yeas 144, Nays 0, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

BILL ANALYSIS

Senate Research Center

S.B. 888
By: Hinojosa
Criminal Justice
6/2/2015
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Under Article 44.47, Code of Criminal Procedure, juveniles certified as adults cannot appeal their certifications until after they are convicted in adult court. This process can leave youth waiting years for a determination regarding whether their certification to adult court was proper. A recent ruling by the Texas Court of Criminal Appeals found that a juvenile court in Harris County was providing "insufficient evidence" detailing why a youth should stand trial as an adult. Allowing an immediate appeal of a juvenile certification would save the state valuable resources by preventing adult court trials in cases of improper certification.

S.B. 888 grants youth the opportunity to appeal their certification prior to conviction in an adult court. This bill would protect juveniles from having to face the consequences of being in adult criminal proceedings if they are improperly certified. It would also give certainty to the certification process after the juvenile has the opportunity to pursue an appeal of the certification and the decision to transfer him or her to adult court has been fully reviewed. S.B. 888 also gives appeals of certifications precedence over all other cases, similar to appeals of cases where the child was removed from a guardian's custody.

S.B. 888 amends current law relating to the appeal of waiver of jurisdiction and transfer to criminal court in juvenile cases.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the supreme court of the State of Texas in SECTION 3 (Section 56.01, Family Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 4.18(g), Code of Criminal Procedure, to authorize a defendant to appeal a defect or error only as provided by Chapter 56 (Appeal), Family Code, rather than Article 44.47 (Appeal of Transfer from Juvenile Court).

SECTION 2. Amends Section 51.041(a), Family Code, to delete existing text providing that an order of the court is reversed or modified and the case remanded to the court by the appellate court as a result of an appeal by the person under Article 44.47, Code of Criminal Procedure, for conduct engaged in by the person before becoming 17 years of age.

SECTION 3. Amends Section 56.01, Family Code, by amending Subsections (c) and (h) and adding Subsections (g-1) and (h-1), as follows:

(c) Authorizes an appeal to be taken:

(1) except as provided by Subsection (n), by or on behalf of a child from an order entered under:

(A) Section 54.02 (Waiver of Jurisdiction and Discretionary Transfer to Criminal Court) respecting transfer of the child for prosecution as an adult;

(B) Creates this paragraph from existing text;

(C) Redesignates existing Paragraph (B) as Paragraph (C);

(D) Redesignates existing Paragraph (C) as Paragraph (D); or

(E) Redesignates existing Paragraph (D) as Paragraph (E) and changes a reference to mentally retarded to intellectually disabled; or

(2) Makes no change to this subdivision.

(g-1) Provides that an appeal from an order entered under Section 54.02 respecting transfer of the child for prosecution as an adult does not stay the criminal proceedings pending the disposition of that appeal.

(h) Provides that, if the order appealed from takes custody of the child from the child's parent, guardian, or custodian or waives jurisdiction under Section 54.02 and transfers the child to criminal court for prosecution, the appeal has precedence over all other cases. Makes a nonsubstantive change.

(h-1) Requires the supreme court of the State of Texas to adopt rules accelerating the disposition by the appellate court and the supreme court of an appeal of an order waiving jurisdiction under Section 54.02 and transferring a child to criminal court for prosecution.

SECTION 4. Repealer: Article 44.47 (Appeal of Transfer from Juvenile Court), Code of Criminal Procedure.

SECTION 5. Makes application of this Act prospective.

SECTION 6. Effective date: September 1, 2015.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 15-9156

ORDER ACCELERATING JUVENILE CERTIFICATION APPEALS AND REQUIRING JUVENILE COURTS TO GIVE NOTICE OF THE RIGHT TO AN IMMEDIATE APPEAL

ORDERED that:

During the 2015 legislative session, the Legislature passed S.B. 888, which amends Family Code section 56.01 to permit an immediate appeal from the decision of a juvenile court under section 54.02 waiving its exclusive jurisdiction and certifying the juvenile to stand trial as an adult. *See* Acts 2015, 84th Leg., R.S., ch. 74 (S.B. 888). The Act also requires this Court to "adopt rules accelerating the disposition by the appellate court and the supreme court of an appeal of an order waiving jurisdiction under Section 54.02 and transferring the child to criminal court for prosecution." *Id.* § 3, sec. 56.01(h-1) (codified at TEX. FAM. CODE § 56.01(h-1)). The Act takes effect on September 1, 2015.

Pending the adoption of rules, the following procedures govern in actions under the Juvenile Justice Code, Title 3 of the Family Code, effective September 1, 2015:

1. The appeal of an order under Family Code section 54.02 certifying a juvenile to stand trial as an adult is governed by the Texas Rules of Appellate Procedure applicable to accelerated appeals.

2. When a juvenile court certifies a juvenile to stand trial as an adult, the court must inform the juvenile and the juvenile's attorney, orally on the record in open court and in writing in the certification order:

    a. that the juvenile may immediately appeal the certification decision under Family Code section 56.01; and

    b. that, by order of this Court, the appeal is accelerated under the Texas Rules of Appellate Procedure applicable to accelerated appeals.

3. Appellate courts should, so far as reasonably possible, ensure that certification appeals are brought to final disposition in conformity with the following time standards:

   a. *Courts of Appeals.* Within 180 days of the date the notice of appeal is filed.

   b. *Supreme Court.* Within 180 days of the date the petition for review is filed.

The Clerk is directed to:

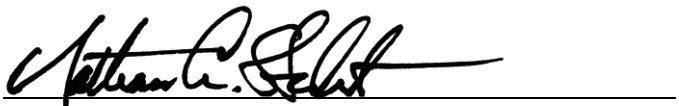
1. file a copy of this order with the Secretary of State;

2. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

3. send a copy of this order to each elected member of the Legislature; and

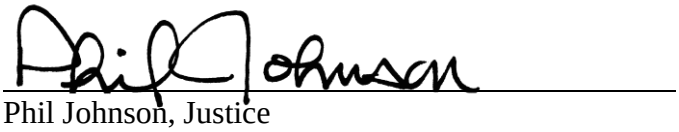
4. submit a copy of the order for publication in the *Texas Register*.

Dated: August 28, 2015.



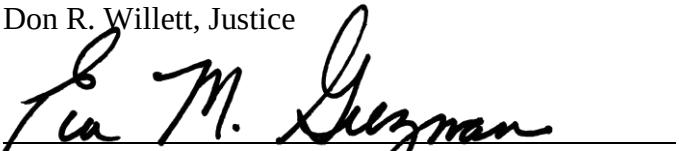
Nathan L. Hecht, Chief Justice

Paul W. Green, Justice

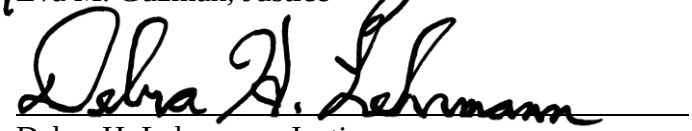


Phil Johnson, Justice

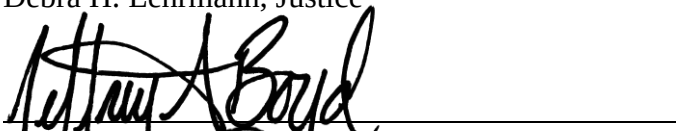
Don R. Willett, Justice



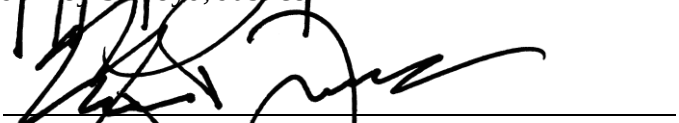
Eva M. Guzman, Justice



Debra H. Lehrmann, Justice



Jeffrey S. Boyd, Justice



John P. Devine, Justice

Jeffrey V. Brown, Justice

Vernon's Texas Rules Annotated
Texas Rules of Appellate Procedure
Section Two. Appeals from Trial Court Judgments and Orders (Refs & Annos)
Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases (Refs & Annos)

TX Rules App.Proc., Rule 28.4

28.4. Accelerated Appeals in Parental Termination and Child Protection Cases

Currentness

(a) *Application and Definitions.*

(1) Appeals in parental termination and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Rule 28.4.

(2) In Rule 28.4:

(A) a “parental termination case” means a suit in which termination of the parent-child relationship is at issue.

(B) a “child protection case” means a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

(b) *Appellate Record.*

(1) Responsibility for Preparation of Reporter's Record. In addition to the responsibility imposed on the trial court in Rule 35.3(c). when the reporter's responsibility to prepare, certify and timely file the reporter's record arises under Rule 35.3(b) the trial court must direct the official or deputy reporter to immediately commence the preparation of the reporter's record. The trial court must arrange for a substitute reporter, if necessary.

(2) Extension of Time. The appellate court may grant an extension of time to file a record under Rule 35.3(c); however, the extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances.

(3) Restriction on Preparation Inapplicable. Section 13.003 of the Civil Practice & Remedies Code does not apply to an appeal from a parental termination or child protection case.

(c) *Remand for New Trial*. If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days after the mandate is issued by the appellate court.

Credits

Adopted by order of Supreme Court Feb. 13, 2012, eff. March 1, 2012.

Rules App. Proc., Rule 28.4, TX R APP Rule 28.4

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2015. Other state court rules and selected county rules are current with rules verified through June 1, 2015.

