

**SCAC MEETING AGENDA (2<sup>nd</sup> AMENDED)**  
**Friday, May 3, 2019, 9:00 a.m. – 5:00 p.m.**  
**Saturday, May 4, 2019, 9:00 a.m. – 12:00 noon**

**Location:** Texas Association of Broadcasters  
502 E. 11<sup>th</sup> Street, #200  
Austin, Texas 78701  
(512) 322-9944

**1. WELCOME (Babcock)**

**2. STATUS REPORT FROM CHIEF JUSTICE HECHT**

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the February 15 meeting.

**3. COMMENTS FROM JUSTICE BOYD**

**4. TEXAS RULE OF CIVIL PROCEDURE 244**

*216-299a Sub-Committee Members:*

*Prof. Elaine Carlson – Chair*  
*Thomas C. Riney – Vice Chair*  
*The Hon. David Peeples*  
*Alistair B. Dawson*  
*Robert Meadows*  
*The Hon. Kent Sullivan*  
*Kennon Wooten*

(a) February 11, 2019 Report re: TRCP 244

**5. DISCOVERY RULES**

*171-205 Sub-Committee Members:*

*Mr. Robert Meadows - Chair*  
*The Hon. Tracy Christopher – Vice Chair*  
*Prof. Alexandra Albright*  
*The Hon. Jane Bland*  
*The Hon. Harvey Brown*  
*David Jackson*  
*The Hon. Ana Estevez*  
*Kent Sullivan*  
*Kimberly Phillips*

- (b) 2019-2-11 R. Meadows Letter to C. Babcock
- (c) Discovery Subcommittee Proposed Amendments (2-6-2019)
- (d) Rule 215 Sanctions Albright Working Document
- (e) Revised Spoliation Rule (2-6-2019)
- (f) Spoliation Draft Rule (Texas)

6. **EX-PARTE COMMUNICATIONS IN PROBLEM-SOLVING CASE [Scheduled for 1:00 P.M.]**

*Judicial Administration Sub-Committee Members:*

*Nina Cortell - Chair*

*Kennon Wooten – Vice Chair*

*The Hon. David Peeples*

*Michael A. Hatchell*

*Prof. Lonny Hoffman*

*The Hon. Tom Gray*

*The Hon. Bill Boyce*

*The Hon. David Newell*

*Andrew P. Van Osselaer (Associate/Haynes and Boone, LLP)*

(g) May 3, 2019 Memo to TSCAC on Ex Parte Communications

7. **TEXAS RULE OF CIVIL PROCEDURE 167**

*166-166a Sub-Committee Members:*

*Richard Munzinger – Chair*

*Pete Schenkkan – Vice Chair*

*The Hon. David Peeples*

*The Hon. Jeffrey Boyd*

*Prof. Elaine Carlson*

*Nina Cortell*

*Rusty Hardin*

8. **NAME CHANGE FORMS**

*Rule 215 Sub-Committee Members:*

*Pete Schenkkan - Chair*

*The Hon. David L. Evans – Vice Chair*

*Jim M. Perdue, Jr.*

*Pamela Baron*

*The Hon. Levi Benton*

*The Hon. Tracy Christopher*

*Robert Meadows*

*Lisa Hobbs*

*Trish McAllister (Texas Access To Justice)*

(h) 2019-3-25 Name Change Forms Memo

(i) Relevant Statutes and Rules

(j) 2019-5 Adult Name Change Instructions – CLEAN

(k) 2019-5 Adult Name Change Petition-CLEAN

(l) 2019-5 Child Name Change Instructions – CLEAN

(m) 2019-5 Child Name Change Petition-CLEAN

(n) Adult Name Change Order-August 2018-FINAL

(o) Child Name Change Order-August 2018-FINAL

Tab A

From: Subcommittee Rules 216-299a  
Professor Elaine Carlson, Chair  
Tom Riney, Vice Chair  
Judge David Peeples  
Alistair Dawson  
Kennon Wooten  
Kent Sullivan  
Bobby Meadows

Date: February 10, 2019

Re: The Role of an Attorney Ad Litem Appointed Pursuant to TRCP 244  
When Defendant is Served by Publication

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**Issue:**

What is the appropriate role of an attorney ad litem appointed pursuant to Texas Rule of Civil Procedure (TRCP) 244 when a defendant is served by publication?

**Existing Rule & Proposal of The State Bar of Texas Committee on Court Rules**

TRCP 109 allows, on a limited basis, service by publication on a defendant in Texas civil lawsuits:

When a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant, and to such party when the affidavit is made by his agent or attorney, or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service.

TRCP 244 requires the court to appoint an attorney ad litem to represent the absent defendant served by publication:

Where service has been made by publication, and no answer has been filed nor appearance entered within the prescribed time, the court shall appoint an attorney to defend the suit in behalf of the defendant, and judgment shall be rendered as in other cases; but, in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof. The court shall allow such attorney a reasonable fee for his services, to be taxed as part of the costs.

The State Bar of Texas Committee on Court Rules, concerned at the amount of the ad litem attorney fees that may be taxed against a prevailing plaintiff and questioning the propriety of the ad litem attorney providing full-blown representation of a missing defendant, proposed amendments to TRCP 244 that would limit the role of the attorney ad litem. Specifically, Carlos Soltero, Chair of the Committee, proffered this explanation:

Under the current Rule 244, which provides for the appointment of an attorney to defend a suit in which service is made by publication, appointed attorneys have often perceived a duty to exhaust all remedies available to the non-appearing defendant and, in many cases, to represent the defendant's interests on appeal. The fees for these services are taxed as costs, ultimately borne by the plaintiff. See *Cahill v. Lyda*, 826 S.W.2d 932 (Tex. 1992).

The practice of appointing an attorney for an absent defendant has its roots in Mexican and Spanish law and was adopted in Texas after Texas attained statehood. See Millar, *Jurisdiction Over Absent Defendants: Two Chapters in American Civil Procedure*, 14 La. L. Rev. 321, 335-335 (1954). This practice reflects a minority view in American jurisprudence, having been adopted by only four states. *Id.* At 335-38 (adopting Spanish law were Texas, Louisiana, Kentucky and Arkansas). One of those states, Louisiana, has abandoned the Spanish rule in favor of a rule similar to the rule proposed here. See La. Code Civ. Proc. Ann. art. 5094 (West 2003).

The proposed Rule 244 limits and clarifies the role of the appointed attorney, whose duties would end after the attorney submits a report documenting the efforts made to locate the defendant and provide notice of the proceedings. The Committee believes that the proposed rule, by preventing automatic entry of default judgments against defendants who can be located, accomplishes the primary aim of the current rule. The Committee also notes that when a default judgment is entered following service by publication, Rule 329 allows the defendant two years in which to file a motion for new trial seeking to set aside the judgment.

The principal advantage of the proposed rule is that it reduces the cost of the litigation. The proposed rule, by providing that the appointed attorney is not responsible for defending the suit or pursuing an appeal, and by requiring fees and expenses awarded to be reasonable, eliminates the often-substantial fees and expenses associated with those responsibilities. Moreover, by clarifying that the appointed attorney does not represent the defendant, the proposed rule addresses the concern that under the current rule, the appointed attorney might owe a duty to a non-appearing defendant who later comes forward and alleges the representation was inadequate. By eliminating the specter of liability to the absent defendant, the proposed rule eliminates the current incentive for attorneys to render services and incur expenses whose benefit to the absent defendant cannot be justified in light of their cost to the plaintiff.

The proposal of the State Bar of Texas Committee on Court Rules is as follows:

**244.1 APPOINTMENT OF ATTORNEY.** If service has been made by publication and no answer has been filed nor appearance entered within the prescribed time, the court must appoint an attorney who, without acting as an attorney for any party, must use due diligence to try to locate the defendant.

**244.2 REPORT OF ATTORNEY.** The appointed attorney must make a report in open court or file a report with the court not later than the thirtieth day after being appointed, or within such other reasonable time period as the court may allow. The report must describe the parties' attempts to locate the defendant or obtain service of nonresident notice, describe the appointed attorney's attempts to locate the defendant, and provide the defendant's location, if discovered. No judgment on service by publication may be granted before the report is made and the court finds that the defendant cannot be located or personal service cannot be obtained.

**244.3 DISCHARGE OF ATTORNEY.** The court must discharge the appointed attorney from any further duties upon receiving a report from the attorney that complies with this Rule. The appointed attorney will have no duty or authority to represent the defendant on the merits of the case or to appeal any judgment in the case.

**244.4 FEES AND EXPENSES.** The court must award the attorney a reasonable fee for services provided and all reasonable expenses incurred during the appointment, to be taxed as part of the costs in the judgment rendered by the court.

### **Analysis:**

Citation by publication is constructive service accomplished by publishing a truncated citation in the newspaper for four weeks generally in the county where the lawsuit is pending. TEX. R. CIV. P. 114-11. As observed by the United States Supreme Court in the seminal case of *Mullane v. Central Hanover Bank*, it is a very weak form of notice and raises serious due process concerns. **The form of service [personal, substituted or constructive] must be “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. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (emphasis added). The Court observed:

It would be idle to pretend that publication alone is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper,

and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint. *Id.* at 315.

However, the Court recognized that, for missing or unknown persons service by publication would not offend due process. *Id.* at 317.

The United States Supreme Court revisited the adequacy of service by publication in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). Notice of a public auction of real property for unpaid taxes was given to creditors by publication. Indiana law required that notice be posted at the county courthouse and published for three consecutive weeks. The Court held "unless the mortgagee is not reasonably identifiable, constructive notice [by publication] alone does not satisfy the mandate of *Mullane*." *Id.* at 798. The identity of the mortgagee was known and the Court assumed the mortgagee's address could be ascertained by reasonably diligent efforts. When an interested party's identity is known, service by publication is generally inadequate and violates due process guarantees. However, constructive service by publication is sufficient when the interested party's identity is not known.

In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), the United States Supreme Court held notice of a probate proceeding by publication to known creditors of the decedent or creditors whose identity could be reasonably ascertainable violated due process and Oklahoma statutes to the contrary were constitutionally infirm. The creditor, unaware of the probate proceeding, did not file its claim in the probate proceeding until after the statutory deadline passed. However, because a judgment premised on service by publication as to known creditors is void, the collateral attack by the creditor could be made at any time.

The Texas Supreme Court addressed the constitutionality of service by publication in *In re E.R.*, 385 S.W.3d 552 (Tex. 2012). A mother's parental rights were terminated with service by citation accomplished by publication. The court held that method of service is invalid absent a demonstrated diligent attempt to locate the parent. The trial court must "inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant before granting a judgment when the only service of citation is by publication." TEX. R. CIV. P. 109; ; see also TEX. FAM.CODE § 161.107(b) ("If a parent of the child has not been personally served in a suit in which the Department of Family and Protective Services seeks termination, the department must make a diligent effort to locate that parent."). A lack of diligence makes service by publication ineffective. The court clarified what constitutes sufficient diligence, opining;

A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search but by its quality. Even disregarding the factual dispute about what [Mother] L.R. told Chidozie about her address, the uncontroverted evidence here establishes a lack of diligence. Chidozie neglected "obvious inquiries" a prudent investigator would have made. *In the Interest of S.P.*, 672 N.W.2d at 848. She did not contact L.R.'s mother, nor she did attempt service by mail in an effort to obtain a forwarding

address. She did not pursue other forms of substituted service that would have been more likely to reach L.R., such as leaving a copy with L.R.'s mother. See TEX.R. CIV. P. 106(b)(1); see also *McDonald v. Mabee*, 243 U.S. 90, 92, 37 S.Ct. 343, 61 L.Ed. 608 (1917) (“To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.”). Even if L.R.'s address was not “reasonably ascertainable,” an address was unnecessary for personal service on L.R. because she visited the Department’s offices during the relevant time period. When a known parent has not left the jurisdiction, when she has attended at least two court hearings and has come to the Department offices for a prescheduled, hour-long meeting with her children during the very period service was being attempted, and when the Department can reach her by telephone and can communicate with her family members, service by publication cannot provide the kind of process she is due. Sending a few faxes, checking websites, and making three phone calls—none of which were to L.R. or her family members—is not the type of diligent inquiry required before the Department may dispense with actual service in a case like this. *Mullane* authorized service by publication when “it is not reasonably possible or practicable to give more adequate warning.” *Mullane*, 339 U.S. at 317, 70 S.Ct. 652. Here, it was both possible and practicable to more adequately warn L.R. of the impending termination of her parental rights, and notice by publication was therefore constitutionally inadequate. *Jones v. Flowers*, 547 U.S. 220, 237, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).

*In re E.R.* at 566-567.

The Family Code provision that “the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed” only applies to parents for whom service by publication is valid. A complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. *Id.* at 566. However, a parent must take prompt action to set aside the judgment upon learning of an adverse judgment, even when service by publication violated their due process rights. “If, after learning that a judgment has terminated her rights, a parent unreasonably stands mute, and granting relief from the judgment would impair another party’s substantial reliance interest, the trial court has discretion to deny relief.” The record at issue in the case was silent as to when Mother learned that her rights were terminated or what actions she took in response. Accordingly, the case was reversed and remanded to the trial court to determine if Mother unreasonably delayed in seeking relief after learning of the judgment. If she acted with reasonable diligence, she would be entitled to a new trial.

### **Sub-Committee Recommendation**

The subcommittee shares the due process concerns about the efficacy of service by publication and questions the realistic ability of an attorney ad litem to adequately



represent an absent client served by publication. Constructive service of citation need not be limited to publication and may be effectuated by any method of service reasonably calculated under the circumstances to give the absent defendant notice (such as through a social media platform). Another subcommittee chaired by Richard Orsinger is currently exploring alternative methods of constructive service besides service by publication.

This subcommittee is tasked with addressing (1) the appropriate role of an attorney ad litem appointed when a defendant is served constructively and (2) the payment of the ad litem fees. The subcommittee noted the disparity in the rules that require prior court approval before obtaining an order approving substituted service on someone other than the defendant and the provisions of TRCP 109 that allow the clerk to issue citation by publication for a defendant without prior judicial approval. Also of concern is the potential imposition of substantial ad litem costs (including attorneys fees of the ad litem) that may be taxed against the plaintiff (see, e.g., *Garza v. Slaughter*, 331 S.W.3d 43 (Tex. App.-Houston [1st Dist.] 2010, no pet.)), as well as the lack of limitation on the scope of the ad litem's role. See, e.g., *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992) ("The attorney ad litem must exhaust all remedies available to the client and, if necessary, represent his [absent] client's interest on appeal."); *In re Estate of Stanton*, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005, pet. denied) ("It the attorney ad litem's duty to defend the rights of his involuntary client with the same vigor and astuteness as he would employ in the defense of clients who had expressly employed him for such purpose."); *Isaac v. Westheimer Colony Assoc.*, 933 S.W.2d 588, 590 (Tex. App.—Houston [1st Dist.] 1996, writ denied) ("The purpose of the portion of Rule 244 requiring the appointment of an attorney ad litem is to provide a non-appearing defendant effective representation."). The efficacy of an appointed ad litem to represent an absent defendant on the merits of the proceeding is questionable. Accordingly, the subcommittee suggests limiting the scope of the attorney ad litem's role.

The subcommittee recommends combining and amending TRCP 109 and 244 as follows:

## **Rule 109 [Constructive Service of Process] Citation By Publication**

A plaintiff should first attempt to obtain service of citation on a defendant, pursuant to Rule 106, by personal in hand service or via the mail (certified or registered, return receipt requested) by qualified process servers. As to a non-resident defendant, the same attempt should be made in conformity with Rule 108.<sup>1</sup>

[If personal service of process is unsuccessful, the plaintiff must use diligent efforts to obtain information of where the defendant resides or a location where the defendant can probably be found before moving for substituted service under Rule 106(b).

If substituted service is unsuccessful [or if substituted service is not possible as the whereabouts of a defendant are unknown after diligent efforts have been made], the plaintiff may move for constructive service under this rule. The motion must be supported by a detailed affidavit by an affiant with personal knowledge describing with particularity the actions the plaintiff took in attempting to locate the defendant and the results of all earlier service attempts. An oral hearing on the motion must be conducted by the court and a record made. It is the court's duty to inquire into the sufficiency of the diligence exercised by the plaintiff in attempting to ascertain the defendant's residence or whereabouts.

If the trial court is not satisfied that sufficient diligent efforts have been made, the court may either order the plaintiff to make additional efforts to locate the defendant or appoint an attorney ad litem to assist the court in attempting to locate the defendant's residence or a location where the defendant can probably be found. The ad litem will have no other role and cannot recover fees or costs associated with any other role. The ad litem must assist the court alone and must not act as an attorney for any party.

[The trial court should inform the plaintiff of the following:] Reasonable and necessary fees sought by the attorney ad litem will be taxed as costs. While costs generally are taxed against the unsuccessful party, TEX. R. CIV. P. 131, for good cause the trial court may tax costs against the successful party. TEX. R. CIV. P. 141. The plaintiff may be required to pay those costs before final judgment and failing to do so, the plaintiff's suit may be dismissed, TEX. R. CIV. P. 143, or the plaintiff's property may be levied on, seized, and sold to satisfy unpaid costs, including unpaid ad litem fees. TEX. R. CIV. P. 129–130.