End of Document

Memorandum

To: SCAC
From: Legislative Mandates Subcommittee
Date: December 7, 2015
Re: SB 995 – Estate Code Chapter 456 (Administration of Deceased Lawyer's Trust Accounts)

Issue Presented

Rules for the Administration of a Deceased Lawyer's Trust Account: SB 995, passed by the 84th Legislature, adds to the Estates Code Chapter 456, which governs the disbursement and closing of a deceased lawyer's trust or escrow account for client funds. Section 465.005 [*sic*] (should say Section 456.005) authorizes the Court to adopt rules for the administration of funds in a trust or escrow account that is subject to Chapter 456.

Subcommittee Recommendation

No rule from the Supreme Court is necessary to further effectuate the intent or practice as contemplated by the legislation.

The Final SB 995 and What it Does

SB 995, passed by the 84th Legislature became effective and enrolled on September 1, 2015. An Act Relating to decedents' estates, SB 995, 2015-2016 Sess. (Tex. 2015) LegiScan. Retrieved November 13, 2015, from https://legiscan.com/TX/bill/SB995/2015.

The following amendments were made to the Estate Code by adding Chapter 456 and made effective September 1, 2015:

> SECTION 45. Subtitle J, Title 2, Estates Code, is amended by adding Chapter 456 to read as follows:
> **CHAPTER 456: DISBURSEMENT AND CLOSING OF LAWYER TRUST OR ESCROW ACCOUNTS**
> § 456.001. Definition
> In this chapter, "eligible institution" means a financial institution or investment company in which a lawyer has established an escrow or trust account for purposes of holding client funds or the funds of third persons that are in the lawyer's possession in connection with representation as required by the Texas Disciplinary Rules of Professional Conduct.
> § 456.002. Authority to Designate Lawyer on Certain Trust or Escrow Accounts

(a) When administering the estate of a deceased lawyer who established one or more trust or escrow accounts for client funds or the funds of third persons that are in the lawyer's possession in connection with representation as required by the Texas Disciplinary Rules of Professional Conduct, the personal representative may hire through written agreement a lawyer authorized to practice in this state to:

(1) be the authorized signer on the trust or escrow account;
(2) determine who is entitled to receive the funds in the account;
(3) disburse the funds to the appropriate persons or to the decedent's estate; and
(4) close the account.

(b) If the personal representative is a lawyer authorized to practice in this state, the personal representative may state that fact and disburse the trust or escrow account funds of a deceased lawyer in accordance with Subsection (a).
(c) An agreement under Subsection (a) or a statement under Subsection (b) must be made in writing, and a copy of the agreement or statement must be delivered to each eligible institution in which the trust or escrow accounts were established.

§ 456.003. Duty of Eligible Institutions

Within a reasonable time after receiving a copy of a written agreement under Section 456.002(a) or a statement from a personal representative under Section 456.002(b) and instructions from the lawyer identified in the agreement or statement, as applicable, regarding how to disburse the funds or close a trust or escrow account, an eligible institution shall disburse the funds and close the account in compliance with the instructions.

§ 456.004. Liability of Eligible Institutions

An eligible institution is not liable for any act respecting an account taken in compliance with this chapter.

§ 456.005. Rules

The supreme court may adopt rules regarding the administration of funds in a trust or escrow account subject to this chapter.
Id.

Estate Code Chapter 456 and Legislative Intent

This is an entirely new chapter. As stated in the fiscal note by the bill's author, Representative Rodriguez: "[a] new Chapter 456 would be added regarding the disbursement and closing of lawyer trust or escrow accounts upon the death of the lawyer. It would authorize the personal representative of an estate to hire a lawyer to disburse funds to the appropriate persons and close the account, and would address the duties and liabilities of the institution where the account is located." FISCAL NOTE, 84TH LEGISLATIVE REGULAR SESSION, SB995 by Rodríguez

(Relating to decedents' estates), *available at* http://www.legis.state.tx.us/tlodocs/84R/fiscalnotes/html/SB00995I.htm.

The intent is summarized on both the House and Senate side. Rep. Rodriguez on page 5 in the introductory analysis in his statement of intent: "Chapter 456, Estates Code, concerning lawyers' trust and escrow accounts, ***applies only*** to a trust or escrow account of a lawyer who dies on or after the effective date of this bill." An Act Relating to decedents' estates, SB 995, 2015-2016 Sess. (Tex. 2015) AUTHOR'S / SPONSOR'S STATEMENT OF INTENT *available at* http://www.legis.state.tx.us/tlodocs/84R/analysis/pdf/SB00995I.pdf#navpanes=0. Rodriguez states, "[a]lternatively, if the executor is a lawyer, this Section allows the executor himself or herself to administer the deceased lawyer's trust and escrow accounts." *Id*. at 4. In the Senate Committee Report's Fiscal Note, it states that "[a] new Chapter 456 would be added regarding the disbursement and closing of lawyer trust or escrow accounts upon the death of the lawyer. It would authorize the personal representative of an estate to hire a lawyer to disburse funds to the appropriate persons and close the account, and would address the duties and liabilities of the institution where the account is located. It would authorize the supreme court to adopt rules regarding the administration of funds in a trust or escrow account subject to the new Chapter 456." An Act Relating to decedents' estates, SB 995, 2015-2016 Sess. (Tex. 2015) FISCAL NOTE, 84TH LEGISLATIVE REGULAR SESSION, *available at* http://www.legis.state.tx.us/tlodocs/84R/fiscalnotes/pdf/SB00995S.pdf#navpanes=0. Further, "SECTION 52 Provides that Subchapter J, Chapter 255, and Chapter 456, Estates Code, as added by this Act, and Sections 309.001, 401.002, 401.003(a), 401.004(c) and (h), and 401.006, Estates Code, as amended by this Act, apply to the administration of the estate of a decedent that is pending or commenced on or after the effective date of this Act." An Act Relating to decedents'

estates, SB 995, 2015-2016 Sess. (Tex. 2015) SENATE COMMITTEE REPORT BILL ANALYSIS, at 14, *available at* http://www.legis.state.tx.us/tlodocs/84R/analysis/pdf/SB00995S.pdf#navpanes=0.

Lastly, the House Committee Report, in their bill analysis explains that S.B. 995 authorizes a personal representative, when administering the estate of a deceased lawyer who established certain trust or escrow accounts for client funds or the funds of third persons that are in the lawyer's possession in connection with representation, to hire through written agreement a lawyer authorized to practice in Texas to be the authorized signer on the trust or escrow account, to determine who is entitled to receive the funds in the account, to disburse the funds to the appropriate persons or to the decedent's estate, and to close the account. The bill authorizes a personal representative who is a lawyer authorized to practice in Texas to state that fact and disburse such trust or escrow account funds. An Act Relating to decedents' estates, SB 995, 2015-2016 Sess. (Tex. 2015) HOUSE COMMITTEE REPORT BILL ANALYSIS, at 4, *available at* http://www.legis.state.tx.us/tlodocs/84R/analysis/pdf/SB00995H.pdf#navpanes=0.

Conclusion

The new Chapter 456 of the Estate Code has language explaining how the concept is effectuated in practice and for any probate proceeding. The new Chapter 456 requires an agreement or statement to be made in writing and requires a copy of the agreement or statement to be delivered to each eligible institution, defined by the bill to mean a financial institution or investment company in which a lawyer has established an escrow or trust account for purposes of holding client funds or the funds of third persons that are in the lawyer's possession in connection with representation, in which the trust or escrow accounts were established. The Chapter requires an eligible institution, within a reasonable time after receiving such a copy and

accompanying instructions, if applicable, to disburse the funds and close the account. The Chapter grants an eligible institution immunity from liability for any act respecting an account taken in compliance with the bill's provisions governing disbursement and closing of lawyer trust or escrow accounts.

The subcommittee on Legislative Mandates agreed unanimously that no rule from the Supreme Court is necessary to further effectuate this amendment to the Estate Code. While it does indeed relate to attorneys and their trust accounts, it is very specific in the language and process for the proper disposition of an attorney trust account that may be a matter or probate. The logical place for the method and terms of how to dispose of a deceased attorneys trust account seem, to the subcommittee's thinking, to be in the Estate Code. There is not a logical place, much less a necessary rule that we could see, elsewhere in the rules under the Supreme Court's authority necessary to effectuate the new Chapter 456. So, while the bill does allow for the Supreme Court to issue rules as necessary to effectuate the new Chapter, the subcommittee does not see a need. Rather, the terms of the new Chapter appear clear, the method it sets up appears clear and consistent, and the placement of the rules for the disposition of a deceased attorney's trust account within the Estate Code seems the logical place any practicing attorney would look for a governing rule on the topic.

Item 9 – Constitutional Adequacy of Texas Garnishment Procedure

From: O.C. Hamilton Jr.

To: Chip Babcock Chair SCAC

Subject:

Report of Sub Committee on Constitutional Adequacy of Texas Garnishment Procedure

Attachment

Strickland vs Alexander in the United States District Court of the Northern District of Georgia

The subcommittee discussed the issues via telephone conference. The consensus was that the current garnishment rules could be improved. The following are suggested changes to the Final Report of the Ancillary Proceeding Task Force on Garnishment.

Rule GARN 5 (620). Contents of Writ of Garnishment

a. *General Requirements*. A writ garnishment must be dated and signed by the clerk or the justice of the peace, bear the seal of the court, and be directed to the garnishee.
b. *Command of Writ***.** The writ must command the garnishee to :
    1. appear before the court out of which the writ is issued at 10 o'clock am of the Monday next following expiration of ten ~~twenty~~ days from the date the writ was served, ~~if the writ is issued out of the district or county court, or the Monday next after the expiration of ten days from the date the writ was served, if the writ is issued out of the justice court;~~ and
    2. answer under oath:
        A. …..
        B. …..
        C. …..
        D. …..
        E. ……
c. **……**
d. *Notice to Respondent*. The face of the writ must display, in not less than 12-point type and in a manner calculated to advise a reasonably attentive person, the following notice:

"To _____, Respondent:

"YOU ARE HEREBY NOTIFIED THAT PROPERTY ALLEGED TO BE OWNED BY YOU HAS BEEN GARNISHED. IF YOU CLAIM ANY RIGHTS IN THE PROPERTY, YOU ARE ADVISED:

"YOUR FUNDS OR OTHER PROPERTY MAY BE EXEMPT FROM GARNISHMENT UNDER FEDERAL OR STATE LAW. YOU SHOULD CONSULT A LAWYER TO DETERMINE IF YOUR PROPERTY IS EXEMPT.

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. HOWEVER, IF YOU BELIEVE YOUR PROPERTY IS EXEMPT FROM GARNISHMENT

UNDER STATE OR FEDERAL LAW, OR OTHERWISE HAS BEEN WRONGFULLY GARNISHED, YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE OR MODIFY THIS WRIT.

Rule GARN 6 (621). Delivery, Service, and Return of Writ

a. *Delivery of Writ*. The clerk or justice of the peace issuing a writ of garnishment must deliver the writ to:

~~1. The sheriff, constable, or other person authorized by Rule 103 or Rule 536; or~~

~~2.~~1. The applicant, who must then deliver the writ to the sheriff, constable, or other person authorized by Rule 103 or Rule 536.

b. ……

c. *Return of Writ.* The return must be in writing and signed by the sheriff, constable, or other person authorized by Rule 103 or Rule 536 who served the writ. The return must be delivered to the applicant who must file it ~~filed~~ with the issuing clerk or justice of the peace without delay. ~~in the same manner as a citation.~~

d. *Service on Respondent*. Immediately ~~As soon as practicable~~ following service of the writ on the garnishee, the applicant must serve the Respondent with a copy of the writ of garnishment, the application, accompanying affidavits, and orders of the court. Service may be in any manner prescribed for service of citation or as provided in Rule 21a. A certificate of service evidencing service of a copy of the writ on the Respondent by the applicant must be on file with the court for at least 10 days prior to the entry of a judgment on the garnishment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TONY W. STRICKLAND,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:12-CV-02735-MHS
RICHARD T. ALEXANDER, Clerk of Court of the State Court of Gwinnett County, Georgia,	:	
Defendant.	:	

ORDER

This action challenging the constitutionality of Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 *et seq.*, is before the Court on the parties' cross-motions for summary judgment. For the following reasons, the Court denies defendant's motion for summary judgment [Doc. 90], grants plaintiff's motion for summary judgment [Doc. 93], and enters appropriate declaratory and injunctive relief.

Statement of Facts[1]

Plaintiff Tony W. Strickland had a long career installing gas products until he was diagnosed with cancer in 2004. Mr. Strickland survived his bout with cancer, but because of the lasting effects of his chemotherapy treatments, he was unable to work as many hours as he had before. In 2005, as a result of the financial hardship created by his inability to work, Mr. Strickland defaulted on a Discover credit card he had used to cover household expenses during his chemotherapy treatments.

Subsequently, Mr. Strickland developed other health issues. He suffered a series of strokes and developed atrial fibrillation, a potentially dangerous heart arrhythmia. He was prescribed Propafenone (commonly known as Rythmol) to keep his heart in rhythm and was told that his heart could fall out of rhythm, with dire consequences, if it was not taken as prescribed.

On June 25, 2009, Mr. Strickland seriously injured his back while at work and subsequently began receiving weekly workers' compensation

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[1] The following facts are taken from the parties' Joint Stipulation of Undisputed Facts ("Stipulation") [Doc. 88] and plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried ("Pl.'s Facts") [Doc. 93-2], which defendant does not dispute. *See* Def.'s Resp. to Pl.'s Facts [Doc. 96].

benefits. In February 2011, Mr. Strickland received a lump-sum workers' compensation settlement for his injuries in the amount of $30,000. He and his wife, Lynn, opened an account at JPMorgan Chase ("Chase") specifically for the purpose of setting aside these workers' compensation funds for household and medical expenses. Mrs. Strickland was listed as a joint account holder in case Mr. Strickland faced further health issues and was unable to access needed funds himself. The Stricklands proceeded to use these funds for basic living and healthcare expenses.

In August 2011, Mr. Strickland's health issues also qualified him to receive Social Security disability benefits. He arranged to have the Social Security Administration deposit those funds in a checking account at a separate institution.

Meanwhile, on December 4, 2009, Discover Bank ("Discover"), represented by the law firm of Greene & Cooper, LLP ("G&C"), sued Mr. Strickland for the unpaid credit card debt in the State Court of Fulton County, Georgia. Stipulation [Doc. 88-1], Ex. A. On April 4, 2012, Discover obtained a default judgment (the "Judgment") against Mr. Strickland in the principal amount of $13,849.93, plus interest of $2,138.64, attorney's fees of $1,613.61, and court costs of $147.50. *Id.*, Ex. B.

On July 6, 2012, G&C, on behalf of Discover, filed a garnishment action against Mr. Strickland in the State Court of Gwinnett County, Georgia, naming Chase as the garnishee and seeking $18,096.65 as the balance due on the Judgment. *Id.*, Ex. C. Defendant Richard T. Alexander, Clerk of Court for the State Court of Gwinnett County, generated a garnishment summons, which advised the garnishee to "hold all property, money and wages, except what is exempt . . . belonging to the defendant." *Id.*, Ex. D. After being served with the garnishment summons on July 11, 2012, Chase immediately froze Mr. Strickland's savings account, which contained $15,652.67 in workers' compensation benefits.

On July 16, 2012, Mr. Strickland received a certified letter from G&C notifying him of the garnishment action. *Id.*, Ex. G. The notice, however, did not inform Mr. Strickland that some forms of property were exempt from garnishment, nor did it inform him how to claim such an exemption. On the same day, Mr. Strickland also received a letter from Chase. *Id.*, Ex. J. The letter advised him that the bank had been served with a writ of garnishment and that his bank account had been frozen. The letter also explained that some forms of income, including workers' compensation benefits, may be protected from garnishment depending on where Mr. Strickland lived, but it

did not advise him how to claim an exemption. Instead, the letter merely advised Mr. Strickland to contact the judgment creditor's attorney if he believed that his money was exempt from the garnishment process. No other notices about the garnishment action were sent to Mr. Strickland.

After receiving the letters from G&C and Chase, Mr. Strickland went to his local bank branch to inquire about the garnishment. There, Mr. Strickland learned that the entirety of what remained of his workers' compensation funds had been frozen, and he was again advised that he should contact the judgment creditor if he believed the garnishment to be in error.

On July 17, 2012, Mr. Strickland contacted G&C, but he was unable to convince them to release the garnishment. When Mr. Strickland hung up the phone after the conversation with G&C, he was so upset that he could not speak, and he began to feel nauseated. Not knowing what the family could do or how the family would be able to afford the remaining household expenses for the month, he began to cry and shake.

By the end of July 2012, Mr. Strickland was out of money and could not afford to refill his Rythmol prescription. Despite his understanding of the dangers of not taking the medication, which included the possibility of a

stroke or the need for shock therapy, he had to skip doses. The danger of skipping the medication took an emotional toll on Mr. Strickland. He lost his appetite, became a quiet person, and felt like he had let his family down.

On August 20, 2012, Chase filed an answer in the garnishment action and paid the entire balance of Mr. Strickland's accounts, totaling $15,652.67, into court. Stipulation [Doc. 88-1], Ex. K. These funds consisted entirely of workers' compensation benefits. Defendant Alexander was responsible for the administration of these funds once they were paid into court.

On August 28, 2012, Mr. Strickland, through his attorney Marsha Kleveckis of Gwinnett Legal Aid, sent an email to G&C explaining that the funds in Mr. Strickland's Chase bank account were exempt workers' compensation settlement funds. *Id.*, Ex. L. Ms. Kleveckis, however, was unable to resolve the matter with G&C.

On September 4, 2012, Ms. Kleveckis, on behalf of Mr. Strickland, filed a Claim for Funds Paid Into Court in the garnishment action. *Id.*, Ex. M. The claim asserted that Mr. Strickland had a superior claim to the funds because they were workers' compensation benefits protected from garnishment under O.C.G.A. § 34-9-84. On October 10, 2012, Discover filed

a Notice of Opposition to Mr. Strickland's claim. *Id.*, Ex. O. The court scheduled a hearing on the claim for October 24, 2012. *Id.*, Ex. P.

Meanwhile, sometime in October 2012, Mr. Strickland developed a blood clot in his hand that required surgery. Because his workers' compensation funds were still in court, he did not know how to pay for the surgery, so Mr. Strickland had to delay scheduling it. During this time, Mr. Strickland lost sleep, lost his appetite, and again began to cry because of the emotional toll of not being able to afford needed medical care. After his hand became so swollen that he could not use it and turned black all the way up to his elbow, the Stricklands decided to schedule the surgery and worry about payment afterwards.