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<sup>1</sup> For example, if the plaintiff has a last known mailing address, diligence requires service first via the mail to determine if the defendant can be served at that location and if not, whether a forwarding address for the defendant can be obtained.

The ad litem must review the plaintiff's efforts, conduct its own diligent search for the defendant, and file an affidavit with the trial court not later than the thirtieth day after being appointed or within such other reasonable time period as the court allows. The affidavit must describe with particularity the actions taken by the plaintiff and the ad litem in attempting to locate the defendant and the results of those efforts. An oral hearing must be conducted by the court and a record made. It is the duty of the court to inquire into the sufficiency of the diligence exercised by the attorney ad litem in attempting to ascertain the defendant's residence or whereabouts.

If the trial court is not satisfied that sufficient diligent efforts have been made by the ad litem, the court may direct the ad litem to undertake additional efforts to locate the defendant [or appoint a different ad litem to undertake that task]. If the trial court is satisfied that a diligent effort has been made by the ad litem to locate the defendant but that those efforts were unsuccessful, the court must discharge the ad litem from any further duties and may order constructive service [by publication] or service by any means reasonably effective under the circumstances to give the defendant notice pursuant to Rule 109a. The clerk shall issue citation in accordance with the court's order.

If the defendant fails to timely file an answer or otherwise timely appear, the trial court may enter a default judgment.

A diligent search, for purposes of this rule, must include inquiries that someone who really wants to find the defendant would make. A diligent search is measured not by the quantity of the search but the quality of the search. In determining whether a search is diligent, the trial court should consider the attempts made to locate the missing person or entity to see if attempts are made through channels expected to render the missing identity. While a reasonable search does not require the use of all possible or conceivable means of discovery, it is an inquiry that a reasonable person would make, and it must extend to places where information is likely to be obtained and to persons who, in the ordinary course of events, would be likely to have information of the person or entity sought. Whether all reasonable means have been exhausted has to be determined by the circumstances of each particular case.

If the attorney ad litem requests compensation, the attorney ad litem must be reimbursed for reasonable and necessary expenses incurred and paid a reasonable hourly fee for necessary services performed. At the conclusion of the appointment, an attorney ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. On request of any party, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary.

## **Duties of Attorney Ad Litem under the Family Code**

**Do we want to enumerate more specifically the duties of the attorney at litem?**

### **V.T.C.A., Family Code § 107.014**

#### **§ 107.014. Powers and Duties of Attorney ad Litem for Certain Parents**

Effective: September 1, 2013

(a) Except as provided by Subsections (b) and (e), an attorney ad litem appointed under Section 107.013 to represent the interests of a parent whose identity or location is unknown or who has been served by citation by publication is only required to:

- (1) conduct an investigation regarding the petitioner's due diligence in locating the parent;
- (2) interview any party or other person who has significant knowledge of the case who may have information relating to the identity or location of the parent; and
- (3) conduct an independent investigation to identify or locate the parent, as applicable.

(b) If the attorney ad litem identifies and locates the parent, the attorney ad litem shall:

(1) provide to each party and the court the parent's name and address and any other available locating information unless the court finds that:

(A) disclosure of a parent's address is likely to cause that parent harassment, serious harm, or injury; or

(B) the parent has been a victim of family violence; and

(2) if appropriate, assist the parent in making a claim of indigence for the appointment of an attorney.

(c) If the court makes a finding described by Subsection (b)(1)(A) or (B), the court may:

- (1) order that the information not be disclosed; or
- (2) render any other order the court considers necessary.

(d) If the court determines the parent is indigent, the court may appoint the attorney ad litem to continue to represent the parent under Section 107.013(a)(1).

(e) If the attorney ad litem is unable to identify or locate the parent, the attorney ad litem shall submit to the court a written summary of the attorney ad litem's efforts to identify or locate the parent with a statement that the attorney ad litem was unable to identify or locate the parent. On receipt of the summary required by this subsection, the court shall discharge the attorney from the appointment.

**Credits** Added by Acts 2013, 83rd Leg., ch. 810 (S.B. 1759), § 5, eff. Sept. 1, 2013.

## **Compensation for Attorney Ad Litem**

We may want to borrow from TEX. R. CIV. P. 173?

### **TEX. R. CIV. P. 173 Guardian Ad Litem**

#### **173.1. Appointment Governed by Statute or Other Rules**

This rule does not apply to an appointment of a guardian ad litem governed by statute or other rules

#### **173.2. Appointment of Guardian ad Litem**

(a) *When Appointment Required or Prohibited.* The court must appoint a guardian ad litem for a party represented by a next friend or guardian only if:

- (1) the next friend or guardian appears to the court to have an interest adverse to the party, or
- (2) the parties agree.

(b) *Appointment of the Same Person for Different Parties.* The court must appoint the same guardian ad litem for similarly situated parties unless the court finds that the appointment of different guardians ad litem is necessary.

#### **173.3. Procedure**

(a) *Motion Permitted But Not Required.* The court may appoint a guardian ad litem on the motion of any party or on its own initiative.

(b) *Written Order Required.* An appointment must be made by written order.

(c) *Objection.* Any party may object to the appointment of a guardian ad litem.

#### **173.4. Role of Guardian ad Litem**

(a) *Court Officer and Advisor.* A guardian ad litem acts as an officer and advisor to the court.

(b) *Determination of Adverse Interest.* A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party.

(c) *When Settlement Proposed.* When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.

(d) *Participation in Litigation Limited.* A guardian ad litem:

- (1) may participate in mediation or a similar proceeding to attempt to reach a settlement;
- (2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest;
- (3) must not participate in discovery, trial, or any other part of the litigation unless:
  - (A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and
  - (B) the participation is directed by the court in a written order stating sufficient reasons.

### **173.5. Communications Privileged**

Communications between the guardian ad litem and the party, the next friend or guardian, or their attorney are privileged as if the guardian ad litem were the attorney for the party.

### **173.6. Compensation**

(a) *Amount.* If a guardian ad litem requests compensation, he or she may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed.

(b) *Procedure.* At the conclusion of the appointment, a guardian ad litem may file an application for compensation. The application must be verified and must detail the basis for the compensation requested. Unless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider compensation as a percentage of any judgment or settlement.

(c) *Taxation as Costs.* The court may tax a guardian ad litem's compensation as costs of court.

(d) *Other Benefit Prohibited.* A guardian ad litem may not receive, directly or indirectly, anything of value in consideration of the appointment other than as provided by this rule.

### **173.7. Review**

(a) *Right of Appeal.* Any party may seek mandamus review of an order appointing a guardian ad litem or directing a guardian ad litem's participation in the litigation. Any party and a guardian ad litem may appeal an order awarding the guardian ad litem compensation.

(b) *Severance.* On motion of the guardian ad litem or any party, the court must sever any order awarding a guardian ad litem compensation to create a final, appealable order.

(c) *No Effect on Finality of Settlement or Judgment.* Appellate proceedings to review an order pertaining to a guardian ad litem do not affect the finality of a settlement or judgment.

**COMMENT--2004**

1. The rule is completely revised.
2. This rule does not apply when the procedures and purposes for appointment of guardians ad litem (as well as attorneys ad litem) are prescribed by statutes, such as the Family Code and the Probate Code, or by other rules, such as the Parental Notification Rules.
3. The rule contemplates that a guardian ad litem will be appointed when a party's next friend or guardian appears to have an interest adverse to the party because of the division of settlement proceeds. In those situations, the responsibility of the guardian ad litem as prescribed by the rule is very limited, and no reason exists for the guardian ad litem to participate in the conduct of the litigation in any other way or to review the discovery or the litigation file except to the limited extent that it may bear on the division of settlement proceeds. See *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004) (per curiam). A guardian ad litem may, of course, choose to review the file or attend proceedings when it is unnecessary, but the guardian ad litem may not be compensated for unnecessary expenses or services.
4. Only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Rule 44. In no event may a guardian ad litem supervise or supplant the next friend or undertake to represent the party while serving as guardian ad litem.
5. As an officer and advisor to the court, a guardian ad litem should have qualified judicial immunity.
6. Though an officer and advisor to the court, a guardian ad litem must not have *ex parte* communications with the court. See Tex. Code Jud. Conduct, Canon 3.
7. Because the role of guardian ad litem is limited in all but extraordinary situations, and any risk that might result from services performed is also limited, compensation, if any is sought, should ordinarily be limited.
8. A violation of this rule is subject to appropriate sanction.

Tab B




# KING & SPALDING

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February 11, 2019

Supreme Court Advisory Committee  
c/o Mr. Charles L. "Chip" Babcock  
Chair, Supreme Court Advisory Committee  
Jackson Walker L.L.P.  
[ebabcock@jw.com](mailto:ebabcock@jw.com)

 RE: Discovery Subcommittee's Revised Proposed Rules  
Dear Chairman Babcock:

The Discovery Subcommittee has completed its review and rewrite of the discovery rules, consistent with our task of modernizing the rules, to improve efficiency and decrease the cost of litigation. For the most part, the recommended changes are the result of thorough discussions and approvals of the Discovery Subcommittee's proposals at SCAC meetings in September 2016, and February, April, and June 2017. What has not been taken up by the full SCAC are suggested changes to Rule 215 and an expanded rule on spoliation.

Our subcommittee's original recommendation on spoliation was limited in scope, dealing singularly with ESI in the manner of recent changes to the FRCP. We heard from a number of SCAC members that the federal rule is too narrow in scope and should not be limited to ESI. We also were advised that in modern litigation the burdens of discovery with ESI are so great that litigants deserve a more precise understanding of the 'duty' to preserve ESI for litigation purposes. Our subcommittee has examined both concerns and has an initial proposal for consideration by the SCAC.

Accordingly, you will find attached, the Discovery Subcommittee's revised proposed rules, including a new Rule 215, and draft spoliation rule, along with an alternative version submitted to our committee for consideration. It is our recommendation, given the prior and exhaustive consideration by the SCAC of the other discovery rules changes, that the full committee now limit its focus to what we do with Rule 215 and the issue of spoliation.

February 11, 2019

Page 2

Thank you and do not hesitate to contact me if there are questions about where are in work or with our proposed next steps.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R.E.M.', with a stylized flourish at the end.

Robert E. Meadows

REM:mfv

Attachments

cc: Marti Walker; [mawalker@jw.com](mailto:mawalker@jw.com) (w/attachments)

# Tab C

**Texas Supreme Court Advisory Committee**  
**Discovery Subcommittee Proposed Amendments**  
**February 2019**

Key:

- Proposed rule amendments based on SCAC discussions September 2016-June 2017 are in yellow highlight in the draft.
- Deletions based on SCAC discussions September 2016-June 2017 have been removed from the draft.
- Previous subcommittee suggestions that were rejected by the SCAC have been removed.
- Discovery Subcommittee new suggested changes are underlined.

Index

I.	General Rules and Disclosures, Stipulations about Discovery Procedure: Tex. R. Civ. P. 190-194.....	p. 2
II.	Experts: Tex. R. Civ. P. 195.....	p. 20
III.	Production and Inspection: Tex. R. Civ. P. 196.....	p. 24
IV.	Interrogatories: Tex. R. Civ. P. 197.....	p. 29
V.	Admissions: Tex. R. Civ. P. 198.....	p. 31
VI.	Depositions, Pre-Suit Depositions, and Depositions Pending Appeal: Tex. R. Civ. P. 199-203.....	p. 33
VII.	Physical and Mental Examinations: Tex. R. Civ. P. 204.....	p. 48
VIII.	Discovery From Non-Parties: Tex. R. Civ. P. 205.....	p. 51
IX.	Sanctions, including spoliation: Tex. R. Civ. P. 215.....	p. 53

**General Rules and Disclosures, Stipulations about Discovery Procedure:  
Tex. R. Civ. P. 190-194**

**RULE 190. DISCOVERY LIMITATIONS**

**190.1 Discovery Control Plan Required.**

Every case must be governed by a discovery control plan as provided in this Rule.

(a) **Initial Pleading.** A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

(b) **Change by Court Order.** On motion and showing of good cause by a party, the court may change the level designated by the plaintiff.

**190.2 Discovery Control Plan - Expedited Actions and Divorces Involving \$100,000 or Less (Level 1)**

(a) **Application.** This subdivision applies to:

- (1) any suit that is governed by the expedited actions process in Rule 169; and
- (2) unless the parties agree that rule 190.3 should apply or the court orders a discovery control plan under Rule 190.4, any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than \$100,000.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

- (1) **Discovery period.** All discovery must be conducted during the discovery period, which begins when initial disclosures are due and continues until 180 days after the date the initial disclosures are due.
- (2) **Total time for oral depositions.** Each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. If one side designates more than one expert, the opposing side may have an additional two hours of total deposition time for each additional expert designated. The court may modify the deposition hours so that no party is given unfair advantage.
- (3) **Interrogatories.** Any party may serve on any other party no more than 15 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate

interrogatory.

(4) **Requests for Production.** Any party may serve on any other party no more than 15 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

(5) **Requests for Admissions.** Any party may serve on any other party no more than 15 written requests for admissions. Each discrete subpart of a request for admission is considered a separate request for admission.

(c) **Reopening Discovery.** If a suit is removed from the expedited actions process in Rule 169 or, in a divorce, the filing of a pleading renders this subdivision no longer applicable, the discovery period reopens, and discovery must be completed within the limitations provided in Rules 190.3 or 190.4, whichever is applicable. Any person previously deposed may be redeposed. On motion of any party, the court should continue the trial date if necessary to permit completion of discovery.

### 190.3 Discovery Control Plan –Level 2

(a) **Application.** Discovery must be conducted in accordance with this subdivision for a level 2 suit.

(b) **Limitations.** Discovery is subject to the limitations provided elsewhere in these rules and to the following additional limitations:

(1) **Discovery period.** All discovery must be conducted during the discovery period, which begins when initial disclosures are due and continues until:

(A) 30 days before the date set for trial, in cases under the Family Code; or

(B) in other cases, the earlier of

(i) 30 days before the date set for trial, or

(ii) nine months after the initial disclosures are due; or

(C) a docket control order sets a new date for the end of discovery.

(2) **Total time for oral depositions.** Each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(3) **Interrogatories.** Any party may serve on any other party no more than 25 written

interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

**(4) Requests for Production.** Any party may serve on any other party no more than 25 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

**190.4 Discovery Control Plan - Level 3(a) Application.** Discovery under level 3 is governed by this rule. After a conference required by this rule, the parties must submit a discovery control plan and proposed order(s) to the court for its consideration. The plan must include the items listed in 190.4(c).

**(b) Conference**

**(1) Conference timing.** The parties must confer as soon as practicable.

**(2) Conference content; Parties' responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 194; discuss any issues about preserving discoverable information; and develop a proposed discovery control plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery control plan, and for submitting to the court within 14 days after the conference a written report outlining the proposed discovery control plan.

**(3) No discovery before conference.** Unless otherwise ordered by the court, a party may not seek discovery from any party before the parties have conferred as required by this rule. This does not include initial disclosures.

**(c) Discovery control plan.** The discovery control plan must state the parties' views and proposals on:

(1) a date for trial or for a conference to determine a trial setting;

(2) a discovery period during which either all discovery must be conducted or all discovery requests must be sent, for the entire case or an appropriate phase of it;

(3) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses;

(4) what changes should be made in the timing, or form, of the initial disclosures under Rule 194, including a statement of when initial disclosures were made or will be made;

(5) the subjects on which discovery may be needed, and whether discovery should be

conducted in phases or be limited to or focused on particular issues;

(6) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(7) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Texas Rule of Evidence 511;

(8) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed;

(9) Dispositive Motion deadlines;

(10) Expert challenges deadlines; and

(11) proposed docket control order(s).

**(d) Docket Control Order.** Upon receipt of the discovery control plan, the trial court must issue a docket control order.

#### **190.5 Modification of Docket Control Order**

The court may modify a docket control order at any time and must do so when the interest of justice requires. Unless a suit is governed by the expedited actions process in Rule 169, the court must allow additional discovery:

(a) related to new, amended or supplemental pleadings, or new information disclosed in a discovery response or in an amended or supplemental response, if:

(1) the pleadings or responses were made after the deadline for completion of discovery or so nearly before that deadline that an adverse party does not have an adequate opportunity to conduct discovery related to the new matters, and

(2) the adverse party would be unfairly prejudiced without such additional discovery;

(b) regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.

#### **190.6 Certain Types of Discovery Excepted**

This rule's limitations on discovery do not apply to or include discovery conducted under Rule 202 ("Depositions Before Suit or to Investigate Claims"), or Rule 621a ("Discovery and Enforcement of Judgment"). But Rule 202 cannot be used to circumvent the limitations of this rule.