On October 23, 2012, the day before the scheduled hearing on Mr. Strickland's claim, Discover dismissed the garnishment action. *Id.*, Ex. Q. The next day, the court entered an order releasing the deposited funds to Mr. Strickland, and on October 29, 2012, the State Court of Gwinnett County issued a check to Mr. Strickland in the amount of his seized workers' compensation funds, $15,652.67. *Id.*, Ex. R. Mr. Strickland's attorney received the check on November 2, 2012, nearly four months after his account had initially been frozen by Chase as a result of the garnishment action.

Procedural History

On August 8, 2012, while the garnishment action was still pending in the State Court of Gwinnett County, Mr. Strickland, through attorneys with the Atlanta Legal Aid Society, filed this action against defendant Alexander, Discover, G&C, and Chase challenging the constitutionality of certain provisions of Georgia's post-judgment garnishment statute and seeking declaratory and injunctive relief as well as compensatory and punitive damages. Mr. Strickland asserted two claims against defendants: one under 42 U.S.C. § 1983 for acting under color of state law and unconstitutionally depriving him of his property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and one under the Georgia Bill of Rights for depriving him of his property in violation of the Due Process Clause of the Georgia Constitution.

Specifically, Mr. Strickland alleged that at least three aspects of the garnishment statute violated due process requirements under both the United States and Georgia Constitutions. Compl. [Doc. 4] ¶¶ 45, 52. First, Mr. Strickland alleged that by not requiring notice of available statutory exemptions from garnishment, O.C.G.A. § 18-4-64 failed to conform with due process notice requirements. Second, Mr. Strickland alleged that by not

providing a debtor with a prompt procedure to claim an exemption and obtain return of the protected property, the structure of the garnishment process failed to conform with due process timeliness requirements. Finally, Mr. Strickland alleged that by not requiring any notice to a debtor that a garnishee has filed an answer, even though the debtor has only 15 days to traverse that answer and file an exemption claim, O.C.G.A. § 18-4-83 failed to conform to due process notice requirements.

Mr. Strickland asked the Court to declare these aspects of the law unconstitutional and enter appropriate injunctive relief (1) against defendant Alexander requiring due process and restraining the unconstitutional features of the statute, (2) against defendants Discover and G&C restraining their use of the unconstitutional garnishment process against his property, and (3) against defendant Chase restraining it from unduly freezing his bank account containing exempt funds and its use of the unconstitutional garnishment process. *Id.*, Prayer for Relief ¶¶ (a)-(d). In addition, Mr. Strickland sought an award of actual, nominal, and punitive damages from defendants Discover, G&C, and Chase, as well as recovery of his attorneys' fees and litigation expenses. *Id.* ¶¶ (e)-(f).

On August 30, 2012, pursuant to Fed. R. Civ. P. 5.1 and O.C.G.A. § 9-4-7(c), Mr. Strickland filed and served on Georgia Attorney General Samuel S. Olens a Notice of Constitutional Question, noting that his complaint questioned the constitutionality of the statutory framework of Georgia's post-judgment garnishment scheme, O.C.G.A. § 18-4-60 *et seq.* [Doc. 6]. On September 14, 2012, pursuant to 28 U.S.C. § 2403 and Fed. R. Civ. P. 5.1(b), the Court certified that O.C.G.A. § 18-4-60 *et seq.* had been questioned and, pursuant to Fed. R. Civ. P. 5.1(c), notified Attorney General Olens that he could intervene in the action within 60 days [Doc. 11]. On November 13, 2012, Attorney General Olens responded that, after review, he had determined that he would not intervene, but that he would monitor the case and might file an amicus brief addressing the constitutional challenge if he believed it would be beneficial to the Court [Doc. 38].

On November 27, 2012, Mr. Strickland and Discover filed a consent motion to dismiss Discover with prejudice pursuant to a settlement agreement [Doc. 40]. Discover filed a satisfaction of judgment in the garnishment proceeding the same day and in the State Court of Fulton County on December 4, 2012. On November 28, 2012, the Court entered an Order granting the consent motion and dismissing Mr. Strickland's claims

against Discover with prejudice, leaving Mr. Alexander, G&C, and Chase as defendants.

Meanwhile, on September 20, 2012, G&C and Chase each filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted [Doc. 12 & Doc. 16]. On April 11, 2013, the Court entered an Order granting Chase's motion and granting in part and denying in part G&C's motion [Doc. 50]. The Court found that Mr. Strickland lacked standing to seek declaratory or injunctive relief because the possibility of future injury was too speculative. Order at 18-26. Even though defendant Alexander had not filed a motion to dismiss, since Mr. Strickland sought only injunctive relief against him, the Court *sua sponte* dismissed Mr. Strickland's claims against Mr. Alexander as well. *Id.* at 27-28.

As for plaintiff's damages claims against Chase and G&C, the Court found that Chase was entitled to dismissal because it was not acting under color of state law when it froze Mr. Strickland's account and transferred the funds to the state court. *Id.* at 28-39. On the other hand, the Court found that G&C's joint participation with state officials in filing and pursuing the garnishment action was sufficient to characterize it as a state actor for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* at 39-42.

Finally, the Court found that Mr. Strickland had asserted plausible claims that the post-judgment garnishment process violated due process timeliness and notice requirements and had thus stated a viable claim for damages against G&C. *Id.* at 43-58.

On July 19 and August 23, 2013, respectively, Mr. Strickland and G&C filed cross-motions for summary judgment on Mr. Strickland's remaining damages claims [Doc. 57 & Doc. 60]. On October 29, 2013, the Court entered an Order denying Mr. Strickland's motion and granting G&C's motion [Doc. 71]. The Court rejected G&C's arguments that Mr. Alexander lacked standing because he had suffered no injury, and that his claim was moot because his funds had been returned to him. Order at 11-16. However, assuming the post-judgment garnishment statute was unconstitutional, the Court concluded that G&C had acted in good faith when it instituted garnishment proceedings against Mr. Strickland pursuant to the statute and therefore could not be held liable for his damages. *Id.* at 16-24.

Mr. Strickland appealed the Court's dismissal of his claims against defendant Alexander only. On November 20, 2014, the court of appeals reversed. *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014). The court held that Mr. Strickland had standing to seek declaratory and injunctive

relief against defendant Alexander because (1) the circumstances alleged in the complaint created "a 'real and immediate' likelihood of future injury,"[2] (2) any future injury would be "fairly traceable" to defendant Alexander's following the procedures set out in Georgia's post-judgment garnishment statute, and (3) the injury would be redressed by a favorable court decision declaring the garnishment process unconstitutional and enjoining any future similar actions that lacked adequate due process protections. *Id.* at 883-86. The court further held that the return of Mr. Strickland's previously garnished funds by the State Court of Gwinnett County and the satisfaction of his debt to Discover did not moot his claim against defendant Alexander because the "capable of repetition, yet evading review" exception to the mootness doctrine applied. *Id.* at 886-88. Finally, to ensure that all interested parties, including Georgia's Attorney General, had notice and, if desired, a chance to present evidence and argument on the constitutional

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[2] In making this finding, the court cited the allegation that Mr. Strickland and his wife subsist on a very modest income consisting only of his disability benefits, so they are very unlikely to satisfy their outstanding debts in the near future; and the allegation that the Stricklands have judgments against them from creditors other than Discover and a second bank account containing exempt funds at a bank other than Chase, so the fact that Discover and Chase now know the Stricklands' funds are exempt does not make future garnishment actions unlikely. *Strickland*, 772 F.3d at 885.

issues, the court remanded the case to this Court for further proceedings to evaluate the constitutionality of the challenged portions of Georgia's post-judgment garnishment statute. *Id.* at 888-89.

Following remand, the Court entered a consent scheduling order under which the parties were to file cross-motions for summary judgment based on stipulated facts [Doc. 87]. In accordance with the scheduling order, the parties filed their respective motions for summary judgment on April 30, 2015. On the same date, the State of Georgia, through Attorney General Olens, filed a motion to intervene [Doc. 89], and the Court entered an Order granting the motion and allowing the State of Georgia to present evidence and argument on the constitutionality of Georgia's post-judgment garnishment statute [Doc. 91]. Briefing of the motions for summary judgment by the parties and the State of Georgia is now complete and the case is ripe for decision.

Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court

held that this burden could be met if the movant demonstrates that there is "an absence of evidence to support the non-moving party's case." *Id.* at 325. At that point, the burden shifts to the non-moving party to go beyond the pleadings and present specific evidence giving rise to a triable issue. *Id.* at 324.

In reviewing a motion for summary judgment, the Court must construe the evidence and all inferences drawn from the evidence in the light most favorable to the non-moving party. *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)(emphasis in original).

The Rule 56 standard is not affected by the filing of cross-motions for summary judgment: "The court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720 at 335-36 (3d ed. 1998). Cross-motions may, however, be probative of the absence

of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. *See United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984).

Discussion

Plaintiff moves for summary judgment on his claims that Georgia's post-judgment garnishment statute violates constitutional due process requirements because it (1) does not provide judgment debtors with adequate notice that their property may be exempt from garnishment; (2) fails to inform debtors of the process to claim such exemptions; and (3) establishes a process that deprives debtors of their exempt property for an unconstitutionally long period of time. Defendant, on the other hand, supported by the State of Georgia, contends that he is entitled to summary judgment on each of these claims because (1) due process does not require that judgment debtors be notified of available exemptions or of a process to claim such exemptions, and (2) the claims process provided under the Georgia statute does not guarantee that an erroneous deprivation of exempt property will last longer than constitutionally permissible.