**RULE 191. MODIFYING DISCOVERY PROCEDURES AND LIMITATIONS; CONFERENCE REQUIREMENT; SIGNING DISCLOSURES; DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS; FILING REQUIREMENTS**

**191.1 Modification of Procedures**

Except where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by the agreement of the parties or by court order. An agreement of the parties is enforceable if it complies with Rule 11 or, as it affects an oral deposition, if it is made a part of the record of the deposition.

**191.2 Conference**

Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions or requests for hearings relating to discovery must contain a certificate by the party filing the motion or request that a reasonable effort has been made to resolve the dispute without the necessity of court intervention and the effort failed.

**191.3 Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections**

(a) **Signature required.** Every disclosure, discovery request, notice, response, and objection must be signed:

(1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and **service e-mail address; or**

(2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and **service email address**, if any.

(b) **Effect of signature on disclosure.** The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(c) **Effect of signature on discovery request, notice, response, or objection.** The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:

(1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) has a good faith factual basis;

(3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(d) **Effect of failure to sign.** If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.

(e) **Sanctions.** If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code.

#### **191.4 Filing of Discovery Materials.**

(a) **Discovery materials not to be filed.** The following discovery materials must not be filed:

(1) discovery requests, deposition notices, and subpoenas required to be served only on parties;

(2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;

(3) documents and tangible things produced in discovery; and

(4) statements prepared in compliance with Rule 193.3(b) or (d).

(b) **Discovery materials to be filed.** The following discovery materials must be filed:

(1) discovery requests, deposition notices, and subpoenas required to be served on nonparties;

(2) motions and responses to motions pertaining to discovery matters; and

(3) agreements concerning discovery matters, to the extent necessary to comply with Rule

11.

(c) **Exceptions.** Notwithstanding paragraph (a):

(1) the court may order discovery materials to be filed;

(2) a person may file discovery materials in support of or in opposition to a motion or for other use in a court proceeding; and

(3) a person may file discovery materials necessary for a proceeding in an appellate court.

(d) **Retention requirement for persons.** Any person required to serve discovery materials not required to be filed must retain the original or exact copy of the materials during the pendency of the case and any related appellate proceedings begun within six months after judgment is signed, unless otherwise provided by the trial court.

(e) **Retention requirement for courts.** The clerk of the court shall retain and dispose of deposition transcripts and depositions upon written questions as directed by the Supreme Court.

#### **191.5 Service of Discovery Materials.**

Every disclosure, discovery request, notice, response, and objection required to be served on a party or person must be served on all parties of record.

### **RULE 192. PERMISSIBLE DISCOVERY: FORMS AND SCOPE; WORK PRODUCT; PROTECTIVE ORDERS; DEFINITIONS**

#### **192.1 Forms of Discovery.**

Permissible forms of discovery are:

(a) **required disclosures;**

(b) requests for production and inspection of documents and tangible things;

(c) requests and motions for entry upon and examination of real property;

(d) interrogatories to a party;

(e) requests for admission;

(f) oral or written depositions; and

(g) motions for mental or physical examinations.

### **192.2 Timing and Sequence of Discovery.**

(a) **Timing.** Unless otherwise agreed to by the parties, or ordered by the court a party may not serve discovery until after the initial disclosures are due.

(b) **Sequence.** The permissible forms of discovery may be combined in the same document and may be taken in any order or sequence.

### **192.3 Scope of Discovery.**

(a) **Generally.** Unless otherwise ordered by the court, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to the subject matter of the pending action and proportional to the needs of the case as set forth in 192.4(b). Information within this scope of discovery need not be admissible in evidence to be discoverable.

(b) **Documents, information and tangible things.** A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents, information and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.

(c) **Contentions.** A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.

### **192.4 Limitations on Scope of Discovery.**

The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(b) the discovery sought is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

## **192.5 Work Product.**

(a) **Work product defined.** Work product comprises:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

(b) **Protection of work product.**

- (1) **Protection of core work product--attorney mental processes.** Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable.
- (2) **Protection of other work product.** Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.
- (3) **Incidental disclosure of attorney mental processes.** It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).
- (4) **Limiting disclosure of mental processes.** If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

(c) **Exceptions.** Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

- (1) information discoverable under Rule 194 concerning experts, trial witnesses, witness statements, and contentions;
- (2) trial exhibits ordered disclosed under Rule 166 or Rule 194;
- (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;
- (4) any photograph or electronic image of underlying facts (e.g., a photograph of the

accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and

(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

(d) **Privilege.** For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.

### **192.6 Protective Order.**

(a) **Motion.** A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. **The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.** A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.

(b) **Order.** To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that:

- (1) the requested discovery not be sought in whole or in part;
- (2) the extent or subject matter of discovery be limited;
- (3) the discovery not be undertaken at the time or place specified;
- (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
- (5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

### **192.7 Definitions.**

As used in these rules

(a) *Written discovery* means requests for disclosure, requests for production and inspection of

documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.

(b) *Possession, custody, or control* of an item means that the person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.

(c) A *testifying expert* is an expert who may be called to testify as an expert witness at trial.

(d) A *consulting expert* is an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.

## **RULE 193. WRITTEN DISCOVERY: RESPONSE; OBJECTION; ASSERTION OF PRIVILEGE; SUPPLEMENTATION AND AMENDMENT; FAILURE TO TIMELY RESPOND; PRESUMPTION OF AUTHENTICITY**

### **193.1 Responding to Written Discovery; Duty to Make Complete Response.**

A party must respond to written discovery in writing within the time provided by court order or these rules. When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. The responding party's answers, objections, and other responses must be preceded by the request to which they apply.

### **193.2 Objecting to Written Discovery**

(a) **Form and time for objections.** A party must make any objection to written discovery in writing - either in the response or in a separate document - within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request. **An objection must state whether any responsive materials are being withheld on the basis of that objection.**

(b) **Duty to respond when partially objecting; objection to time or place of production.** A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order.

(c) **Good faith basis for objection.** A party may object to written discovery only if a good faith

factual and legal basis for the objection exists at the time the objection is made.

(d) **Amendment.** An objection or response to written discovery may be amended or supplemented to state an objection or basis that, at the time the objection or response initially was made, either was inapplicable or was unknown after reasonable inquiry.

(e) **Waiver of objection.** An objection that is not made within the time required, or that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown.

(f) **No objection to preserve privilege.** A party should not object to a request for written discovery on the grounds that it calls for production of material or information that is privileged but should instead comply with Rule 193.3. A party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out.

### **193.3 Asserting a Privilege**

A party may preserve a privilege from written discovery in accordance with this subdivision.

(a) **Withholding privileged material or information.** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that:

- (1) information or material responsive to the request has been withheld,
- (2) the request to which the information or material relates, and
- (3) the privilege or privileges asserted.

(b) **Description of withheld material or information.** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:

- (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and
- (2) asserts a specific privilege for each item or group of items withheld.

(c) **Exemption.** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative



(1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which the discovery is requested.

(d) **Privilege not waived by production.** A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

#### **193.4 Hearing and Ruling on Objections and Assertions of Privilege.**

(a) **Hearing.** Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits. If the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.

(b) **Ruling.** To the extent the court sustains the objection or claim of privilege, the responding party has no further duty to respond to that request. To the extent the court overrules the objection or claim of privilege, the responding party must produce the requested material or information within 30 days after the court's ruling or at such time as the court orders. A party need not request a ruling on that party's own objection or assertion of privilege to preserve the objection or privilege.

(c) **Use of material or information withheld under claim of privilege.** A party may not use--at any hearing or trial--material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's response to that discovery.

#### **193.5 Amending or Supplementing Responses to Written Discovery.**

(a) **Duty to amend or supplement.** If a party learns that the party's response to written discovery

was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:

(1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and

(2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

**(b) Time and form of amended or supplemental response.** An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.

**(c) Use of Material or Information Withheld under other Objection.** A party may not use—at any hearing or trial—material or information withheld from discovery under any objection, including an objection sustained by the court, without timely amending or supplementing the party’s response to include that discovery in accordance with these rules.

### **193.6 Failing to Timely Respond - Effect on Trial**

**(a) Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:

(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or

(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

**(b) Burden of establishing exception.** The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

**(c) Continuance.** Even if the party seeking to introduce the evidence or call the witness fails to

carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

### **193.7 Production of Documents Self-Authenticating**

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

## **RULE 194. DUTY TO DISCLOSE**

### **194.1 Required Disclosures.**

**(a) In general.** Except as exempted by this Rule or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties the information or material described in Rule 194.2, 194.3, and 194.4. Unless the court orders otherwise, all disclosures under Rule 194 must be in writing, signed, and served. In ruling on an objection that initial disclosures are not appropriate in this action, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

**(b) Production.** Copies of documents and other tangible items required to be disclosed under this rule ordinarily must be served with the response. But if the responsive documents are voluminous, the response must state a reasonable time and place for the production of documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

### **194.2 Initial Disclosures.**

**(a) Time for initial disclosures.** Both the plaintiff and the defendant must make the initial disclosures at or within 30 days after the filing of the defendant's answer unless a different time is set by agreement or court order. A party that is first served or otherwise joined after the filing of the first answer must make the initial disclosures within 30 days after the filing of the party's

answer, unless a different time is set by agreement or court order.

**(b) Content.** Without awaiting a discovery request, a party must provide the following:

- (1) the correct names of the parties to the lawsuit;
- (2) the name, address, and telephone number of any potential parties;
- (3) the legal theories and the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
- (4) a computation of each category of damages claimed by a party. Each disclosing party must also make available for inspection and copying the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
- (5) the name, address, e-mail, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation;
- (6) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment;
- (7) except as otherwise provided by law, the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial
- (8) the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial;
- (9) the statement of any person with knowledge of relevant facts--a "witness statement"--regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person

may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.;

(10) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(11) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(12) the name, address, and telephone number of any person who may be designated as a responsible third party.

**(c) Proceedings exempt from initial disclosure.** The following proceedings are exempt from initial disclosure, but a court may order that the parties make particular disclosures as appropriate:

(1) an action for review on an administrative record;

(2) a forfeiture action arising from a state statute;

(3) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(4) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(5) an action to enforce or quash an administrative summons or subpoena;

(6) an action by the state to recover benefit payments;

(7) an action by the state to collect on a student loan guaranteed by the state;

(8) a proceeding ancillary to a proceeding in another court; and

(9) an action to enforce an arbitration award.

**194.2A Initial Disclosures Under Title I and V of the Texas Family Code** [R. Orsinger to report from family law bar].

### **194.3 Expert Disclosure.**

In addition to the disclosures required by Rule 194.2, a party must disclose to the other parties expert information as provided by Rule 195.

### **194.4 Pretrial Disclosures.**

**(a) In General.** In addition to the disclosures required by Rules 194.2 and 194.3, a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(1) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(2) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

**(b) Time for Pretrial Disclosures; Objections.** Unless the court orders otherwise, these disclosures must be made at least 30 days before trial.

**194.5 No Objection or Assertion of Work Product.** No objection or assertion of work product is permitted to a disclosure under this rule.

**194.6 Certain Responses Not Admissible.**

A disclosure under Rule 194.2(b)(3) and (4) that has been changed by an amended or supplemental response is not admissible and may not be used for impeachment.

## Experts: Tex. R. Civ. P. 195

### RULE 195. DISCOVERY REGARDING TESTIFYING EXPERT WITNESSES

#### 195.1 Permissible Discovery Tools.

A party may request another party to designate and disclose information concerning testifying expert witnesses only through **disclosure** under Rule 194 and through **other discovery** permitted by this rule.

#### 195.2 Schedule for Designating Experts.

Unless otherwise ordered by the court, a party must designate experts - that is, furnish information **described in Rule 195.5(b) - by the following dates:**

(a) with regard to all experts testifying for a party seeking affirmative relief, 90 days before the end of the discovery period;

(b) with regard to all other experts, 60 days before the end of the discovery period.

#### 195.3 Scheduling Depositions.

(a) **Experts for party seeking affirmative relief.** A party seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition as follows:

(1) **If no report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is not produced when the expert is designated, then the party must make the expert available for deposition reasonably promptly after the expert is designated. If the deposition cannot--due to the actions of the tendering party--reasonably be concluded more than 15 days before the deadline for designating other experts, that deadline must be extended for other experts testifying on the same subject.

(2) **If report furnished.** If a report of the expert's factual observations, tests, supporting data, calculations, photographs, and opinions is produced when the expert is designated, then the party need not make the expert available for deposition until reasonably promptly after all other experts have been designated.

(b) **Other experts.** A party not seeking affirmative relief must make an expert retained by, employed by, or otherwise in the control of the party available for deposition reasonably

promptly after the expert is designated and the experts testifying on the same subject for the party seeking affirmative relief have been deposed.

#### **195.4 Oral Deposition.**

In addition to the information disclosed under Rule 195.5, a party may obtain discovery concerning the subject matter on which the expert is expected to testify, the expert's mental impressions and opinions, the facts known to the expert (regardless of when the factual information was acquired) that relate to or form the basis of the testifying expert's mental impressions and opinions, and other discoverable matters, including documents not produced in disclosure, only by oral deposition of the expert and by a report prepared by the expert under this rule.

#### **195.5 Expert Disclosures and Reports.**

(a) **Disclosures.** Pursuant to Rule 194.3, and without awaiting a discovery request, a party must provide the following for any testifying expert and for any expert who has been retained or specially employed in anticipation of litigation or to prepare for trial and whose mental impressions or opinions have been reviewed by a testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify; and

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) For any expert retained by, employed by, or otherwise subject to the control of the responding party, a party must provide the following:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony;

(B) the expert's current resume and bibliography;

(C) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(D) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(E) a statement of the compensation to be paid for the study and testimony in the



case.

**(b) Expert reports.** If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition. If the trial court orders an expert report for a witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, the report must contain:

(1) a complete statement of all opinions the witness will express and the basis and reasons for them;

(2) the facts or data considered by the witness in forming them; and

(3) any exhibits that will be used to summarize or support them.

**(c) Expert communication exempt from disclosure.** Communications between the party's attorney and any testifying expert witness in the case are exempt from discovery regardless of the form of the communications, except to the extent that the communications:

(1) relate to compensation for the expert's study or testimony;

(2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

**(d) Draft reports or disclosures.** Any draft of a report by an expert or disclosure required under this rule is protected from disclosure regardless of the form in which the draft is recorded.

**(e) Expert employed for trial preparation.** A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial and whose mental impressions or opinions have not been reviewed by a testifying expert. But a party may do so as provided in Rule 204.2 (Report of Examining Physician or Psychologist) or on showing exceptional circumstances under which it is impracticable for the party to obtain facts on the same subject by other means.

#### **195.6 Amendment and Supplementation.**

A party's duty to amend and supplement written discovery regarding a testifying expert is

governed by Rule 193.5. If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also amend or supplement any deposition testimony or written report by the expert, but only with regard to the expert's mental impressions or opinions and the basis for them.

**195.7 Cost of Expert Witnesses.**

When a party takes the oral deposition of an expert witness retained by the opposing party, all reasonable fees charged by the expert for time spent in preparing for, giving, reviewing, and correcting the deposition must be paid by the party that retained the expert.

## Production and Inspection: Tex. R. Civ. P. 196

### RULE 196. REQUESTS FOR PRODUCTION AND INSPECTION TO PARTIES; REQUESTS AND MOTIONS FOR ENTRY UPON PROPERTY

#### 196.1 Request for Production and Inspection to Parties.

(a) **Request.** A party may serve on another party a request for production or for inspection within the scope of discovery, to inspect, sample, test, photograph and copy the following items in the responding party's possession, custody, or control:

(1) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(2) any designated tangible things.

(b) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.

(c) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 requests for production or for inspection in a Level 1 case or 25 requests for production or for inspection in Level 2 or Level 3 cases, including all discrete subparts.

(d) **Contents of request.** The request

(1) must describe with reasonable particularity each item or category of items to be inspected;

(2) must specify a reasonable time (on or after the date on which the response is due), place, and manner for the production or inspection and for performing the related acts; and

(3) If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

(e) **Requests for production of medical or mental health records regarding nonparties.**

(1) **Service of request on nonparty.** If a party requests another party to produce

medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a.

(2) **Exceptions.** A party is not required to serve the request for production on a nonparty whose medical records are sought if:

(A) the nonparty signs a release of the records that is effective as to the requesting party;

(B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or

(C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required.

(3) **Confidentiality.** Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records.

#### **196.2 Response to Request for Production and Inspection.**

(a) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the request.

(b) **Content of response.** For each item or category of items, the response:

(1) must either state that inspection and related activities will be permitted as requested or state an objection or privilege under Rule 193.;

(2) may state that it will produce copies of documents or electronically stored information instead of permitting inspection;

(3) state, as appropriate, that production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(4) state, as appropriate, that no items have been identified - after a diligent search - that are responsive to the request.

#### **196.3 Production.**

(a) **Time and place of production.** Subject to any objections stated in the response, the production must be completed no later than the time for the production or inspection specified in the request or another reasonable time specified in the response. Subject to any objections stated in the response, the responding party must produce the requested

documents or tangible things within the person's possession, custody or control at the place requested or the place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

(b) **Copies.** The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. **Copies must be produced on the same level of resolution as the originals.** If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.