Before addressing the constitutional issues raised, the Court briefly describes the operation of Georgia's post-judgment garnishment statute. The

Court then considers whether each of the challenged aspects of the law comports with due process requirements.

I. Operation of Georgia's Post-Judgment Garnishment Statute

A plaintiff creditor who obtains a money judgment against a defendant debtor may file a garnishment action against a third party (the garnishee) to subject any debt that the garnishee owes to the debtor to payment of the judgment. O.C.G.A. §§ 18-4-20(b) & 18-4-60. "A creditor typically uses garnishment to reach two types of debts that a third party owes to an individual judgment debtor: an employer's debt for earnings due to an employee and a debtor's account with a bank or similar financial institution, which is a debt payable to the depositor or her order." *In re Johnson*, 479 B.R. 159, 167-68 (Bankr. N.D. Ga. 2012)(footnote omitted).

A judgment creditor initiates a garnishment action by filing an affidavit of garnishment in any court with jurisdiction over the garnishee. O.C.G.A. § 18-4-61. After determining that the affidavit contains the statutorily required information, the clerk of court issues a summons of garnishment directed to the garnishee. *Id.* The summons commands the garnishee to file an answer not sooner than 30 days and not later than 45 days after service of the summons "stating what money or other property is subject to

garnishment." O.C.G.A. § 18-4-62(a). The answer must be accompanied by the money or other property subject to garnishment. *Id.*; *see also* O.C.G.A. §§ 18-4-82 & 18-4-84. The garnishee must serve a copy of the answer on the judgment creditor; however, there is no requirement that a copy of the answer be served on the judgment debtor. O.C.G.A. § 18-4-83.

The creditor must give notice of the garnishment action to the judgment debtor by either formally serving him with a copy of the summons of garnishment or sending him written notice by other specified means consisting either of a copy of the summons of garnishment or of a document that "includes the names of the plaintiff and the defendant, the amount claimed in the affidavit of garnishment, a statement that the garnishment against the property and credits of the defendant has been or will be served on the garnishee, and the name of the court issuing the summons of garnishment." O.C.G.A. § 18-4-64(a) & (c). There is no requirement that the judgment debtor be notified that certain money or property may be exempt from garnishment.

After receiving notice of the garnishment action, the judgment debtor "may challenge the existence of the judgment or the amount claimed due thereon" or "any other matter in bar of the judgment," except the validity of

the judgment, by filing a traverse of the creditor's affidavit "stating that the affidavit is untrue or legally insufficient." O.C.G.A. §§ 18-4-65(a), 18-4-93. The judgment debtor is entitled to a hearing within 10 days after filing the traverse, and "no further summons of garnishment may issue nor may any money or other property delivered to the court as subject to garnishment be disbursed until the hearing shall be held." O.C.G.A. § 18-4-93.

After the garnishee serves its answer on the plaintiff creditor, the creditor or another "claimant" has 15 days to file a traverse stating that "the garnishee's answer is untrue or legally insufficient." O.C.G.A. §§ 18-4-85, 18-4-86. If no traverse is filed within 15 days after service of the garnishee's answer, the clerk must pay any money delivered to the court by the garnishee to the plaintiff creditor, and the garnishee is automatically discharged from further liability. O.C.G.A. §§ 18-4-85, 18-4-89(1).

In addition, prior to entry of judgment on the garnishee's answer or distribution of any money or property subject to garnishment, "any person may file a claim in writing under oath stating that he has a claim superior to that of the plaintiff to the money or other property in the hands of the garnishee subject to the process of garnishment; and the claimant shall be a party to all further proceedings upon the garnishment." O.C.G.A. § 18-4-95.

The court must retain the money or property subject to garnishment until trial of any such claims. O.C.G.A. § 18-4-88.

II. Notice of Available Exemptions

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Plaintiff contends that Georgia's garnishment statute fails to satisfy this requirement because the notice it requires does not inform the judgment debtor of available exemptions. Plaintiff relies on a long line of cases beginning with the Third Circuit's decision in *Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980) (en banc). In *Finberg*,, the court held that Pennsylvania's post-judgment garnishment law violated due process notice requirements because it did not inform the judgment debtor of exemptions that might apply to her property. 634 F.2d at 61-62; *see also Aacen v. San Juan Cnty. Sheriff's Dep't*, 944 F.2d 691, 699 (10th Cir. 1991) ("'[T]he Constitution requires, at a minimum, that the debtor be informed that various state exemptions as to certain real and personal property exist and, if an incomplete list is given, state that the list is partial and advise the debtor regarding discovery of unlisted exemptions.") (footnote

omitted); *Reigh v. Schleigh*, 784 F.2d 1191, 1196 (4th Cir. 1986) ("notice [must] alert the judgment debtor that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the attached property") (internal quotation marks omitted); *Dionne v. Bouley*, 757 F.2d 1344, 1354 (1st Cir. 1985) (same); *McCahey v. L.P. Investors*, 774 F.2d 543, 549 (2nd Cir. 1985) (due process requires "notice to judgment debtors of exemptions to which they may be entitled").

Defendant and the State of Georgia contend that this case is controlled by the Supreme Court's decision in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924). In that case, the Supreme Court held that due process did not require notice and an opportunity to be heard before issuance of a writ to garnish a judgment debtor's wages. The Court reasoned that the judgment debtor "has had his day in court" in the underlying action on the merits, and "after the rendition of the judgment he must take notice of what will follow, no further notice being necessary to advance justice." *Id.* at 288 (internal quotation marks omitted). Under *Endicott-Johnson*, defendant and the State argue, "*no notice* beyond the underlying judgment itself is necessary to afford due process." Br. in Support of Def.'s Mot. for Summ. J. [Doc. 90-1] at 2 (emphasis in original); *see also* State of Ga.'s Br. in

Opp'n to Pl.'s Mot. for Summ. J. & in Support of Def.'s Mot. for Summ. J. ("State's Br.") [Doc. 98] at 2. Because Georgia's statute goes further and provides the judgment debtor with notice of the garnishment action, defendant and the State contend that it exceeds minimum due process notice requirements.

With regard to the more recent *Finberg* line of cases, defendant and the State argue that they are merely persuasive authority to which this Court is not bound and which this Court should not follow. They also contend that these cases do not establish a clear rule that due process requires specific notice of what statutory exemptions from garnishment exist. Finally, they point out that the Georgia courts have repeatedly upheld the constitutionality of the current post-judgment garnishment scheme.

The Court concludes that *Endicott-Johnson* is not controlling in this case, and that the overwhelming weight of authority establishes that, in a garnishment action, due process requires that a judgment debtor receive notice that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the garnished property. Because the Georgia post-judgment garnishment statute requires no such notice to the judgment debtor, it is constitutionally deficient.

An unbroken line of modern court decisions, including a decision by the former Fifth Circuit, holds that *Endicott-Johnson* is not controlling in cases challenging the constitutional sufficiency of notice and hearing procedures in post-judgment garnishment proceedings. *See Brown v. Liberty Loan Corp. of Duval*, 539 F.2d 1355, 1365 (5th Cir. 1976) ("More recent decisions of the Supreme Court [than *Endicott-Johnson*] establish the need to balance various interests in order to determine whether due process requires notice and an opportunity for a hearing whenever an individual is to be deprived of property permanently or temporarily.") (citations omitted);[3] *see also Aacen*, 944 F.2d at 695 ("*Endicott* is not dispositive of this case."); *McCahey*, 774 F.2d at 548 ("[S]ubsequent Supreme Court decisions have implied that *Endicott* is not the last word on the subject [of due process limits on post-judgment remedies]."); *Dionne*, 757 F.2d at 1351 ("[*Endicott-Johnson*'s] expansive

[3] Contrary to the State's argument, the *Brown* decision is not "rooted in *Endicott*." State's Br. [Doc. 98] at 7. Instead of applying *Endicott-Johnson*'s holding that no notice to the judgment debtor beyond the underlying judgment was necessary to satisfy due process, the *Brown* court utilized a balancing analysis derived from more recent Supreme Court decisions. 539 F.2d at 1365. The court concluded that the law adequately protected the debtor's interests primarily because, after the writ of garnishment issued, it provided for "prompt judicial determination of the debtor's claim to an exemption." *Id.* at 1368. *Endicott-Johnson*, on the other hand, required no balancing of creditor and debtor interests and evinced no concern with the debtor's ability to enforce exemptions, which were virtually nonexistent at the time.

language is no longer the law given the more recent Supreme Court precedent in the area of property sequestrations and due process.") (footnote omitted); *Duranceau v. Wallace*, 743 F.2d 709, 711 n. 1 (9th Cir. 1984) ("[T]he series of [Supreme Court] cases reexamining the pre-judgment seizure of property by an alleged creditor" indicates "that the 'established rules of our system of jurisprudence' have changed since *Endicott*.") (quoting *Endicott-Johnson*, 266 U.S. at 288) (citations omitted); *Finberg*, 634 F.2d at 57 ("[A] series of more recent decisions by the Supreme Court adopts a different line of reasoning [than *Endicott-Johnson*].")[4]

These cases have universally employed the balancing analysis summarized in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether post-judgment garnishment procedures satisfy due process requirements. *See Aacen*, 944 F.2d at 695-96; *McCahey*, 774 F.2d at 548-49; *Dionne*, 757 F.2d at 1352; *Duranceau*, 743 F.2d at 711; *Finberg*, 634 F.2d at

[4] In departing from *Endicott-Johnson*, these cases relied on four pre-judgment seizure cases in which the Supreme Court held that due process required "a constitutional accommodation of the respective interests" of the creditor and debtor. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610 (1974); *see also N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadich v. Family Fin. Corp.*, 395 U.S. 337 (1969).

58; *Brown*, 539 F.2d at 1365-69. Under that analysis, the court considers three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335 (citation omitted).

Chief among the cases applying the *Mathews* balancing analysis to post-judgment garnishment proceedings is the Third Circuit's decision in *Finberg v. Sullivan*. The *Finberg* court noted that the judgment creditor has "a strong interest in a prompt and inexpensive satisfaction of the debt," but that the judgment debtor has a countervailing interest in access to a bank account which "may well contain the money that a person needs for food, shelter, health care, and other basic requirements of life." 634 F.2d at 58. Considering "the additional fact that the money in the accounts may, as here, be covered by exemptions designed to protect a debtor's means of purchasing basic necessities," the court found that "the debtor's interest in access to a bank account becomes very compelling." *Id.* Since "[k]nowledge of these exemptions is not widespread, and a judgment debtor may not be able to

consult a lawyer before the freeze on a bank account begins to cause serious hardships," the court found that "[n]otice of these matters can prevent serious hardship for the judgment debtor whose lack of information otherwise would cause delay or neglect in filing a claim of exemption." *Id.* at 62. Considering that "[t]he conveyance of this information would not place a great burden on the state," and that "[t]he creditor would not have to incur any additional expense or delay," the court concluded that "the failure to provide [the judgment debtor] with this information was a violation of due process." *Id.* Subsequent circuit court decisions to consider this issue have agreed with *Finberg* that due process requires that judgment debtors in garnishment proceedings be notified of the existence of statutory exemptions to garnishment. *See Aacen*, 944 F.2d at 697-98; *Reigh*, 784 F.2d at 1196; *McCahey*, 774 F.2d at 549; *Dionne*, 757 F.2d at 1354.

Apart from their misplaced reliance on *Endicott-Johnson*, defendant and the State offer little in the way of support for their argument that Georgia's post-judgment garnishment statute satisfies due process notice requirements. Quoting *McCahey*, 774 F.2d at 550, defendant argues that "judgment debtors are in the best position to provide evidence of exemption and may legitimately be required to carry the burden of proving the existence

thereof." Def.'s Br. in Support of Mot. for Summ. J. [Doc. 90-1] at 12. The *McCahey* court's statement, however, was made in the context of rejecting the suggestion that judgment creditors should be required to swear ignorance of any possible exemptions and does not imply that judgment debtors need not receive notice of exemptions in garnishment proceedings. In fact, the *McCahey* court expressly agreed with *Finberg* and other cases that such notice was constitutionally required because it struck "a fair balance between the competing interests." 774 F.2d at 549.

Defendant also points out that the Fourth Circuit in *Reigh*, following the First Circuit's decision in *Dionne* and the dissents in *Finberg*, held that "due process does not mandate that the notice to the judgment debtor of the attachment should include a list of all the exemptions possibly available to the judgment debtor." *Reigh*, 784 F.2d at 1196. Instead, "it is sufficient that the notice alert the judgment debtor 'that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the attached property. . . .'" *Id.* (quoting *Dionne*, 757 F.2d at 1354). *Reigh* and *Dionne*, however, agree with the basic principle established in *Finberg* that some notice of exemptions is constitutionally required. The only disagreement is as to the level of specificity that this notice must have.

Because the Georgia statute does not require *any* notice, either general or specific, it is clearly unconstitutional regardless.[5]

Defendant also argues that plaintiff received notice of the existence of exemptions because the affidavit of garnishment referred to property held by the garnishee "except what is exempt," and the letter plaintiff received from Chase advised him that some forms of property might be exempt from garnishment. Stipulation [Doc. 88-1], Exs. C & J. This argument, however, ignores the fact that plaintiff never received a copy of the affidavit of garnishment – or of the summons of garnishment, which also refers to property that is "exempt," *id.*, Ex. D – because the Georgia statute does not

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[5] The Court agrees that a potentially confusing "laundry list" of *all* available exemptions "is not likely to increase the probability of a debtor's correcting an erroneous deprivation," and therefore "is not required by due process." *Harris v. Bailey*, 574 F. Supp. 966, 971 (W.D. Va. 1983) (citation omitted). However, the notice should include at least a partial list of "those essential federal and state exemptions that provide the basic necessities of life for someone in [Mr. Strickland's] position." *Id.* This would certainly include the exemption for workers' compensation benefits, as well as the Social Security exemption. "Beyond this list of absolutely essential exemptions . . . , the debtor should be informed simply that other possible exemptions exist under the law." *Id.* (citation omitted); *see also Aacen*, 944 F.2d at 699 (notice may provide partial list of exemptions and advise debtor regarding discovery of unlisted exemptions); *McCahey*, 774 F.2d at 546, 550-52 (notice to judgment debtor providing expressly partial list of nine exemptions, including Social Security and workers' compensation benefits, was constitutional). "Such a requirement balances the debtor's need for notice that exemptions exist with the very real danger that information overload will only confuse the debtor." *Harris*, 574 F. Supp. at 971.

require these documents to be served on the judgment debtor. Instead, in accordance with O.C.G.A. § 18-4-64(c), the only notice plaintiff received informed him simply of the fact that a garnishment action had been or would be filed against his property and served on Chase, the name of the plaintiff and the defendant and the court issuing the garnishment, and the amount claimed due. *Id.*, Ex. G. It made no mention of exemptions. The fact that, in this case, Chase voluntarily sent plaintiff a letter that mentioned possible exemptions does not satisfy the State's duty to require that adequate notice of exemptions be sent to all judgment debtors.[6]

Finally, defendant and the State point out that the Georgia Supreme Court and the Georgia Court of Appeals have repeatedly upheld the constitutionality of the current form of Georgia's post-judgment garnishment statute. Br. in Support of Def.'s Mot. for Summ. J. [Doc. 90-1] at 16 (citing *Antico v. Antico*, 241 Ga. 294 (1978); *Easterwood v. LeBlanc*, 240 Ga. 61 (1977); *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699 (1977); *Morgan v. Morgan*, 156 Ga. App. 726 (1980)); State's Br. [Doc. 98] at

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[6] In addition, Chase's letter itself was constitutionally deficient because it merely advised Mr. Strickland to contact Discover's attorney if he believed his funds were exempt and did not inform him that there was a procedure to claim an exemption. *See* discussion in Section III *infra*.

8 (citing *Antico*, *Easterwood*, and *Black v. Black*, 245 Ga. 281 (1980)). None of these cases, however, raised the issues of notice and timeliness regarding exemptions and claim procedures that are presented in this case. Therefore, they offer no support for the constitutionality of these aspects of the statute.

III. Notice of Procedure to Claim Exemption

"Notice . . . does not comport with constitutional requirements when it does not advise the [debtor] of the availability of a procedure for protesting a [property deprivation]." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978). Plaintiff contends that the post-judgment garnishment statute fails to satisfy this requirement because it does not inform the debtor of a procedure to claim an exemption. Plaintiff again relies on *Finberg* and its progeny, which uniformly hold that due process requires such notice. *See Aacen*, 944 F.2d at 699 ("Due process also requires some indication that a procedure exists to protect one's exempt property and how, in general, to trigger the process or to gain information regarding the process."); *Reigh*, 784 F.2d at 1196 (debtor is entitled to notice "that there is available a prompt procedure for challenging the attachment"); *McCahey*, 774 F.2d at 552 ("Notice that procedures exist to assert exemptions and a recommendation to seek legal counsel . . . meet the constitutional standards for post-judgment

remedies."); *Dionne*, 757 F.2d at 1352 ("[T]he debtor must receive and be notified of a timely opportunity to challenge any sequestration of his property which the law makes unattachable."); *Finberg*, 634 F.2d at 62 (failure to provide debtor with notice of the procedure for claiming exemptions was a violation of due process).

Defendant and the State again rely on *Endicott-Johnson* for the proposition that no notice to the debtor is required beyond the underlying judgment. In addition, defendant argues that a judgment debtor is put on notice of the procedure for claiming an exemption in the underlying proceedings in which the judgment was obtained. Defendant also again argues that plaintiff received notice of the existence of exemptions in the affidavit of garnishment and Chase's letter, and "that he ought to make some effort to ascertain how to claim them." Def.'s Resp. in Opp'n to Pl.'s Mot. for Summ. J. [Doc. 95] at 5. Apart from *Endicott-Johnson*, the State argues that Georgia's post-judgment garnishment statute itself provides ample notice of the procedures and remedies available to a judgment debtor, so that no further notice is required.

The Court finds defendant's and the State's arguments without merit and concludes that the unbroken line of cases from *Finberg* on establishes

that, in addition to notice of the existence of exemptions, due process requires that judgment debtors in garnishment actions be informed of the procedures for claiming an exemption. Because the Georgia statute requires no such notice, it is constitutionally deficient.

First, as discussed in the preceding section, the Supreme Court's decision in *Mathews v. Eldridge*, rather than *Endicott-Johnson*, provides the appropriate analytical framework for deciding what process is due in post-judgment garnishment proceedings. Using the *Mathews* balancing analysis, *Finberg* and every subsequent case to address the issue have concluded that due process requires that judgment debtors receive notice of the procedures available to claim an exemption from garnishment.