(c) **Organization.** The responding party must produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.

#### **196.4 Electronically Stored Information.**

(a) **Request.** To obtain discovery **of electronically stored information**, the requesting party must specify the form in which the requesting party wants it produced.

(b) **Responses and Objections.** The response:

(1) must **either state that production of the electronically stored information** that is responsive to the request and is reasonably available to the responding party in its ordinary course of business **will occur or state an objection or privilege under Rule 193;**

(2) **may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use. The court must order a reasonable form of production, considering the scope and limitations of discovery. If the court orders the responding party to comply with the request that the responding party cannot—through reasonable efforts—retrieve or produce as requested,** the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) **Producing the Electronically Stored Information.** **Unless otherwise stipulated or ordered by the court, if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and a party need not produce the same electronically stored information in more than one form.**

### **196.5 Destruction or Alteration.**

Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court.

### **196.6 Expenses of Production.**

Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

### **196.7 Request of Motion for Entry Upon Property.**

(a) **Request or motion.** A party may serve on any other party a request within the scope of discovery to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it. If the land or property belongs to a non-party, the party seeking entry onto designated land or other property possessed or controlled by the nonparty must file a motion and notice of hearing on all parties and the nonparty. If the identity or address of the nonparty is unknown and cannot be obtained through reasonable diligence, the court must permit service by means other than those specified in Rule 21a that are reasonably calculated to give the nonparty notice of the motion and hearing.

(b) **Timing of request.** The request for entry upon a party's property, or the order for entry upon a nonparty's property, must be filed no later than 30 days before the end of any applicable discovery period.

(c) **Requested time, place, and other conditions of inspection.** The request must state the time, place, manner, conditions, and scope of the inspection, and must specifically describe any desired means, manner, and procedure for testing or sampling, and the person or persons by whom the inspection, testing, or sampling is to be made.

#### **(d) Response to request for entry.**

(1) **Time to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request.

(2) **Content of response.** The responding party must state an objection or privilege under Rule 193, and state, as appropriate, that:

(A) entry or other requested action will be permitted as requested;

(B) entry or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(C) entry or other requested action cannot be permitted for reasons stated in the response.

(e) **Requirements for order for entry on nonparty's property.** An order for entry on a nonparty's property may issue only for good cause shown and only if the land, property, or object thereon as to which discovery is sought is relevant to the subject matter of the action.

## Interrogatories: Tex. R. Civ. P. 197

### RULE 197. INTERROGATORIES TO PARTIES

#### 197.1 Interrogatories – In General.

(a) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written interrogatories in a Level 1 case or 25 written interrogatories in Level 2 or Level 3 cases, including all discrete subparts, but excluding interrogatories asking a party only to identify or authenticate specific documents.

(b) **Scope.** A written interrogatory may inquire about any matter within the scope of discovery except matters covered by Rule 195. An interrogatory may inquire whether a party makes a specific legal or factual contention and may ask the responding party to state the legal theories and to describe in general the factual bases for the party's claims or defenses, but interrogatories may not be used to require the responding party to marshal all of its available proof or the proof the party intends to offer at trial.

(c) **Timing of request.** A party may serve written interrogatories on another party no later than 30 days before the end of the discovery period.

#### 197.2 Response to Interrogatories.

(a) **Responding parties; verification.** A responding party - not an attorney of record as otherwise permitted by Rule 14 - must sign the answers under oath or a declaration except that:

(1) when answers are based on information obtained from other persons, the party may so state, and

(2) a party need not sign answers to interrogatories about persons with knowledge of relevant facts, trial witnesses, and legal contentions.

(b) **Time for response.** The responding party must serve a written response on the requesting party within 30 days after service of the interrogatories.

(c) **Content of response.** A response must include the party's answers to the interrogatories and may include objections and assertions of privilege under Rule 193.

(d) **Option to produce records.** If the answer to an interrogatory may be derived or ascertained



from public records, from the responding party's business records, or from an examination, auditing, compilation, abstract or summary of the responding party's business records (including electronically stored information), and the burden of deriving or ascertaining the answer is substantially the same for the requesting party as for the responding party, the responding party may answer the interrogatory by

(1) specifying the records that must be reviewed, in sufficient detail to enable the requesting party to locate and identify them as readily as the responding party could; and,

(2) if applicable, producing the records or compilation, abstract or summary of the records; and

(3) stating a reasonable time and place for examination of the documents. The responding party must produce the documents at the time and place stated, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

### **197.3 Use.**

Answers to interrogatories may be used only against the responding party. An answer to an interrogatory inquiring about matters described in Rule 194.2(c) and (d) that has been amended or supplemented is not admissible and may not be used for impeachment.

## Admissions: Tex. R. Civ. P. 198

### RULE 198. REQUESTS FOR ADMISSIONS

#### 198.1 Request for Admissions.

(a) **Request.** A party may serve on another party written requests that the other party admit, for purposes of the pending action only, the truth of any matter within the scope of discovery, including:

- (1) facts, the application of law to fact, or opinions about either; and
- (2) the genuineness of any described documents.

(b) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 15 written requests for admissions in a Level 1 case or 25 written requests for admissions in Level 2 or Level 3 cases, including all discrete subparts, but excluding requests asking a party only to identify or authenticate specific documents.

(c) **Timing of request.** The request must be served no later than 30 days before the end of the discovery period.

(d) **Form; copy of a document.** Each matter for which an admission is requested must be stated separately. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

#### 198.2 Response to Requests for Admissions.

(a) **Time to respond; effect of failure to respond.** The responding party must serve a written response on the requesting party within 30 days after service of the request. If a response is not timely served, the request is considered admitted without the necessity of a court order.

(b) **Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(c) **Motion regarding the sufficiency of an answer or objection.** The requesting party may move

to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served.

**198.3 Effect of an Admission; Withdrawal or Amendment.**

An admission made by a party under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding. An admission made by a party under this rule may be used only against the responding party. A matter admitted under this rule is conclusively established unless the court, on motion, permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if:

(a) the party shows good cause for the withdrawal or amendment; and

(b) the court finds that the withdrawal or amendment would promote the presentation of the merits of the action and the court is not persuaded that the withdrawal or amendment would prejudice the requesting party in maintaining or defending the action on the merits.

## Depositions, Pre-Suit Depositions, and Depositions Pending Appeal:

### Tex. R. Civ. P. 199-203

#### RULE 199. DEPOSITIONS UPON ORAL EXAMINATION

##### 199.1 Oral Examination; Alternative Methods of Conducting or Recording.

(a) **Generally.** A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made.

(b) **Hour limitations.** Unless otherwise stipulated or ordered by the court, each party may have no more than the following amount of time for depositions:

(1) For Level 1 cases, each party may have no more than six hours in total to examine and cross-examine all witnesses in oral depositions. The parties may agree to expand this limit up to ten hours in total, but not more except by court order. If one side designates more than one expert, the opposing side may have an additional two hours of total deposition time for each additional expert designated. The court may modify the deposition hours so that no party is given unfair advantage.

(2) For Level 2 cases, each side may have no more than 50 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(3) For Level 3 cases, each side may have no more than 60 hours in oral depositions to examine and cross-examine parties on the opposing side, experts designated by those parties, and persons who are subject to those parties' control. "Side" refers to all the litigants with generally common interests in the litigation. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated. The court may modify the deposition hours and must do so when a side or party would be given unfair advantage.

(c) **Depositions by remote means.** The parties may stipulate—or the court may on motion

**order**—an oral deposition by telephone or other remote electronic means. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction.

**(d) Non-stenographic recording.** Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.

### **199.2 Procedure for Noticing Oral Depositions.**

**(a) Time to notice deposition.** A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.

**(b) Content of notice.**

**(1) Identity of witness; organizations.** The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

**(2) Time and place.** The notice must state a reasonable time and place for the oral

deposition. The place may be in:

- (A) the county of the witness's residence;
- (B) the county where the witness is employed or regularly transacts business in person;
- (C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);
- (D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or
- (E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending.

(3) **Alternative means of conducting and recording.** The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c).

(4) **Additional attendees.** The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).

(5) **Request for production of documents.** A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.

### **199.3 Compelling Witness to Attend.**

A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness.

### **199.4 Objections to Time and Place of Oral Deposition.**

A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. **The motion must offer an alternative time and place for oral deposition.** If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.

### **199.5 Examination, Objection, and Conduct During Oral Depositions.**

#### **(a) Attendance.**

(1) **Witness.** The witness must remain in attendance from day to day until the deposition is begun and completed.

(2) **Attendance by party.** A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition.

(3) **Other attendees.** If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons.

(b) **Oath; examination.** Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness. **An objection at the time of the examination to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. The record must state:**

**(1) the officer's name and business address;**

**(2) the date, time, and place of the deposition;**

**(3) the deponent's name;**

**(4) the administration of the oath or affirmation to the deponent; and**

**(5) the identity of all persons present.**

**(c) Qualifications and Objections to Translator [Placeholder]**

**(d) Time limitation.** No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation. The court must allow additional time consistent with Rule 192.3 and Rule 192.4 if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

**(e) Conduct during the oral deposition; conferences.** The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. If the deposition is recorded nonstenographically, the deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

**(f) Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.

**(g) Instructions not to answer.** An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.

**(h) Suspending the deposition.** If the time limitations for the deposition have expired or the



deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

(i) **Good faith required.** An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.

#### **199.6 Hearing on Objections.**

Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an *in camera* review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper.

### **RULE 200. DEPOSITIONS UPON WRITTEN QUESTIONS**

#### **200.1 Procedure for Noticing Deposition Upon Written Questions.**

(a) **Who may be noticed; when.** A party may take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions. A notice of intent to take the deposition must be served on the witness and all parties at least 20 days before the deposition is taken. A deposition on written questions may be taken outside the discovery period only by agreement of the parties or with leave of court. The party noticing the deposition must also deliver to the deposition officer a copy of the notice and of all written questions to be asked during the deposition.

(b) **Content of notice.** The notice must comply with Rules 199.1(b), 199.2(b), and 199.5(a)(3). If the witness is an organization, the organization must comply with the requirements of that provision. The notice also may include a request for production of documents as permitted by Rule 199.2(b)(5), the provisions of which will govern the request, service, and response.

### **200.2 Compelling Witness to Attend.**

A party may compel the witness to attend the deposition on written questions by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the deposition notice upon the party's attorney has the same effect as a subpoena served on the witness.

### **200.3 Questions and Objections.**

(a) **Direct questions.** The direct questions to be propounded to the witness must be attached to the notice.

(b) **Objections and additional questions.** Within ten days after the notice and direct questions are served, any party may object to the direct questions and serve cross-questions on all other parties. Within five days after cross-questions are served, any party may object to the cross-questions and serve redirect questions on all other parties. Within three days after redirect questions are served, any party may object to the redirect questions and serve re-cross questions on all other parties. Objections to re-cross questions must be served within five days after the earlier of when re-cross questions are served or the time of the deposition on written questions.

(c) **Objections to form of questions.** Objections to the form of a question are waived unless asserted in accordance with this subdivision.

### **200.4 Conducting the Deposition Upon Written Questions.**

The deposition officer must: take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203. The deposition officer has authority when necessary to summon and swear an interpreter to facilitate the taking of the deposition.

## **RULE 201. DEPOSITIONS IN FOREIGN JURISDICTIONS FOR USE IN TEXAS PROCEEDINGS; DEPOSITIONS IN TEXAS FOR USE IN FOREIGN PROCEEDINGS**

### **201.1 Depositions in Foreign Jurisdictions for Use in Texas Proceedings.**

(a) **Generally.** A party may take a deposition on oral examination or written questions of any person or entity located in another state or a foreign country for use in proceedings in this

State. The deposition may be taken by:

- (1) notice;
- (2) letter rogatory, letter of request, or other such device;
- (3) agreement of the parties; or
- (4) court order.

(b) **By notice.** A party may take the deposition by notice in accordance with these rules as if the deposition were taken in this State, except that the deposition officer may be a person authorized to administer oaths in the place where the deposition is taken.

(c) **By letter rogatory.** On motion by a party, the court in which an action is pending must issue a letter rogatory on terms that are just and appropriate, regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter must:

- (1) be addressed to the appropriate authority in the jurisdiction in which the deposition is to be taken;
- (2) request and authorize that authority to summon the witness before the authority at a time and place stated in the letter for examination on oral or written questions; and
- (3) request and authorize that authority to cause the witness's testimony to be reduced to writing and returned, together with any items marked as exhibits, to the party requesting the letter rogatory.

(d) **By letter of request or other such device.** On motion by a party, the court in which an action is pending, or the clerk of that court, must issue a letter of request or other such device in accordance with an applicable treaty or international convention on terms that are just and appropriate. The letter or other device must be issued regardless of whether any other manner of obtaining the deposition is impractical or inconvenient. The letter or other device must:

- (1) be in the form prescribed by the treaty or convention under which it is issued, as presented by the movant to the court or clerk; and
- (2) must state the time, place, and manner of the examination of the witness.

(e) **Objections to form of letter rogatory, letter of request, or other such device.** In issuing a letter rogatory, letter of request, or other such device, the court must set a time for objecting to the form of the device. A party must make any objection to the form of the device in writing and serve it on all other parties by the time set by the court, or the objection is waived.

(f) **Admissibility of evidence.** Evidence obtained in response to a letter rogatory, letter of request, or other such device is not inadmissible merely because it is not a verbatim transcript, or the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within this State under these rules.

(g) **Deposition by electronic means.** A deposition in another jurisdiction may be taken by telephone, video conference, teleconference, or other electronic means under the provisions of Rule 199.

### **201.2 Depositions in Texas for Use in Proceedings in Foreign Jurisdictions.**

If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State.

## **RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS**

### **202.1 Generally.**

A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:

- (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or
- (b) to investigate a potential claim or suit.

### **202.2 Petition**

The petition must:

- (a) be verified;
- (b) be filed in a proper court of any county:
  - (1) where venue of the anticipated suit may lie, if suit is anticipated; or
  - (2) where the witness resides, if no suit is yet anticipated;
- (c) be in the name of the petitioner;

(d) state either:

(1) that the petitioner anticipates the institution of a suit in which the petitioner may be a party; or

(2) that the petitioner seeks to investigate a potential claim by or against petitioner;

(e) state the subject matter of the anticipated action, if any, and the petitioner's interest therein;

(f) if suit is anticipated, either:

(1) state the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the addresses and telephone numbers for such persons; or

(2) state that the names, addresses, and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons;

(g) state the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and

(h) request an order authorizing the petitioner to take the depositions of the persons named in the petition.

### **202.3 Notice and Service.**

(a) **Personal service on witnesses and persons named.** At least 15 days before the date of the hearing on the petition, the petitioner must serve the petition and a notice of the hearing – in accordance with Rule 21a - on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit.

(b) **Service by publication on persons not named.**

(1) **Manner.** Unnamed persons described in the petition whom the petitioner expects to have interests adverse to petitioner's in the anticipated suit, if any, may be served by publication with the petition and notice of the hearing. The notice must state the place for the hearing and the time it will be held, which must be more than 14 days after the first publication of the notice. The petition and notice must be published once each week for two consecutive weeks in the newspaper of broadest circulation in the county in which the petition is filed, or if no such newspaper exists, in the newspaper of broadest circulation in the nearest county where a newspaper is

published.

(2) **Objection to depositions taken on notice by publication.** Any interested party may move, in the proceeding or by bill of review, to suppress any deposition, in whole or in part, taken on notice by publication, and may also attack or oppose the deposition by any other means available.

(c) **Service in probate cases.** A petition to take a deposition in anticipation of an application for probate of a will, and notice of the hearing on the petition, may be served by posting as prescribed by Section 33(f)(2) of the Probate Code. The notice and petition must be directed to all parties interested in the testator's estate and must comply with the requirements of Section 33(c) of the Probate Code insofar as they may be applicable.

(d) **Modification by order.** As justice or necessity may require, the court may shorten or lengthen the notice periods under this rule and may extend the notice period to permit service on any expected adverse party.

#### **202.4 Order.**

(a) **Required findings.** The court must order a deposition to be taken if, but only if, it finds that:

(1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or

(2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

(b) **Contents.** The order must state whether a deposition will be taken on oral examination or written questions. The order may also state the time and place at which a deposition will be taken. If the order does not state the time and place at which a deposition will be taken, the petitioner must notice the deposition as required by Rules 199 or 200. The order must contain any protections the court finds necessary or appropriate to protect the witness or any person who may be affected by the procedure.

#### **202.5 Manner of Taking and Use.**

Except as otherwise provided in this rule, depositions authorized by this rule are governed by the rules applicable to depositions of non-parties in a pending suit. The scope of discovery in depositions authorized by this rule is the same as if the anticipated suit or potential claim had been filed. A court may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from

any unfair prejudice or to prevent abuse of this rule.

**RULE 203. SIGNING, CERTIFICATION AND USE OF ORAL  
AND WRITTEN DEPOSITIONS**

**203.1 Signature and Changes.**

(a) **Deposition transcript to be provided to witness.** The deposition officer must provide the original deposition transcript to the witness for examination and signature. If the witness is represented by an attorney at the deposition, the deposition officer must provide the transcript to the attorney instead of the witness.