Second, defendant offers no support for his contention that the proceedings leading to the underlying judgment provide debtors with the requisite notice of procedures for claiming exemptions. The Court is aware of no authority, and defendant cites none, requiring that defendants in actions seeking to recover a debt be informed of procedures for claiming exemptions if the plaintiff creditor should subsequently seek to collect a judgment by garnishing bank accounts or other property of the debtor.

Third, defendant's argument that debtors ought to be able to find out for themselves how to claim exemptions ignores the fact that the law does not require debtors to be notified that there even *are* exemptions. Debtors cannot be expected to find out how to claim what they do not even know exists. Even where, as here, the garnishee voluntarily informs the debtor of the possible availability of exemptions, it is not reasonable to expect an untutored layperson to be able to discover the procedures for making an exemption claim. As discussed below, even if the debtor were to examine the garnishment statute, he or she would find little, if any, guidance regarding how to assert such an exemption.

Finally, the State's argument that the garnishment statute itself provides all the notice necessary of the procedures for claiming an exemption is not supported by either the facts or the law. The words "exempt," "exemption," or "exempted" appear only six times in the Georgia statute: (1) in a section referring to the exemption of a portion of a debtor's wages, O.C.G.A. § 18-4-20(f); (2) in a section providing for the exemption of pension and retirement benefits, O.C.G.A. § 18-4-22; (3) in the form summons of garnishment and summons of continuing garnishment, which direct the garnishee to hold all property "except what is exempt," O.C.G.A. §§ 18-4-66(2)

& 18-4-118(2); (4) in a section explaining how a garnishee can have a default judgment modified to exclude, in the case of garnishment of wages, "any exemption allowed the defendant by law," O.C.G.A. § 18-4-91; (5) in a section absolving the garnishee of liability for failing to deliver to the court property that is "exempted from garnishment." O.C.G.A. § 18-4-92.1(c)(2)(B); and (6) in a section providing that exemptions "required or allowed by law" are applicable to continuing garnishments, O.C.G.A. § 18-4-111(c). None of these provisions, however, says anything about how a debtor can assert a claim that seized property is exempt from garnishment.

The State argues that the Georgia post-judgment garnishment statute "clearly provides" procedures to claim an exemption in O.C.G.A. §§ 18-4-65(a) and 18-4-95. State's Br. [Doc. 98] at 12. Section 18-4-65(a) authorizes the debtor to challenge the existence or amount of the underlying judgment or "plead any other matter in bar of the judgment" by filing a traverse of the creditor's affidavit. O.C.G.A. § 18-4-65(a). Section 18-4-95 authorizes any person to file a claim asserting that "he has a superior claim to that of the plaintiff [creditor] to the money or other property in the hands of the garnishee." O.C.G.A. § 18-4-95. Neither section, however, either mentions "exemptions" or otherwise explains that it provides a procedure by which a

debtor may claim an exemption. In fact, contrary to the State's argument, Code Section 18-4-65(a) clearly does not provide a procedure for claiming an exemption because such a claim does not challenge either the existence or the amount of the underlying judgment, nor is it a plea in bar of the judgment, which remains in effect and collectible even if an exemption claim is upheld; it simply cannot be collected against the exempt property.[7]

As for Code Section 18-4-95, in *Terrell v. Fuller*, 160 Ga. App. 56 (1981), the Georgia Court of Appeals explained the complicated procedure a debtor must follow to assert an exemption under this provision. First, the debtor must become a "claimant" by filing a claim under Section 18-4-95 (former Ga. Code § 46-404) asserting that he has a claim to the garnished funds superior to that of the creditor. *Id.* at 58. Then, the debtor must file a traverse of the garnishee's answer under Section 18-4-86 (former Ga. Code § 46-505) asserting that the answer is untrue or legally insufficient. *Id.* Both the claim and the traverse must be filed within 15 days after the garnishee's answer is filed or the funds delivered to the court by the garnishee will be paid to the

[7] Even if a traverse of the creditor's affidavit provided a means to claim an exemption, the debtor would find it difficult to take advantage of the procedure because the Georgia statute does not require that debtor to be served with the affidavit.

creditor and the garnishee will be "automatically discharged from further liability." O.C.G.A. §§ 18-4-85 & 18-4-89. Failure to strictly comply with this convoluted, two-step process, which is nowhere explained in the statute, will result in the debtor's exemption claim being forever barred by *res judicata*. *Terrell*, 160 Ga. App. at 58. The Court concludes that neither O.C.G.A. § 18-4-65(a) nor O.C.G.A. § 18-4-95 is reasonably calculated to provide effective notice to judgment debtors about how to assert their exemption rights.

The State's reliance on the Supreme Court's decision in *City of West Covina v. Perkins*, 525 U.S. 234 (1999), is misplaced. In that case, the Court held that due process did not require law enforcement officers who seized property pursuant to a search warrant to give the property owners "individualized notice of state-law remedies" for return of the seized property because such remedies were "established by published, generally available state statutes and case law." 525 U.S. at 241. *West Covina*, however, "does not stand for the . . . proposition that statutory notice is always sufficient to satisfy due process." *Grayden v. Rhodes*, 345 F.3d 1225, 1244 (11th Cir. 2003). "The Court's opinion acknowledges a practical concern about the public's ability to learn of its rights," *id.*, and recognizes that, under its earlier decision in *Memphis Light*, "notice of the procedures for protecting one's

property interests may be required when those procedures are arcane and are not set forth in documents accessible to the public." *West Covina*, 525 U.S. at 242.

This case is analogous to *Memphis Light.* In that case, the Court held that a utility was required to provide individualized notice to customers threatened with termination of their service where "no description of a dispute resolution process was ever distributed to the utility's customers" and no "written account of such a procedure was accessible to customers who had complaints about their bills." *Memphis Light*, 436 U.S. at 14 n.14. Similarly, in this case, the procedures for claiming an exemption from garnishment are not clearly set forth anywhere in Georgia's post-judgment garnishment statute. Nowhere does the statute even mention "exemptions" in connection with any procedure that is available to judgment debtors. Nor does the State cite any other publicly available document where this information may be found. Instead, as discussed above, the State relies on two statutory provisions as providing the requisite notice, one of which, by its terms, does not apply to exemption claims, and another that provides for the assertion of a "superior claim" to garnished property but does not expressly refer to exemptions and does not explain that the debtor must also traverse the

garnishee's answer to avoid having his claim barred. *See* O.C.G.A. §§ 18-4-65(a) & 18-4-95; *Terrell*, 160 Ga. App. at 58. For all practical purposes, therefore, the procedures for claiming an exemption from garnishment in Georgia "are arcane and are not set forth in documents that are accessible to the public." *West Covina*, 525 U.S. at 242. Under these circumstances, a judgment debtor who is informed that a garnishment action has been filed against his property, like the utility customer in *Memphis Light* who was informed that the utility planned to terminate his service, "could not reasonably be expected to educate himself about the procedures available to protect his interests." *Id.* Therefore, individualized notice of these procedures is constitutionally required.

The State also cites the Eleventh Circuit's decision in *Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006), but that case is distinguishable as well. In *Arrington*, the court held that a state agency administering child support payments to custodial parents was not required to provide the parents with individualized notice of their right to, and procedures for obtaining, a hearing because publicly available statutes, administrative rules, and agency policy manuals provided adequate notice. 438 F.3d at 1351-53. In reaching this conclusion, the court relied on a variety of

circumstances. First, the court noted that three publicly available documents – a state statute, the state agency's administrative code, and the agency's policies and procedures manual – combined to notify parents of their right to a hearing and the procedures for obtaining one. *Id.* at 1352-53. In addition, the court pointed out that when the agency opened a child support case, it sent the parents a document alerting them to their right to a hearing, and that the parents could contact the agency's customer support unit and obtain a written statement explaining the right to appeal and how to exercise that right "without having to research [the state's] statutes, regulations, and agency policy manuals independently." *Id.* at 1353. Finally, the court noted that parents had 30 days after learning of an erroneous deprivation of child support payments to ascertain their rights and submit a request for a hearing. *Id.*

No comparable circumstances are present in this case. As discussed above, when a judgment debtor learns that his property has been seized in a garnishment action, he is confronted with nothing more than an arcane statute that nowhere explains how to go about asserting a claim of exemption. There is no publicly available administrative code and no policies and procedures manual that spells out his rights and how to enforce them.

Nor is the debtor told whom he may contact to obtain this information. Instead, he is notified only that a creditor has filed or is about to file a garnishment action against his property, together with the identity of the garnishee, the amount claimed due, and the court issuing the garnishment. *See* O.C.G.A. § 18-4-64(c); Stipulation [Doc. 88-1], Ex. G. Meanwhile, funds that may be needed to pay daily living expenses, including for food, shelter, and medical care, are frozen and subject to being forfeited just fifteen days after the garnishee files its answer if the debtor does not somehow ascertain his rights and how to enforce them. Under these very different circumstances from those present in *Arrington*, individualized notice of the procedures available for claiming an exemption from garnishment is constitutionally required.

IV. Timeliness of Procedure to Claim Exemption

"A fundamental requirement of due process is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation marks and citation omitted). Applying this requirement in the context of post-judgment garnishment proceedings, some courts have held that a judgment debtor must be afforded a hearing on an exemption claim within a mandated time period

of limited duration. *See Finberg*, 634 F.2d at 59 ("fifteen days is too long to deprive a person of money needed for food, shelter, health care, and other basic needs"); *Harris*, 574 F. Supp. at 971 (due process requires a prompt post-seizure hearing "within a mandated period of time"). Others have required a "prompt" or "expeditious" hearing on such claims without stating a specific time limit. *See Reigh*, 784 F.2d at 1199; *McCahey*, 774 F.2d at 553.