(b) **Changes by witness; signature.** The witness may change responses as reflected in the deposition transcript by indicating the desired changes, in writing, on a separate sheet of paper, together with a statement of the reasons for making the changes. No erasures or obliterations of any kind may be made to the original deposition transcript. The witness must then sign the transcript under oath and return it to the deposition officer. If the witness does not return the transcript to the deposition officer within **30** days of the date the transcript was provided to the witness or the witness's attorney, the witness may be deemed to have waived the right to make the changes.

(c) **Exceptions.** The requirements of presentation and signature under this subdivision do not apply:

- (1) if the witness and all parties waive the signature requirement;
- (2) to depositions on written questions; or
- (3) to non-stenographic recordings of oral depositions.

**203.2 Certification.**

The deposition officer must file with the court, serve on all parties, and attach as part of the deposition transcript or non-stenographic recording of an oral deposition a certificate duly sworn by the officer stating:

(a) that the witness was duly sworn by the officer and that the transcript or non-stenographic recording of the oral deposition is a true record of the testimony given by the witness;

(b) that the deposition transcript, if any, was submitted to the witness or to the attorney for the witness for examination and signature, the date on which the transcript was submitted,

whether the witness returned the transcript, and if so, the date on which it was returned.

(c) that changes, if any, made by the witness are attached to the deposition transcript;

(d) that the deposition officer delivered the deposition transcript or nonstenographic recording of an oral deposition in accordance with Rule 203.3;

(e) the amount of time used by each party at the deposition;

(f) the amount of the deposition officer's charges for preparing the original deposition transcript, which the clerk of the court must tax as costs; and

(g) that a copy of the certificate was served on all parties and the date of service.

### **203.3 Delivery.**

(a) **Endorsement; to whom delivered.** The deposition officer must endorse the title of the action and "Deposition of (name of witness)" on the original deposition transcript (or a copy, if the original was not returned) or the original nonstenographic recording of an oral deposition, and must return:

(1) the transcript to the party who asked the first question appearing in the transcript,  
or

(2) the recording to the party who requested it.

(b) **Notice.** The deposition officer must serve notice of delivery on all other parties.

(c) **Inspection and copying; copies.** The party receiving the original deposition transcript or non-stenographic recording must make it available upon reasonable request for inspection and copying by any other party. Any party or the witness is entitled to obtain a copy of the deposition transcript or non-stenographic recording from the deposition officer upon payment of a reasonable fee.

### **203.4 Exhibits.**

At the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or non-stenographic recording. The person producing the materials may produce copies instead of originals if the party gives all other parties fair opportunity at the deposition to compare the copies with the originals. If the person offers originals rather than copies, the deposition officer must, after the conclusion of the deposition, make copies to be attached to the original deposition transcript or non-stenographic recording, and then return the originals to the person who produced them. The



person who produced the originals must preserve them for hearing or trial and make them available for inspection or copying by any other party upon seven days' notice. Copies annexed to the original deposition transcript or non-stenographic recording may be used for all purposes.

### **203.5 Motion to Suppress.**

A party may object to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer by filing a motion to suppress all or part of the deposition. If the deposition officer complies with Rule 203.3 at least one day before the case is called to trial, with regard to a deposition transcript, or 30 days before the case is called to trial, with regard to a non-stenographic recording, the party must file and serve a motion to suppress before trial commences to preserve the objections.

### **203.6 Use.**

(a) **Non-stenographic recording; transcription.** A non-stenographic recording of an oral deposition, or a written transcription of all or part of such a recording, may be used to the same extent as a deposition taken by stenographic means. However, the court, for good cause shown, may require that the party seeking to use a non-stenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter. The court reporter's transcription must be made from the original or a certified copy of the deposition recording. The court reporter must, to the extent applicable, comply with the provisions of this rule, except that the court reporter must deliver the original transcript to the attorney requesting the transcript, and the court reporter's certificate must include a statement that the transcript is a true record of the non-stenographic recording. The party to whom the court reporter delivers the original transcript must make the transcript available, upon reasonable request, for inspection and copying by the witness or any party.

(b) **Same proceeding.** All or part of a deposition may be used for any purpose in the same proceeding in which it was taken. If the original is not filed, a certified copy may be used. "Same proceeding" includes a proceeding in a different court but involving the same subject matter and the same parties or their representatives or successors in interest. A deposition is admissible against a party joined after the deposition was taken if:

- (1) the deposition is admissible pursuant to Rule 804(b)(1) of the Rules of Evidence, or
- (2) that party has had a reasonable opportunity to redepose the witness and has failed

to do so.

(c) **Different proceeding.** Depositions taken in different proceedings may be used as permitted by the Rules of Evidence.

## Physical and Mental Examinations: Tex. R. Civ. P. 204

### RULE 204. PHYSICAL AND MENTAL EXAMINATION

#### 204.1 Motion and Order Required.

(a) **Motion.** A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to:

- (1) submit to a physical or mental examination **by a suitably licensed examiner**; or
- (2) produce for such examination a person in the other party's custody, conservatorship or legal control.

(b) **Service.** The motion and notice of hearing must be served on the person to be examined and all parties.

(c) **Requirements for obtaining order.** The court may issue an order for examination only for good cause shown and only in the following circumstances:

- (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or
- (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

(d) **Requirements of order.** The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by who **will perform it.**

#### 204.2 Examiner's Report.

(a) **Right to report by the party or person examined.** Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist. **The court on motion may limit delivery of a report on such terms as are just.**

(b) **Contents of report.** The written report must set out in detail the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition.

**(c) Request by the moving party.** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. The court on motion may limit delivery of a report on such terms as are just.

**(d) Waiver of privilege.** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

**(e) Failure to deliver a report.** If an examiner fails or refuses to make a report the court may exclude the testimony if offered at the trial.

**(f) Agreements; relationship to other rules.** This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

#### **204.3 Effect of No Examination.**

If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination.

#### **204.4 Cases Arising Under Titles II or V, Family Code.**

In cases arising under Family Code Titles II or V, the court may - on its own initiative or on motion of a party - appoint:

(a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert;

(b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.

**204.5 Definitions.**

For the purpose of this rule, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist.

## Discovery from Non-Parties: Tex. R. Civ. P. 205

### **RULE 205. DISCOVERY FROM NON-PARTIES**

#### **205.1 Forms of Discovery; Subpoena Requirement.**

A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:

- (a) an oral deposition;
- (b) a deposition on written questions;
- (c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and
- (d) a request for production of documents and tangible things under this rule.

#### **205.2 Notice.**

A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery. A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

#### **205.3 Production of Documents and Tangible Things Without Deposition.**

(a) **Notice; subpoena.** A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.

(b) **Contents of notice.** The notice must state:

- (1) the name of the person from whom production or inspection is sought to be compelled;

(2) a reasonable time and place for the production or inspection; and

(3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

(c) **Requests for production of medical or mental health records of other non-parties.** If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2).

(d) **Response.** The nonparty must respond to the notice and subpoena in accordance with Rule 176.6.

(e) **Custody, inspection and copying.** The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.

(f) **Cost of production.** A party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.

## Sanctions, including spoliation: Tex. R. Civ. P. 215

### RULE 215. ABUSE OF DISCOVERY; SANCTIONS

#### 215.1 Motion for Sanctions or Order Compelling Discovery.

A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

a) **Appropriate court.** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty may be made in any district court where the discovery is or will be taken if different from the district where the action is pending. ~~On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.~~

#### (b) Motion.

(1) To Compel Disclosure. If a party fails to make a disclosure required by Rule 194, any other party may move to compel disclosure and for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such disclosure.

(2) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, response, designation, production, or inspection. This motion may be made if:

(i) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or

(ii) if a party, or other deponent, or a person designated to testify on behalf of a party or other

Parties must go to the court where case is pending; nonparties to the district where discovery taken if different from where action pending. NOTE: This allows nonparties who have to produce documents only to go to local court.

Changed now that adopting initial disclosures. Used the federal rule's division between failure to make a disclosure and failure to respond to a request. This changes this rule substantively to allow for sanctions (other than fees) without a previous order compelling discovery ONLY when the party fails to make initial disclosures.

The second portion of (b)(1) has been moved from elsewhere in the current rule.



deponent fails:

(A) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(B) to answer a question propounded or submitted upon oral examination or upon written questions; or

(iii) if a party fails:

(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or

(B) to answer an interrogatory submitted under Rule 197; or

(C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or

(D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196.

~~the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.~~

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.

c) **Evasive or incomplete answer.** For purposes of this

subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(d) **Disposition of motion to compel: award of expenses.** If the motion is granted, the court ~~shall~~must, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

(e) **Providing person's own statement.** If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

Note TX uses "may" for award of sanctions after denial of motion. Federal Rules say "must".

**215.2 Failure to Comply with Order or with Discovery Request.**

(a) **Sanctions by court in district where deposition is taken.** If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) **Sanctions by Court in Which Action is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

- (1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;
- (2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;
- (3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;
- (6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the

failure to obey any orders except an order to submit to a physical or mental examination;

(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

**c) Sanction against nonparty for violation of Rules 196.7 or 205.3.** If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.

**215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.**

If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.

**215.4 Failure to Comply with Rule 198**

(a) **Motion.** A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or

Note 215.4 could be included in Rule 198.

objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion.

**(b) Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

**215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses.**

**(a) Failure of party giving notice to attend.** If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

**(b) Failure of witness to attend.** If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in

attending, including reasonable attorney fees.

### **215.6 Exhibits to Motions and Responses.**

Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

### **215.7 Duty to Preserve Electronically Stored Information; Sanctions**

**(a) Duty.** A party has a duty to take reasonable and proportional steps to preserve electronically stored information relevant to the dispute or lawsuit after:

- (1) Service of a citation;
- (2) Service of a notice that complies with 215.7(b); or
- (3) From the time a claim of privilege under 192.5(a) arises.

**(b) Notice.** A written notice to preserve electronically stored information or of litigation triggers the duty described in 215.7(a). The notice shall state with specificity the claim or claims of the anticipated action. A party receiving such notice must take reasonable and proportional steps to preserve electronically stored information, which may differ from steps that the party seeking preservation demands.

**(c) Failure to Preserve Electronically Stored Information.** A court may order sanctions described in 215.7(d) if electronically stored information that should have been preserved is lost because:

- (1) a party failed to take reasonable steps to preserve it;
- (2) it cannot be restored or replaced through additional discovery; and
- (3) the trial court finds prejudice to another party from loss of the information.

**(d) Sanctions.**

- (1) the party may present evidence concerning the loss of the evidence;
- (2) the court may order measures no greater than necessary to cure the prejudice but must not comment

on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence; and

(3) only upon the trial court finding that the party acted with the intent to deprive another party of the information's use in the litigation, the trial court may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(e) **Safe harbor.** Unless a party is subject to the duty to preserve described in 215.7(a), a party's management of electronically stored information in accordance with its usual course of business or ordinary practices does not constitute an intent to deprive another party the information's use in the litigation for purposes of 215.7(d)(3).

**215.8. Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Texas needs this.

# Tab D



Tex. R. Civ. P. 215 <u>(with redline suggestions)</u>	Fed. R. Civ. P. 37	Issues
RULE 215. ABUSE OF DISCOVERY; SANCTIONS	RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS	
<p><b>215.1 Motion for Sanctions or Order Compelling Discovery.</b>  A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:</p>	<p><b>(a) Motion for an Order Compelling Disclosure or Discovery.</b>  <b>(1) <i>In General.</i></b> On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.</p>	
<p>a) <b>Appropriate court.</b> <u>A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty may be made in any district court where the discovery is or will be taken if different from the district where the action is pending. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any</u></p>	<p><b>(2) <i>Appropriate Court.</i></b> A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty <del>must</del> <u>may</u> be made in <del>the</del> <u>any district</u> court where the discovery is or will be taken <u>if different from the district where the action is pending.</u></p>	<p><b>I prefer the Federal rule as redlined— parties must go to the court where case is pending; nonparties to the district where discovery taken if different from where action pending. NOTE: This allows nonparties who have to produce documents only to go to local court.</b></p>

<p><del>district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.</del></p>		
<p><b>(b) Motion.</b></p> <p><u>(1) <i>To Compel Disclosure.</i> If a party fails to make a disclosure required by Rule 194, any other party may move to compel disclosure and for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such disclosure.</u></p> <p><u>(2) <i>To Compel a Discovery Response.</i> A party seeking discovery may move for an order compelling an answer, response, designation, production, or inspection. This motion may be made if:</u></p> <p><u>(i) If a party or other deponent which is a corporation or other</u></p>	<p><b>(3) Specific Motions.</b></p> <p><b>(A) <i>To Compel Disclosure.</i></b> If a party fails to make a disclosure required by Rule <del>194-26(a)</del><sup>xx</sup>, any other party may move to compel disclosure and for appropriate sanctions.</p> <p><b>(B) <i>To Compel a Discovery Response.</i></b> A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:</p> <p><b>(i)</b> a deponent fails to answer a question asked under Rule 30 or 31;</p> <p><b>(ii)</b> a corporation or other entity fails to</p>	<p><b>We need to change this rule now that we are adopting initial disclosures. I have used the federal rule’s division between failure to make a disclosure and failure to respond to a request. This changes this rule substantively to allow for sanctions (other than fees) without a previous order compelling discovery ONLY when the party fails to make initial disclosures.</b></p> <p><b>The highlighted portion of (b)(1) has been moved from elsewhere in the current rule.</b></p>

entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or ~~(ii)~~ if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(A) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(B) to answer a question propounded or submitted upon oral examination or upon written questions; or

~~(3iii)~~ if a party fails:

(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or

(B) to answer an interrogatory submitted under Rule 197; or

(C) to serve a written response to a request for inspection submitted under Rule 196, after

make a designation under Rule 30(b)(6) or 31(a)(4);

**(iii)** a party fails to answer an interrogatory submitted under Rule 33; or

**(iv)** a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

<p>proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196.;</p> <p><del>the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.</del></p>		
<p>When taking a deposition on oral examination, the proponent of the question may complete or</p>	<p><b>(C) Related to a Deposition.</b> When taking an oral deposition, the party asking a question may complete or</p>	

<p>adjourn the examination before he applies for an order.</p>	<p>adjourn the examination before moving for an order.</p>	
<p>If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.</p>		
<p>c) <b>Evasive or incomplete answer.</b> For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.</p>	<p><b>(4) Evasive or Incomplete Disclosure, Answer, or Response.</b> For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.</p>	
<p>(d) <b>Disposition of motion to compel: award of expenses.</b> If the motion is granted, the court <del>must</del><u>shall</u>, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other</p>	<p><b>(5) Payment of Expenses; Protective Orders.</b>  <b>(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).</b> If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct</p>	

<p>circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.</p>	<p>necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:</p> <ul style="list-style-type: none"> <li>(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;</li> <li>(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or</li> <li>(iii) other circumstances make an award of expenses unjust.</li> </ul>	
<p>If the motion is denied, the court may, after opportunity for hearing, require the</p>	<p><b>(B) <i>If the Motion Is Denied.</i></b> If the motion is denied, the court may issue any protective</p>	<p><b>TX uses "may" for award of sanctions after denial of motion. Feds say "must"</b></p>

<p>moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.</p>	<p>order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.</p>	
<p>If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.</p> <p>In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.</p>	<p><b>(C) <i>If the Motion Is Granted in Part and Denied in Part.</i></b> If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.</p>	
<p><b>(e) Providing person's own statement.</b> If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h),</p>	<p><i>(No directly related provision)</i></p>	

<p>the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.</p>		
<p><b>215.2 Failure to Comply with Order or with Discovery Request.</b>  <b>(a) Sanctions by court in district where deposition is taken.</b> If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.</p>	<p><b>(b) Failure to Comply with a Court Order.</b>  <b>(1) Sanctions Sought in the District Where the Deposition Is Taken.</b> If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.</p>	
<p><b>(b) Sanctions by Court in Which Action is Pending.</b> If a party or an officer, director,</p>	<p><b>(b) . . .</b></p>	



<p>or managing agent of a party or a person designated under <a href="#">Rules 199.2(b)(1)</a> or <a href="#">200.1(b)</a> to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204<sup>1</sup> or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:</p> <p>(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;</p> <p>(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;</p> <p>(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;</p>	<p><b>(2) Sanctions Sought in the District Where the Action Is Pending.</b></p> <p><b>(A) For Not Obeying a Discovery Order.</b> If a party or a party's officer, director, or managing agent--or a witness designated under <a href="#">Rule 30(b)(6)</a> or <a href="#">31(a)(4)</a>--fails to obey an order to provide or permit discovery, including an order under <a href="#">Rule 26(f)</a>, <a href="#">35</a>, or 37(a), the court where the action is pending may issue further just orders. They may include the following:</p> <p>(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;</p> <p>(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;</p> <p>(iii) striking pleadings in whole or in part;</p> <p>(iv) staying further proceedings until the order is obeyed;</p> <p>(v) dismissing the action or proceeding in whole or in part;</p>	
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<p>(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;</p> <p>(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;</p> <p>(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;</p> <p>(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.</p>	<p>(vi) rendering a default judgment against the disobedient party; or</p> <p>(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.</p> <p><b>(B) For Not Producing a Person for Examination.</b> If a party fails to comply with an order under <a href="#">Rule 35(a)</a> requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.</p> <p><b>(C) Payment of Expenses.</b> Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.</p>	
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<p>(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.</p>		
	<p><b>(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.</b>  <b>(1) Failure to Disclose or Supplement.</b> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:  <b>(A)</b> may order payment of the reasonable expenses,</p>	<p>Exclusion sanction is in Texas Rule 193.6.</p>