Plaintiff contends that Georgia's post-judgment garnishment statute not only fails to afford debtors a sufficiently prompt mechanism to resolve exemption claims, but that by relegating debtors to the generic claims procedure set out in O.C.G.A. § 18-4-95, the law guarantees that such claims will not be heard for an unconstitutionally long period of time. Under that procedure, plaintiff argues, a debtor cannot file a claim for exemption until the garnishee has answered and deposited the garnished property into court, which the garnishee is not permitted to do until at least 30 days after being served with the summons of garnishment. *See* O.C.G.A. § 18-4-62(a). Thereafter, plaintiff points out, the statute provides no time frame within which a hearing must be held nor any requirement that garnished property be promptly returned if an exemption claim is upheld.

Defendant and the State do not dispute that due process requires a prompt procedural mechanism for resolving exemption claims. Instead, they argue that the Georgia statute provides such a mechanism by authorizing the judgment debtor to file a traverse of the creditor's affidavit of garnishment, whereupon the court is required to hold a hearing within 10 days. *See* O.C.G.A. §§ 18-4-65(a) & 18-4-93.

The Court concludes that the Georgia statute violates due process because it does not provide for a prompt and expeditious procedure to resolve a debtor's claim that seized property is exempt from garnishment. Contrary to defendant's and the State's argument, the procedure for traversing the creditor's affidavit does not provide for an expeditious hearing of exemption claims. As discussed above, the Georgia statute expressly limits the grounds on which a debtor may traverse the creditor's affidavit to the "the existence of the judgment or the amount claimed due thereon" or "any other matter in bar of the judgment." O.C.G.A. § 18-4-65(a). A claim of exemption does not challenge either the existence or the amount of the judgment. Nor does it seek to "bar" the judgment, which remains in effect and collectible even if the exemption claim is successful; it simply cannot be collected against the exempt property.

The State argues that the traverse procedure was available to Mr. Strickland because all of the funds in his Chase bank account were exempt and, as a result, the creditor's affidavit could be found to be "legally insufficient." State's Br. [Doc. 98] at 16 (quoting O.C.G.A. § 18-4-93). But, as the statute makes clear, the term "legally insufficient" does not include exemption-based challenges but is limited to the grounds set out in Code Section 18-4-65. *See* O.C.G.A. § 18-4-93 (providing that the debtor "may become a party to the garnishment *for the purposes set out in Code Section 18-4-65* by filing a traverse to the plaintiff's affidavit stating that the affidavit is untrue or legally insufficient") (emphasis added). The State relies on *Citizens Bank of Ashburn v. Shingler*, 173 Ga. App. 511 (1985), which upheld a trial court decision sustaining the debtor's traverse of the creditor's affidavit of garnishment on the basis that the individual retirement accounts in the garnishee's possession were exempt from garnishment. *Id.* at 512. In that case, however, no issue was raised regarding the appropriate procedure for asserting an exemption claim, and the court's one-page decision includes no discussion or analysis of Georgia's post-judgment garnishment statute. *Id.* Therefore, *Shingler* provides no authority for the State's interpretation of the statute, which is contrary to its plain terms.

Since the procedure for traversing the creditor's affidavit is not available, a debtor who contends that garnished property is exempt from garnishment must follow the generic claims procedure set out in Code Section 18-4-95. As discussed above, in accordance with the Georgia Court of Appeals' decision in *Terrell*, the debtor must first file a claim to the garnished funds and then file a traverse of the garnishee's answer under Code Section 18-4-86. *Terrell*, 160 Ga. App. at 58 ("[A] defendant . . . who has a claim superior to that of the plaintiff to money or property in the hands of the garnishee . . . must . . . assert such a claim and then traverse the answer of the garnishee."). Obviously, the debtor cannot traverse the garnishee's answer until the answer has been filed, which the garnishee must do not less than 30 days, or more than 45 days, after service of the summons of garnishment. O.C.G.A. § 18-4-62(a). Thus, the debtor must wait at least 30 days, and perhaps as long as 45 days, after his or her property has been seized before he or she can even assert an exemption claim.

Once the garnishee files its answer and deposits the garnished funds with the court, the debtor has 15 days to file a claim of exemption and a traverse or the funds will be paid to the creditor and the garnishee will be discharged from further liability. O.C.G.A. §§ 18-4-85 & 18-4-89. Despite

this limited time frame, there is no requirement in the statute that the debtor be served with the garnishee's answer. Even if the debtor learns that the garnishee has filed its answer and manages to file a timely traverse and claim of exemption, there is no statutory requirement that the court conduct an expedited hearing. And even if the court ultimately upholds the debtor's exemption claim after a hearing, there is no requirement that the garnished property or funds be promptly returned to the debtor. *See* O.C.G.A. § 18-4-94. Whatever the outer constitutional time limit may be to resolve exemption claims, the delay inherent in this procedure far exceeds it.

This unconstitutional delay is well-illustrated by the facts of this case. Chase was served with the summons of garnishment on July 11, 2012, and immediately froze Mr. Strickland's bank account, which contained exempt workers' compensation benefits. In accordance with the Georgia statute, Chase filed its answer and paid the garnished funds into court on August 20, 2012, 40 days after being served with the summons. After unsuccessfully attempting to resolve the matter informally with Discover, Mr. Strickland, through counsel, filed a Claim for Funds on September 4, 2012.[8] However,

[8] There is no indication in the record that Mr. Strickland's counsel also filed a traverse of Chase's answer, and Discover initially asserted that this failure barred (continued...)

the court did not schedule a hearing on the claim until October 24, 2012, more than seven weeks later. The day before the scheduled hearing, Discover dismissed the garnishment action. The following day, the court entered an order releasing the deposited funds to Mr. Strickland. But the court did not issue a check to Mr. Strickland until October 29, 2012, and Mr. Strickland's attorney did not receive the check until November 2, 2012. All together, therefore, Mr. Strickland was deprived of his exempt funds – money that he desperately needed to pay for everyday living expenses as well as urgent medical care – for a total of 115 days, or nearly four months. By any standard, this type of delay does not satisfy the Constitution's demand that debtors be afforded a prompt and expeditious procedure to correct potentially erroneous post-judgment deprivations of their property.

V. Conclusion

The Court concludes that plaintiff is entitled to summary judgment on his claims that Georgia's post-judgment garnishment statute violates due

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[8](...continued)
Mr. Strickland's exemption claim. Stipulation [Doc. 88-1], Ex. O. Under the holding in *Terrell*, 160 Ga. App. at 58, this defense might very well have succeeded if Discover had chosen to pursue it. If so, Mr. Strickland would have lost all of his exempt funds despite the legitimacy of his claim. Such a procedural trap for the unwary illustrates the risks that even debtors represented by counsel run in navigating the murky waters of Georgia's post-judgment garnishment statute.

process by failing to require that debtors be notified of the existence of exemptions which they may be entitled to claim with respect to the garnished property and of the procedure to claim such an exemption, and by failing to provide a timely procedure for adjudicating exemption claims. Accordingly, plaintiff is entitled to entry of final judgment in his favor declaring that the statute is unconstitutional in these respects and enjoining defendant Alexander from issuing any summons of garnishment pursuant to the existing forms and procedures insofar as they are inconsistent with this decision. *See Dionne*, 757 F.2d at 1354 (affirming, as modified, injunction prohibiting state court clerk from issuing writs of attachment under constitutionally deficient procedures).

Summary

For the foregoing reasons, the Court DENIES defendant's motion for summary judgment [Doc. 90] and GRANTS plaintiff's motion for summary judgment [Doc. 93]. The Court DECLARES that Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 *et seq.*, is unconstitutional insofar as it (1) fails to require that judgment debtors be notified that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the garnished property; (2) fails to require

that judgment debtors be notified of the procedure to claim an exemption; and (3) fails to provide a timely procedure for adjudicating exemption claims. The Court ENJOINS defendant Alexander from issuing any summons of garnishment pursuant to the existing forms and procedures insofar as they are inconsistent with this decision. The Clerk is DIRECTED to enter final judgment accordingly.

IT IS SO ORDERED, this 8th day of September, 2015.

Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TONY W. STRICKLAND,

Plaintiff,

vs.

RICHARD T. ALEXANDER,
Clerk of Court of the State Court
of Gwinnett County, Georgia,

Defendant.

CIVIL ACTION FILE

NO. 1:12-cv-02735-MHS

JUDGMENT

This action having come before the court, Honorable Marvin H. Shoob, Senior United States District Judge, for consideration of the parties' cross-motions for summary judgment, and the court having denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment, it is

Ordered and Adjudged that judgment be entered in favor of Plaintiff and against Defendant Richard T. Alexander, Clerk of Court of the State Court of Gwinnett County, Georgia. The Court DECLARES that Georgia's post-judgment garnishment statute, O.C.G.A. § 18-4-60 et seq., is unconstitutional. The Court ENJOINS defendant Alexander from issuing any summons of garnishment pursuant to the existing forms and procedures insofar as they are inconsistent with this decision, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 8th day of September, 2015.

JAMES N. HATTEN
CLERK OF COURT

By: s/ Traci Clements-Campbell
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 8, 2015
James N. Hatten
Clerk of Court

By: s/ Traci Clements-Campbell
Deputy Clerk