	<p>including attorney’s fees, caused by the failure; <b>(B)</b> may inform the jury of the party’s failure; and <b>(C)</b> may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).</p>	
<p><b>c) Sanction against nonparty for violation of Rules 196.7 or 205.3.</b> If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.</p>	<p><i>(No directly related provision)</i></p>	
<p><b>215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.</b> If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by</p>	<p><i>(No directly related provision)</i></p>	

<p>paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.</p>		
<p><b>215.4 Failure to Comply with Rule 198</b>  <b>(a) Motion.</b> A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion.  <b>(b) Expenses on failure to admit.</b> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the</p>	<p><b>(2) Failure to Admit.</b> If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making</p>	<p><b>215.4 could be included in Rule 198</b></p>

<p>reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.</p>	<p>that proof. The court must so order unless:</p> <ul style="list-style-type: none"> <li>(A) the request was held objectionable under Rule 36(a);</li> <li>(B) the admission sought was of no substantial importance;</li> <li>(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or</li> <li>(D) there was other good reason for the failure to admit.</li> </ul>	
<p><b>215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses.</b></p> <p><b>(a) Failure of party giving notice to attend.</b> If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.</p> <p><b>(b) Failure of witness to attend.</b> If a party gives notice of the taking of an oral</p>	<p><b>(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.</b></p> <p><b>(1) In General.</b></p> <p><b>(A) Motion; Grounds for Sanctions.</b> The court where the action is pending may, on motion, order sanctions if:</p> <ul style="list-style-type: none"> <li>(i) a party or a party's officer, director, or managing agent—or a person designated</li> </ul>	

deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

under Rule 30(b)(6) or 31(a)(4)— fails, after being served with proper notice, to appear for that person’s deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

**(B) Certification.** A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

**(2) Unacceptable Excuse for Failing to Act.** A failure described in Rule 37(d)(1)(A) is not excused on the

	<p>ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).</p> <p><b>(3) Types of Sanctions.</b> Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.</p>	
<p><b>215.6 Exhibits to Motions and Responses.</b> Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.</p>	<i>(No directly related provision)</i>	
<u><b>215.7</b></u>	(e) Failure to Preserve Electronically Stored Information. [addressed separately]	
<i>(No directly related provision)</i>	<b>(f) Failure to Participate in Framing a Discovery Plan.</b> If a party or its attorney fails to participate in good faith in	<b>Texas needs this.</b>



**215.8. Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

<p><i>(No directly related provision)</i></p>	<p><b>(f) Failure to Participate in Framing a Discovery Plan.</b> If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.</p>	
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# Tab E

## **215.7 Duty to Preserve Electronically Stored Information; Sanctions**

(a) **Duty.** A party has a duty to take reasonable and proportional steps to preserve electronically stored information relevant to the dispute or lawsuit after:

- (1) Service of a citation;
- (2) Service of a notice that complies with 215.7(b); or
- (3) From the time a claim of privilege under 192.5(a) arises.

(b) **Notice.** A written notice to preserve electronically stored information or of litigation triggers the duty described in 215.7(a). The notice shall state with specificity the claim or claims of the anticipated action. A party receiving such notice must take reasonable and proportional steps to preserve electronically stored information, which may differ from steps that the party seeking preservation demands.

(c) **Failure to Preserve Electronically Stored Information.** A court may order sanctions described in 215.7(d) if electronically stored information that should have been preserved is lost because:

- (1) a party failed to take reasonable steps to preserve it;
- (2) it cannot be restored or replaced through additional discovery; and
- (3) the trial court finds prejudice to another party from loss of the information.

(d) **Sanctions.**

- (1) the party may present evidence concerning the loss of the evidence;
- (2) the court may order measures no greater than necessary to cure the prejudice but must not comment on the failure to preserve the evidence or instruct the jury that a duty to preserve the evidence existed or the consequences of the failure to produce the evidence; and
- (3) only upon the trial court finding that the party acted with the intent to deprive another party of the information's use in the litigation, the trial court may:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.

(e) **Safe harbor.** Unless a party is subject to the duty to preserve described in 215.7(a), a party's management of electronically stored information in accordance with its usual course of business or ordinary practices does not constitute an intent to deprive another party the information's use in the litigation for purposes of 215.7(d)(3).

# Tab F

DUTY TO PRESERVE ELECTRONICALLY STORED INFORMATION; SANCTIONS

(a) DUTY.

- 1) Prior to service of a citation or notice as specified in subsection (b) of this Rule, a party's duty regarding electronically stored information is to not act with the intent to deprive another actual or potential party to a lawsuit of the use of that information in the lawsuit that the party knows about or reasonably anticipates. Absent service of a citation or notice as specified in subsection (b) of this Rule, a party may manage electronically stored information in accordance with its usual course of business or ordinary practices and such actions do not constitute an intent to deprive another party of the use of the information in any lawsuit.
- 2) After service of a citation or notice that complies with subsection (b) of this Rule, a party has a duty to take reasonable and proportional efforts to preserve electronically stored information relevant to the dispute or lawsuit in compliance with subsections (b)(1) and (b)(2) of this Rule.
- 3) In the event of any dispute, the party seeking discovery of electronically stored information has the burden to prove the existence of a duty to preserve the specific electronically stored information at issue under this Rule.

(b) NOTICE.

- 1) Notwithstanding its usual course of business, a party must take reasonable and proportional steps to preserve electronically stored information after:
  - A. Service of a citation; or
  - B. Service of a notice to preserve electronically stored information. The notice shall be conspicuously styled "NOTICE TO PRESERVE ELECTRONICALLY STORED INFORMATION," and it shall state with specificity the claim or claims of the anticipated action. The notice shall be served on the party or the party's designated agent for service of process as provided by law.
- 2) A party's duty to preserve electronically stored information under this subsection is limited to electronically stored information in its possession, custody, or control that is directly relevant to the claim or claims identified in the citation or notice and any known or reasonably anticipated defenses or counterclaims concerning the asserted claim or claims.
- 3) The Notice in subsection (b)(1)(B) may contain specific requests to preserve certain sources or types of electronically stored information but such identifications or demands are not determinative of the scope of any duty to preserve; the party's duty to preserve remains bounded by reasonableness and proportionality and the party obligated to preserve electronically stored information is in the best position to

determine the scope, means, methods and manners of reasonable and proportional preservation.

(c) AVAILABLE RELIEF.

- 1) A party may petition the court for relief from a notice to preserve electronically stored information. The court shall grant such relief if:
  - A. The notice was not properly served;
  - B. The notice failed to state with specificity the claim or claims of the anticipated action; or
  - C. The notice is otherwise unduly burdensome as may be determined by reference to Rules 192 and 196.
- 2) Any party may petition the court for relief regarding the scope of preservation required in connection with service of a citation or a notice to preserve electronically stored information. The court shall grant relief if:
  - A. The party seeking preservation reasonably has made demands regarding the scope or preservation that are not reasonable or proportional and the party subject to the duty to preserve has a reasonable belief that a dispute regarding preservation needs clarification
  - B. The party seeking preservation reasonably has actual knowledge that the party subject to the duty to preserve is not taking reasonable and proportional efforts to preserve relevant electronically stored information.
- 3) A motion for relief under subsections (c)(1) and (2)(A) is not necessary if a party takes reasonable and proportional steps to preserve electronically stored information even if those steps are different from those demanded by a party seeking preservation.
- 4) A motion for relief under subsections (c)(2)(B) is not necessary for a party to later assert that a party with the duty to preserve relevant electronically stored information failed to take reasonable steps under subsection (d).
- 5) A motion for relief under this subsection may be filed in a proper court of any county where venue of the anticipated suit may lie or where the actual lawsuit has been filed.
- 3) The filing of a petition does not constitute waiver of any otherwise valid objections to personal jurisdiction in subsequent litigation.

(d) SANCTIONS. If electronically stored information that should have been preserved in accordance with this Rule is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court, upon finding prejudice to another party from the loss of the information:

- 1) May order measures no greater than necessary to cure the prejudice; or
- 2) May, only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
  - A. Presume that the lost information was unfavorable to the party;
  - B. Instruct the jury that it may or must presume the information was unfavorable to the party; or
  - C. Dismiss the action or enter a default judgment if lesser remedies are inadequate to cure the prejudice.



# Tab G

## MEMORANDUM

To: Texas Supreme Court Advisory Committee  
From: Judicial Administration Subcommittee  
Re: Ex Parte Communications in Problem-Solving Courts  
Date: May 3, 2019

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### **OVERVIEW:**

The Judicial Administration Subcommittee has been asked to consider whether Canon 3 of the Code of Judicial Conduct should be amended to permit ex parte communications in problem-solving courts. There are differing views on the Subcommittee as to whether any amendment or comment is proper and what the wording of any comment should be. Subject to that caveat, the Subcommittee presents, for discussion by the Texas Supreme Court Advisory Committee, the proposed comment at page 4 of this memorandum (which also reflects alternate proposals).

Background information is provided at pages 1-3 of this memorandum, including the referenced attachments.

### **BACKGROUND:**

#### **1. Excerpt from referral letter from Chief Justice Hecht:**

**Ex Parte Communications in Problem-Solving Courts.** In the [email below], Hon. Robert Anchondo proposes adding a comment to or amending Canon 3 of the Code of Judicial Conduct to permit ex parte communications in problem-solving courts. The following article may inform the Committee's work: Brian D. Shannon, *Specialty Courts, Ex Parte Communications, and the Need to Revise the Texas Code of Judicial Conduct*, 66 Baylor L. Rev. 127 (2014).

- The referenced law review article is attached at Tab A.

#### **2. Email from Hon. Robert Anchondo:**

Greetings Jaclyn, pursuant to our conversation I am respectfully requesting that Canon 3 (B) (8) (e) be modified or a comment be included as follows to address ex parte communication issues facing problem solving courts: **“A judge may initiate, permit, or consider ex parte communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, DWI treatment courts, veterans courts, juvenile courts. In this capacity, the judge may assume a more interactive role with the parties, treatment providers, community supervision officers, law enforcement officers, social workers, and others”**. Regulation of ex parte contacts in the drug court context is evolving. Under the 1990 version of the ABA Model Code of Judicial Conduct, ex parte communications were prohibited, except in limited situations involving administrative purposes, scheduling, or emergencies. The 2007 ABA Model Code of Judicial Conduct dramatically changes the ethical landscape by permitting ex parte

communications in drug and other problem solving courts. Rule 2.9 (A) (5) of the 2007 Model Code provides that a judge may “initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.” The comment to this provision states: “A judge may initiate, permit, or consider ex parte communications when authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, DWI problem courts or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.” Please forward this information to whomever it may be necessary to address this issue and hopefully resolve performing our duties of Judicial Office Impartially and Diligently. Thank you for your attention.

**3. Memorandum prepared by Andrew Van Osselaer reflecting feedback from specialty court judges, attached at Tab B.**

**4. Pending legislation, attached at Tab C.**

**5. Gov’t Code Sections 121.001 and 121.002, attached at Tab D.**

**6. Excerpt from Canon 3 of Texas Code of Judicial Conduct:**

Performing the duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age,

sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) 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:

(a) communications concerning uncontested administrative or uncontested procedural matters;

(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;

(c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an ex parte communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

### **PROPOSED COMMENT TO CANON 3:**

It is not a violation of the prohibition on ex parte communications for a judge, when serving on a statutory specialty court, to initiate, permit or consider ex parte communications insofar as the communications are reasonably necessary to fulfill the court's functions and the specialty court's procedures contemplate those communications.<sup>1</sup> If such ex parte communications occur, then the judge, prior to presiding over a contested matter, should consider whether recusal is proper under Canon 3, Texas Rule of Civil Procedure 18b, or other Texas law.<sup>2</sup>

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<sup>1</sup> Alternate proposal: Substitute the “reasonably necessary” language with: “the type of ex parte communication] specifically authorized and approved by the rules governing the specialty court as adopted by the Specialty Courts Advisory Council and approved by the Texas Judicial Council. (See Tex. Gov’t Code 121.002).”

<sup>2</sup> Alternate proposal: This comment does not prevent a judge from voluntarily recusing from contested matters following ex parte communications. A permissible ex parte communication is not a ground to force recusal of a judge.

SPECIALTY COURTS, EX PARTE COMMUNICATIONS, AND THE NEED TO  
REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

Brian D. Shannon\*

I.	Introduction.....	128
II.	Specialty Courts and Current Shortcomings in the Texas Code of Judicial Conduct.....	131
III.	The ABA Model Approach.....	132
IV.	A Review from Other States .....	135
	A. Case Law and Ethics Opinions.....	135
	1. New Hampshire .....	136
	2. Idaho .....	138
	3. Minnesota.....	139
	4. Kentucky.....	140
	5. Tennessee.....	141
	B. State Codes of Judicial Conduct.....	149
	1. Tennessee.....	149
	2. Idaho .....	150
	3. Additional States.....	152

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\*Charles “Tex” Thornton Professor of Law, Texas Tech University School of Law; B.S., summa cum laude, Angelo State University, 1979; J.D., with high honors, The University of Texas School of Law, 1982. Professor Shannon serves on the board of directors for StarCare Specialty Health System (formerly known as Lubbock Regional Mental Health & Mental Retardation Center), is a past chair of the State Bar of Texas Committee on People with Disabilities, and from 2003-11 was a gubernatorial appointee to the Texas Governor’s Committee on People with Disabilities. This Article represents the opinions of the author, however, and does not necessarily reflect the views of these other organizations. Shannon also served on the Texas legislative task force that re-wrote the Texas statutes pertaining to competency to stand trial, and he is the co-author of multiple editions of a book on Texas criminal procedure as it relates to persons diagnosed with mental illness. Brian D. Shannon & Daniel H. Benson, *Texas Criminal Procedure and the Offender with Mental Illness: An Analysis and Guide* (NAMI-Texas 4th ed. 2008). For their comments and guidance, the author would like to thank Judge Ruben Reyes, who chairs the Texas Governor’s Criminal Justice Advisory Council and is the presiding judge of the Lubbock County, Texas, Adult Drug Court, and Judge Oscar Kazen, who is the Associate Probate Court Judge for Bexar County, Texas, and presides over a specialty court that oversees San Antonio’s Involuntary Outpatient Civil Commitment Program.

V.	Recommendations to Revise the Texas Code of Judicial Conduct.....	158
VI.	Conclusion .....	163

## I. INTRODUCTION

As of January 2013, there were roughly “140 operational specialty courts in Texas.”<sup>1</sup> These specialty courts include an array of focuses, “such as adult and juvenile drug courts, veteran courts, DWI courts, . . . family drug courts,” and mental health courts.<sup>2</sup> A listing of Texas specialty courts that is maintained by the Texas Governor’s office includes the foregoing types of specialty courts, as well as reentry courts, DWI hybrid courts, co-occurring disorder courts, and prostitution courts.<sup>3</sup> These courts differ from the usual adjudicatory model. For example, the first of the “Ten Key Components” of drug courts is the following: “Drug courts integrate alcohol and other drug treatment services with justice system case processing.”<sup>4</sup> Going beyond adjudication and punishment, the “mission of drug courts is to stop the abuse of alcohol and other drugs and related criminal activity.”<sup>5</sup> Correspondingly, the following characteristics are typical of “the vast majority of mental health courts”:<sup>6</sup>

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<sup>1</sup>The Governor of the State of Tex. Crim. Justice Div., *Criminal Justice Advisory Council Report: Recommendations for Texas Specialty Courts*, at 1, OFFICE OF THE GOVERNOR - RICK PERRY, [http://governor.state.tx.us/files/cjd/CJAC\\_Report\\_January\\_2013.pdf](http://governor.state.tx.us/files/cjd/CJAC_Report_January_2013.pdf) (last visited Nov. 23, 2013) [hereinafter CJAC Report]. A listing maintained by the Texas Governor’s office of all such specialty courts in Texas identified a total of 140 specialty courts as of August 1, 2013. See The Governor of the State of Tex. Crim. Justice Div., *Texas Specialty Courts*, OFFICE OF THE GOVERNOR—RICK PERRY (Aug. 1, 2013), available at [http://governor.state.tx.us/files/cjd/Specialty\\_Courts\\_By\\_County\\_August\\_2013.pdf](http://governor.state.tx.us/files/cjd/Specialty_Courts_By_County_August_2013.pdf) [hereinafter Specialty Courts List].

<sup>2</sup>CJAC Report, *supra* note 1, at 1; see also The Governor of the State of Tex., Executive Order RP 77—Relating to the reauthorization of the operation of the Governor’s Criminal Justice Advisory Council, 37 Tex. Reg. 2806 (2012), available at <http://governor.state.tx.us/news/executive-order/16995/>.

<sup>3</sup>Specialty Courts List, *supra* note 1, at 1.

<sup>4</sup>BUREAU OF JUSTICE ASSISTANCE, NCJ 205621, *Defining Drug Courts: The Key Components*, at 1 (2004), available at <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf>.

<sup>5</sup>*Id.*

<sup>6</sup>COUNCIL OF STATE GOV’TS JUSTICE CENTER, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*, at vii (2007), BUREAU OF JUSTICE ASSISTANCE - HOME, [https://www.bja.gov/Publications/MHC\\_Essential\\_Elements.pdf](https://www.bja.gov/Publications/MHC_Essential_Elements.pdf) (last visited Nov. 23, 2013).

- A specialized court docket, which employs a problem-solving approach to court processing in lieu of more traditional court procedures for certain defendants with mental illnesses.
- Judicially supervised, community-based treatment plans for each defendant participating in the court, which a team of court staff and mental health professionals design and implement.
- Regular status hearings at which treatment plans and other conditions are periodically reviewed for appropriateness, incentives are offered to reward adherence to court conditions, and sanctions are imposed on participants who do not adhere to conditions of participation.
- Criteria defining a participant's completion of (sometimes called graduation from) the program.<sup>7</sup>

The judge's role in a specialty court differs from that of the traditional judicial role.<sup>8</sup> As a specialty court judge, "the judge's role is less that of a traditional 'umpire,' than a problem-solver, who coordinates court proceedings with one or more parties and a range of service providers, including social workers, psychologists, drug, alcohol, employment, or family counselors, and others."<sup>9</sup> As one mental health court judge described, "Being a judge in a problem-solving court looks very different from what has been the judge's traditional role. A judge in a problem-solving court becomes the leader of a team rather than a dispassionate arbitrator."<sup>10</sup> In that regard, "the collaborative nature of drug court decision

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<sup>7</sup>*Id.* For further discussion of specialty courts generally (often called "therapeutic" or "problem-solving" courts); see, e.g., JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS (2002), available at <http://www.courtinnovation.org/sites/default/files/JudgesProblemSolvingCourts1.pdf>.

<sup>8</sup>See CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 5.03(7), 5-23 (5th ed. 2013).

<sup>9</sup>*Id.*

<sup>10</sup>Louraine C. Arkfeld, *Ethics for the Problem-Solving Court Judge: The New ABA Model Code*, 28 JUST. SYS. J. 317, 317 (2007). Judge Arkfeld presided over both a mental health court and a homeless court; see Court Leadership Institute of Arizona, *Faculty*, ARIZONA JUDICIAL BRANCH, available at <http://www.azcourts.gov/clia/Faculty.aspx> & <http://www.azcourts.gov/clia/>



making (seen most clearly in staffings) may undermine perceptions of judicial independence and impartiality.”<sup>11</sup> In addition, because the judge—as team leader—will be coordinating information and discussion between multiple members of the specialty court team, “in such a capacity, *ex parte* communications with these various participants can be difficult to avoid.”<sup>12</sup> Correspondingly, “a blanket prohibition on *ex parte* communication” could thwart the specialty court judge’s efforts at addressing the “underlying causes of legal problems giving rise to the cases they adjudicate” such as substance abuse or mental illness.<sup>13</sup> In addition, exposure to *ex parte* communications and extensive involvement in staffings can lead to concerns regarding a specialty court judge’s impartiality in any subsequent judicial proceedings—particularly in situations in which an individual has been terminated from the specialty court program.<sup>14</sup>

The Texas Code of Judicial Conduct does not include any provisions that recognize the new role of judges in specialty courts.<sup>15</sup> This Article will discuss the shortcomings in this regard in the Texas Code of Judicial Conduct, particularly with regard to *ex parte* communications; the approach set forth in the American Bar Association’s 2007 Model Code of Judicial Conduct; and the law in several other states.<sup>16</sup> Finally, the Article will propose revisions to the Texas Code of Judicial Conduct pertaining to *ex parte* communications and specialty courts, and the related topic of disqualifications or recusals.<sup>17</sup>

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Faculty/LorraineArkfeld.aspx.

<sup>11</sup>William G. Meyer, *Ethical Obligations of Judges in Drug Courts*, THE DRUG COURT JUDICIAL BENCHMARK 197 (Douglas B. Marlowe & William G. Meyer eds., Nat’l Drug Court Inst. 2011).

<sup>12</sup>GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (italics in original). At specialty court team staffings, “the judge in the problem-solving court now hears all kinds of information that a judge would not normally hear, nor would the information necessarily be considered relevant to the determination of the facts or law of the case at hand.” Arkfeld, *supra* note 10, at 317.

<sup>13</sup>GEYH ET AL., *supra* note 8, § 5.03(7), at 5-23 (emphasis in original).

<sup>14</sup>*See Meyer, supra* note 11, at 205–06 (discussing possible disqualification issues, and observing that a “judge should disclose on the record information that he or she believes the parties or their lawyers might consider relevant to the question of disqualification, even if he or she believes that there is no real basis for disqualification”).

<sup>15</sup>TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. B (West 2005 & Supp. 2013).

<sup>16</sup>*See generally* ABA MODEL CODE OF JUD. CONDUCT (2011).

<sup>17</sup>There are other ethical issues that can arise with regard to specialty courts that are beyond the scope of this Article. For an excellent overview discussion of ethical issues in drug courts that

## II. SPECIALTY COURTS AND CURRENT SHORTCOMINGS IN THE TEXAS CODE OF JUDICIAL CONDUCT

The Texas Code of Judicial Conduct does not mention specialty courts.<sup>18</sup> Indeed, although a January 2005 report of the Texas Supreme Court's Task Force on the Code of Judicial Conduct included recommendations for several amendments to the Texas Code, that report also did not address specialty courts.<sup>19</sup> Accordingly, the current Texas Code presumptively governs judges in both traditional courts, as well as specialty courts.<sup>20</sup> There are several sections relevant to ex parte communications and disqualifications or recusals. First, Canon 3(B)(8) places significant limits on the judge's consideration of ex parte communications.<sup>21</sup> Although the current Canon includes an exception for ex parte communications that are "expressly authorized by law," the Texas Code, however, does not further define the phrase "authorized by law."<sup>22</sup> Does it extend to local rules establishing specialty courts, or is it limited to statutes, formally adopted administrative regulations, and court opinions? As will be discussed below, in contrast to the Texas Code, the 2007 ABA Model Code provides further guidance in this regard with respect to specialty courts.<sup>23</sup> Similar changes are warranted for the Texas Code.

Another issue concerning specialty courts that should be considered and addressed pertains to disqualifications or recusals. Canon 3 of the Texas Code requires a judge to perform the duties of office "impartially and diligently."<sup>24</sup> Specifically, subsection (B)(1) of Canon 3 requires that a judge not decide a matter "in which disqualification is required or recusal is

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would be pertinent to any specialty court, *see Meyer, supra* note 11; *see also* GEYH ET AL., *supra* note 8, § 10.05(3), at 10-27 (highlighting situations in which specialty court judges had "associated with criminal defendants outside of court in ways that appear improper").

<sup>18</sup> *See generally* TEX. CODE JUD. CONDUCT.

<sup>19</sup> *See* Tex. Supreme Court Task Force on the Code of Jud. Conduct, *Final Report and Recommendations* (2005), available at <http://www.scjc.state.tx.us/pdf/rpts/cjcfinalreport.pdf> (recommending several amendments to the Code). The Texas Supreme Court has never adopted any of the Task Force's recommendations for Code amendments. *See* Kevin Dubose, *The Development of Judicial Ethics in Texas*, 1 State Bar of Tex. Prof. Dev. Program, *The History of Texas Supreme Court Jurisprudence Course* 13, 13.6 (2013).

<sup>20</sup> TEX. CODE JUD. CONDUCT, Preamble.

<sup>21</sup> *Id.* Canon 3(B)(8).

<sup>22</sup> *Id.* Canon 3(B)(8)(e).

<sup>23</sup> *See infra* Part III.

<sup>24</sup> TEX. CODE JUD. CONDUCT, Canon 3.

appropriate.”<sup>25</sup> In addition, a “judge shall perform judicial duties without bias or prejudice,” and a “judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . .”<sup>26</sup> A specialty court judge may learn a considerable amount of information about a program participant both on the record and through *ex parte* communications as the specialty court’s team leader.<sup>27</sup> In addition, due to “the intense level of involvement a problem-solving judge has with the defendant and the case, there has always been a question about the judge’s impartiality.”<sup>28</sup> As discussed below, some states have adopted particular provisions relating to disqualifications or recusals in specialty court proceedings.<sup>29</sup> Should the Texas Code of Judicial Conduct be amended to include any specific rule in this regard for specialty courts?

### III. THE ABA MODEL APPROACH

The American Bar Association (ABA) substantially revised its Model Code of Judicial Conduct in 2007.<sup>30</sup> For the first time, the Model Code included recognition of specialty courts.<sup>31</sup> In particular, the revised Code addressed specialty courts in Comment 3 to Section 1 of the Application provisions of the Code, which provides:

In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others

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<sup>25</sup> *Id.* Canon 3(B)(1).

<sup>26</sup> *Id.* Canon 3(B)(5)–(6); *see also* TEX. R. CIV. P. 18b(b)(1)–(3) (identifying certain grounds for recusal in civil cases including questionable impartiality, “personal bias or prejudice,” and “personal knowledge of disputed evidentiary facts”).

<sup>27</sup> *See* Arkfeld, *supra* note 10, at 318.

<sup>28</sup> *Id.* at 319.

<sup>29</sup> *See infra* notes 135–142 and accompanying text.

<sup>30</sup> GEYH ET AL., *supra* note 8, § 1.03, at 1-5. There were also further amendments in 2010. *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2011).

<sup>31</sup> *See, e.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 2, R. 2.9 cmt. 4 (2011); One specialty court judge observed that the 2007 “Code for the first time recognizes those of us who work in problem-solving courts.” *See* Arkfeld, *supra* note 10, at 318.

outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local rules provide and permit otherwise.<sup>32</sup>

In the lead-up to the adoption of the 2007 ABA Model Code, several witnesses at hearings conducted by the ABA’s Joint Commission to Evaluate the Model Code of Judicial Conduct “urged the Commission to create special ethical rules” for specialty courts.<sup>33</sup> Because of the number and wide variety of specialty courts, however, the Commission opted not to adopt separate ethical guidelines solely for specialty courts.<sup>34</sup> Instead, the Commission set forth Comment 3 as quoted above, by which the ABA recognized that judges presiding over specialty courts are engaging in “nontraditional” activities as part of their duties.<sup>35</sup> The Comment also reflects the Commission’s intent that local rules governing specialty courts should prevail over the Code’s provisions when they “specifically authorize conduct not otherwise permitted under these Rules.”<sup>36</sup> Accordingly, in those

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<sup>32</sup> ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

<sup>33</sup> Mark L. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 264 (2007); see also Arkfeld, *supra* note 10, at 318 (stating that “[f]or those who sit in problem-solving court, one of the hopes was that the new Code would address their issues and the concerns that arise out of this new way of conducting court proceedings”).

<sup>34</sup> See Harrison, *supra* note 33, at 264 (observing that the “Commission was ultimately unwilling to” create separate ethical rules for specialty courts “because therapeutic courts are too numerous and varied to enable the Commission to devise enforceable rules of general applicability for such courts.”); see also Michele B. Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 119 (2011) (observing that “Unfortunately, the ABA fell short of adopting guidelines specifically for alternative courts.”).

<sup>35</sup> ABA MODEL CODE OF JUDICIAL CONDUCT, Application § I cmt. 3 (2011).

<sup>36</sup> *Id.*; see also Arkfeld, *supra* note 10, at 318 (asserting that Comment 3 reflects an acknowledgement “that the states, which may adopt or modify whatever portions of the Code they feel are appropriate, may allow judges to do things the Code restricts, for example, engage in ex parte communications in the course of monitoring a drug offender’s sentence in which treatment is ordered.”). *But see* Neitz, *supra* note 34, at 120 (criticizing the Commission’s decision to leave these determinations up to local rules: “By leaving these issues to be resolved at the state and local level, the ABA’s reluctance to create ethical guidelines for the unique circumstances of nontraditional courts creates a dilemma for judges in these courts.”).

states that have adopted the 2007 Model Code, judges in specialty courts who face ethical questions will need to review their state's version of the Code, but may also consult local rules that govern the specialty court.<sup>37</sup>

The 2007 ABA Model Code also addressed and acknowledged that the judge's role in a specialty court is different from that of a court in a traditional proceeding in the coverage of issues pertaining to ex parte communications.<sup>38</sup> First, Model Rule 2.9(A)(5) provides that "[a] judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so."<sup>39</sup> In turn, the 2007 Model Code defines "law" to include "court rules as well as statutes, constitutional provisions, and decisional law."<sup>40</sup> The drafters of the 2007 ABA Model Code provided further guidance with regard to this subsection by including Comment 4 that specifically discussed ex parte communications in specialty courts:

A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.<sup>41</sup>

This provision and comment go further than previous ethical guidelines in attempting to address specialty courts. Nonetheless, "the Commission stopped short of recommending an express problem-solving justice exception to the bar on ex parte communications" due to the wide variety and types of specialty courts.<sup>42</sup> Accordingly, some commentators have

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<sup>37</sup>In addition, should specialty court judges and court administrators located in 2007 Model Code states believe that the Code does not address a particular issue, Comment 3 suggests that "the option exists that a local rule or administrative order could be implemented that would exempt the judge from the Code's requirements." Arkfeld, *supra* note 10, at 318.

<sup>38</sup>See ABA MODEL CODE OF JUDICIAL CONDUCT Application § I cmt. 3 (2011).

<sup>39</sup>*Id.* Canon 2, R. 2.9(A)(5).

<sup>40</sup>See *id.* at Terminology (defining "law" for purposes of the Model Code).

<sup>41</sup>See *id.* Canon 2, R. 2.9(A)(5) cmt. 4.

<sup>42</sup>See GEYH ET AL., *supra* note 8, at 5-23 (citing CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 38 (2009)).

suggested that states or local jurisdictions do more to tailor statutes or court rules to address the unique needs of specialty courts in their jurisdictions.<sup>43</sup>

#### IV. A REVIEW FROM OTHER STATES

Although there is not yet a considerable amount of case authority regarding *ex parte* communications and disqualification or recusal issues arising from specialty court proceedings, several other states have considered these issues in both judicial decisions and ethics opinions.<sup>44</sup> In addition, about half the states have adopted the 2007 ABA Model Code and its provisions recognizing specialty courts.<sup>45</sup> This Section will examine the existing case law and ethics opinions from other states, and then turn to a review of those states that have not only adopted that 2007 ABA Model Code, but also included additional, unique provisions relating to specialty courts.

##### A. Case Law and Ethics Opinions

A judge overseeing a specialty court will often be exposed to a significant amount of information about a program participant not only through traditional judicial processes, but also via program staffings or *ex parte* communications with court team members.<sup>46</sup> What, then, is the judge's proper action in a situation in which a hearing is necessary, for example, to consider whether an individual's specialty court participation

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<sup>43</sup>See *id.* (reviewing the history of the development of the special rule for *ex parte* communications for specialty courts and concluding, "The solution, then, lies in courts of the several jurisdictions developing rules of their own that relax restrictions on *ex parte* communications to meet the special needs of problem-solving justice in their respective court systems."); see also Arkfeld, *supra* note 10, at 321 (expressing a concern that the phrase in Rule 2.9(A)(5) and in Comment 4 regarding "expressly authorized by law" might be "open to interpretation" and not necessarily extend to specialty courts that "do not operate under a specific law or administrative order," but nonetheless arguing "that the judge may ethically proceed with the defense attorney present and with waivers in place").

<sup>44</sup>See, e.g., *In re Disqualification of Giesler*, 985 N.E.2d 486 (Ohio 2011).

<sup>45</sup>See GEYH ET AL., *supra* note 8, § 1.03, at 1-6-1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Judicial Conduct, although most with revisions to various sections").

<sup>46</sup>See Meyer, *supra* note 11, at 205 (observing that a judge overseeing a specialty court will "often have substantial information about . . . [specialty] court participants—some of which was gained through on-the-record colloquies and pleadings and other information from informal staffings . . .") (focusing on drug courts).

should be terminated or in subsequent proceedings on issues such as parole revocation or sentencing? Case authority, as well as ethics opinions, from other jurisdictions with regard to these questions vis-à-vis specialty court judges provide mixed outcomes. This Section will explore relevant recent judicial decisions and ethics opinions from several other states.

### 1. New Hampshire

In the New Hampshire case of *State v. Belyea*, Defendant pleaded guilty to forgery and credit card offenses and, following certain probation violations, received a suspended sentence, but with the condition that he take part in a drug court program.<sup>47</sup> During his time with the program, he garnered three program sanctions, the last of which resulted from his leaving the state without permission for two months.<sup>48</sup> Thereafter, the State moved to impose the previously suspended sentence and to terminate Defendant's participation in the drug court program.<sup>49</sup> In response to the State's motion, Defendant moved to recuse the judge "from presiding over any termination proceedings, contending that the judge's participation as a member of the drug court team, which had recommended his termination, created an appearance of impropriety."<sup>50</sup> The trial judge denied the motion and presided over the termination hearing.<sup>51</sup> At the close of the hearing, the judge "ruled that the defendant's participation in the Program [sic] was 'no longer warranted,' and he imposed the . . . suspended sentence."<sup>52</sup> On appeal, Defendant urged that the judge should have recused himself and contended "that a disinterested observer would entertain significant doubt about whether . . . [the trial judge] prejudged the facts and was able to remain indifferent to the outcome of the termination hearing."<sup>53</sup> In particular, he asserted that because the judge had been a part of the treatment team, the judge had "already evaluated the evidence and likely

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<sup>47</sup>999 A.2d 1080, 1081 (N.H. 2010).

<sup>48</sup>*Id.* at 1082.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* Defendant admitted during the hearing that he indeed had been out of the state for nearly two months. *Id.*

<sup>53</sup>*Id.* at 1085.

given input about the recommendation to terminate” to other members of the team.<sup>54</sup>

The New Hampshire Supreme Court rejected Defendant’s appeal and noted that his “argument rest[ed] upon the faulty premise that . . . when . . . [the judge] participated as a member of the drug court team and monitored the defendant’s progress, he acted in some role other than as a neutral and detached magistrate.”<sup>55</sup> Instead, the Court found that the trial judge “remained an impartial judicial officer,” and that there was nothing in the record to reflect that the judge “acted as an investigator, advocate, or prosecutor when participating with the drug court team.”<sup>56</sup> The Court observed further, “It is not uncommon for judges to acquire information about a case while sitting in their judicial capacity in one judicial setting and later to adjudicate the case without casting significant doubt on their ability to render a fair and impartial decision.”<sup>57</sup> The trial judge in *Belyea* “listened to current information on the defendant’s progress or problems in the Program” as part of the entire drug court team and considered “recommendations presented by individual members of the team, as a result of the defendant’s purported misconduct.”<sup>58</sup>

With regard to Defendant’s contention of bias based on the trial judge’s prior participation as part of the treatment team, the New Hampshire Supreme Court concluded that there was “no evidence that he had or considered facts not known by the drug treatment team or that he had personal, independent knowledge of any facts relied upon in ordering Defendant’s termination from the Program [sic].”<sup>59</sup> Moreover, as the presiding judge of the drug court team, the trial judge had solely “learned information about the defendant’s compliant and noncompliant behavior in the context of the [team’s] weekly review meetings and in the presence of the entire team, and retained the authority to decide and impose any sanctions . . . for a participant’s misconduct.”<sup>60</sup> Accordingly, the New

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* The New Hampshire Supreme Court also observed that the trial judge’s participation was “in the presence of the entire drug court team, which included a lawyer from the New Hampshire Public Defender Program.” *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1087.

<sup>60</sup> *Id.* at 1086. The record also revealed that there were “no disputed evidentiary facts that . . . [the trial judge] relied upon terminating . . . [Defendant] from the program. At the hearing, the



Hampshire Supreme Court determined that no “objective, disinterested observer would . . . entertain significant doubt about . . . [the trial judge’s] impartiality.”<sup>61</sup>

## 2. Idaho

Like New Hampshire, other courts have taken the view that a specialty court judge can preside over termination hearings. For example, in *State v. Rogers*, the Idaho Supreme Court considered an appeal by a drug court participant who had been terminated from the program and sentenced for possession of a controlled substance.<sup>62</sup> Defendant had initially pleaded guilty to possession, but the State agreed to a dismissal should Defendant successfully complete the drug court program.<sup>63</sup> After the drug court judge “confronted [Defendant] with information suggesting [Defendant] had been attempting to solicit fellow drug court participants to enter into a prostitution ring or ‘adult entertainment business,’” the judge “terminated [Defendant] from the drug court program” and thereafter imposed a sentence on the original possession charge.<sup>64</sup>

On appeal, Defendant alleged that his termination violated due process protections.<sup>65</sup> The Idaho Supreme Court determined that because Defendant pleaded guilty to enter into the drug court program, he then had a protected “liberty interest at stake as he . . . [would] no longer be able to assert his innocence if expelled from the program.”<sup>66</sup> Because he had a liberty interest in remaining in the program, he was therefore “entitled to procedural due process before he . . . [could] be terminated from that program.”<sup>67</sup>

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defendant agreed that he had left the state for two months without permission.” *Id.* This was a “clear violation” of the drug court policies, and the judge’s decision to terminate Defendant from the program and impose the previously suspended sentence was based solely on Defendant’s “admitted misconduct in fleeing the state, as well as his three prior Program [sic] sanctions.” *Id.*

<sup>61</sup> *Id.* at 1086–87.

<sup>62</sup> 170 P.3d 881, 882 (Idaho 2007).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 883. Defendant had also previously violated drug court rules and was sanctioned, yet had “seemed to improve markedly [thereafter] and even earned praise for his performance from the drug court judge” on two occasions. *Id.*

<sup>65</sup> *Id.* at 882–83.

<sup>66</sup> *Id.* at 884.

<sup>67</sup> *Id.* The Court reasoned that a liberty interest was implicated because prior to his termination from the drug court program “he was living in society (subject to the restrictions of

Notwithstanding this holding, however, the Court also determined that the drug court judge could preside over the termination proceedings, as well as any ensuing sentencing hearing, and that such subsequent adjudicatory processes would satisfy procedural due process requirements.<sup>68</sup>

### 3. Minnesota

Similarly, consider the court's dicta in an unpublished Minnesota Court of Appeals case involving the termination of parental rights.<sup>69</sup> Evidence in that case revealed that the children's mother had "received nine sanctions for drug court violations" and also "had one missed [drug] test, one diluted [drug] test, and one positive test for cocaine."<sup>70</sup> After the trial court terminated her parental rights, and among her contentions on appeal, Appellant asserted that the trial judge "should have voluntarily removed himself as the judge . . . because he . . . had previous knowledge of facts outside of the record and preside[d] over the county's drug court program."<sup>71</sup> The appellate court declined to rule on the contention because the parent had not properly objected at trial.<sup>72</sup> Nonetheless, the court added, "In any event, we see no basis for removal."<sup>73</sup> The court found no evidence of bias or reason to question the judge's impartiality and declared that "any knowledge the judge had of the appellant's drug history was obtained in his judicial capacity" and not via his personal or private life.<sup>74</sup> The court concluded, "Any information the district court judge obtained about appellant through her participation in the county's drug court program was acquired in his judicial capacity" not his private life.<sup>75</sup> "Therefore, he was

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complying with the drug court program), and after his termination from . . . [the drug court program] he was incarcerated." *Id.* at 885.

<sup>68</sup> *Id.* at 886. The Court also observed that "the neutral court may consider evidence which might not necessarily be admissible in a criminal trial, if such evidence is disclosed to [Defendant] prior to the hearing, is reliable, and would assist the court in making its determination." *Id.*

<sup>69</sup> *In re Welfare of Children of C.C.*, No. 07-JV-11-2909, 2012 Minn. App. LEXIS 471, at \*1, \*3 (Minn. Ct. App. May 29, 2012).

<sup>70</sup> *Id.* at \*4.

<sup>71</sup> *Id.* at \*20.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*21–22.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

not required to disqualify himself under the Minnesota Code of Judicial Conduct.”<sup>76</sup>

#### 4. Kentucky

Kentucky takes a similar view. In 2011 the Ethics Committee of the Kentucky Judiciary issued an ethics opinion “regarding recusal when the drug or mental health court judge will be the same judge presiding over a probation revocation hearing.”<sup>77</sup> The ethics committee concluded that in general a specialty court judge may preside at a subsequent revocation hearing at which program termination serves as the basis for the revocation, and that “recusal would only be required in certain circumstances.”<sup>78</sup> In particular, the committee opined that if the specialty court judge “receives the reason for the termination from the program in the course of his or her official duties, and no part of the evidence at a subsequent revocation hearing is dependent on the judge’s personal knowledge of any pertinent circumstances, no recusal is required.”<sup>79</sup>

In formulating this opinion, the Ethics Committee of the Kentucky Judiciary reasoned that a specialty court judge “by the very nature and purpose of the program, must remain familiar with the status of the participant, who has voluntarily elected to enter the program.”<sup>80</sup> The committee observed further, however, that recusal could “be required in situations where information on which the revocation may be based comes from the judge’s ‘personal knowledge,’ *i.e.*, information learned by the judge outside the regular drug or mental health court process.”<sup>81</sup> The

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<sup>76</sup> *Id.*; see also *Wilkinson v. State*, 641 S.E.2d 189, 190 (Ga. Ct. App. 2006). The court rejected an appeal from a trial judge’s decision to terminate an individual from a drug court program. *Id.* One of the issues on appeal was the drug court judge’s purported refusal to consider the defendant’s recusal motion relating to the termination hearing. *Id.* at 191. The court of appeals found the contention without merit and relied, in part, on the fact that the defendant had waived certain rights to seek recusal of the drug court judge as part of entering into the drug court contract. *Id.* The court also stated, “[W]e will not interfere with a trial court’s termination of a drug contract absent manifest abuse of discretion on the part of the trial court.” *Id.* at 190.

<sup>77</sup> The Ethics Comm. of the Ky. Judiciary, *Judicial Ethics Opinion JE-122*, KY BENCH & BAR, November 2011, at 34, 34, available at [http://www.kybar.org/documents/benchbar\\_searchable/benchbar\\_1111.pdf](http://www.kybar.org/documents/benchbar_searchable/benchbar_1111.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 35.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

committee then identified an example that would likely require recusal as a situation in which the specialty court judge “personally observed the . . . [program] participant committing some act that would form or support the basis for termination from the program.”<sup>82</sup>

## 5. Tennessee

By way of contrast, however, the Tennessee Court of Criminal Appeals took a very different approach to the recusal question in *State v. Stewart* by focusing on due process concerns.<sup>83</sup> In *Stewart*, Defendant claimed “that his due process rights were violated because the judge presiding over his probation revocation had previously served as a member of his drug court team and had received *ex parte* information regarding Defendant’s conduct at issue by virtue of his prior involvement.”<sup>84</sup> The court agreed that due process required that a different judge, who had “not previously reviewed the same or related subject matter as part of the defendant’s drug court team,” must adjudicate the probation revocation proceedings.<sup>85</sup> Defendant in *Stewart* was not successful in his drug court participation, and accrued numerous program violations.<sup>86</sup> Consequently, “a trial judge who had participated in a significant amount of the defendant’s drug court treatment, including his expulsion from the program,” presided over Defendant’s probation revocation hearing.<sup>87</sup> Defendant “urged the trial judge to recuse

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<sup>82</sup> *Id.* In formulating its opinion, the committee observed that the “Kentucky Supreme Court has stated that drug court ‘is a **court function**, clearly laid out as an alternative sentencing program . . .’” *Id.* (citing *Commonwealth v. Nicely*, 326 S.W.3d 441, 444 (Ky. 2010)) (emphasis in original). The committee also noted, “Ordinarily, recusal is appropriate only when the information is derived from an extra-judicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse.” *See id.* (quoting *Marlowe v. Commonwealth*, 709 S.W.2d 424, 428 (Ky. 1986)) (internal citations omitted) (internal quotation marks omitted).

<sup>83</sup> No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, \*28 (Tenn. Crim. App. Aug. 18, 2010).

<sup>84</sup> *Id.* at \*1.

<sup>85</sup> *Id.* at \*1–2.

<sup>86</sup> *See id.* at \*8–10. The appellate court observed that the case was “not a shining example of a successful drug court program intervention” and that as part of the program, “the defendant had ongoing issues with marijuana usage and repeatedly failed to comply with basic program requirements.” *Id.* at \*8. He was also “‘sanctioned’ five or six times and sentenced to significant jail terms wholly outside of those envisioned by his original sentence or probation.” *See id.* at \*8–10 (delineating a lengthy list of the defendant’s drug court program violations and sanctions).

<sup>87</sup> *Id.* at \*10–11.

himself because of his prior participation on the drug court team,” but the judge declined, “citing the practical difficulties of bringing in a new judge every time someone violates their drug court contract.”<sup>88</sup> The trial judge then found that Defendant had violated his probation terms, and the court sentenced him to jail time.<sup>89</sup>

On appeal, the Tennessee Court of Criminal Appeals determined that due process bars “any member of the defendant’s drug court from adjudicating a subsequent parole revocation *when the violations or conduct at issue in both forums involves the same or related subject matter.*”<sup>90</sup> Given the liberty interest at stake, the court first observed, “[i]t is now firmly established that a probationer is entitled to due process when a State attempts to remove his probationary status and have him incarcerated.”<sup>91</sup> The Court then identified the minimum required procedural protections and described the right to a “neutral hearing body” as “[o]ne of the most fundamental” of the due process rights.<sup>92</sup> In finding a violation of due process in *Stewart*, the Court reasoned that “the role of a judge in the drug courts program is, by its very nature, almost the polar opposite of ‘neutral and detached.’”<sup>93</sup> In great detail, the Court highlighted the following array of due process concerns with regard to a drug court judge’s neutrality in later presiding at a defendant’s probation revocation hearing:

- Drug court judges are expected “*to step beyond their traditionally independent and objective arbiter roles.*”<sup>94</sup>

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<sup>88</sup> *Id.* at \*11. In seeking recusal, the defendant argued “that the judge would already be familiar with the materials that would comprise most of the State’s proof at the probation revocation by virtue of his [prior] involvement.” *Id.* Although the trial judge denied the motion to recuse, he “stated that he would not mind getting further guidance from the Court of Criminal Appeals on the issue as it was likely to arise again in other cases.” *Id.*

<sup>89</sup> *Id.* at \*12.

<sup>90</sup> *Id.* (emphasis in original).

<sup>91</sup> *Id.* at \*13.

<sup>92</sup> *Id.* at \*13–14. The court further opined that “a defendant’s rights are plainly violated when his probation revocation case is reviewed by something other than a ‘neutral and detached’ arbiter” and that in Tennessee, trial judges serve as the probation revocation adjudicators. *Id.* at \*14 & n.1.

<sup>93</sup> *Id.* at \*14.

<sup>94</sup> *Id.* at \*15 (emphasis in original) (quoting Key Components, *supra* note 4, at 15). The court further explained that under Tennessee law, drug court treatment programs are required to operate “according to the principles established by the Drug Courts Standards Committee of the National Association of Drug Court Professionals.” *Id.* at \*14. *See also* TENN. CODE ANN. § 16-22-104

- Drug court judges are expected to “issue praise for regular attendance or a period of clean drug tests, offer encouragement, and even award the participants tokens of accomplishment during open court ceremonies” for program successes.<sup>95</sup>
- Drug court judges should have “frequent status hearings and maintain regular communications with other program staff to uncover noncompliance,” should instill a “fear that big brother is always watching,” and address program infractions “with responses ranging from disparaging remarks to jail time.”<sup>96</sup>
- Drug court judges are “an integral part of the defendant’s ‘therapeutic team’” and are “expected to ‘play an active role in the [participant’s] drug treatment process.’”<sup>97</sup> Accordingly, a drug court judge “will necessarily find it difficult, if not impossible, to reach the constitutionally-required level of detachment when dealing with a course of conduct . . . [that was] previously reviewed as a member of a drug court team.”<sup>98</sup>
- Drug court judges will have participated in team decisions about treatment and services, and thus will “develop a stake in the success or failure” of the selected programs.<sup>99</sup>
- Drug court judges are participating in a collaborative process of decision-making that “poses an additional threat

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(West 2013) (setting forth ten general principles for the establishment and operation of drug court programs). Given the lack of further legislative elucidation of these ten principles, the court turned to the National Association of Drug Court Professionals’ program guidelines for further clarification. *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*14–15.

<sup>95</sup> *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*14–15 (citing Key Components, *supra* note 4, at 13). The court reasoned that such repeated praiseworthy activities could lead the prosecution to “question a judge’s impartiality.” *Id.* at \*16.

<sup>96</sup> *Id.* The court further observed that the judge’s imposition of disciplinary actions “could cause the defendant to reasonably question the judge’s impartiality when reviewing the same subject matter in a different forum later.” *Id.* at \*17.

<sup>97</sup> *Id.* at \*18 (quoting Key Components, *supra* note 4, at 2, 7).

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* at \*19 (leading the court to question a drug court judge’s detachment in later proceedings).

to the impartiality of any judge who would later adjudicate a defendant's probation revocation involving the same or related conduct."<sup>100</sup>

- Drug court judges will have received access to a "considerable amount of *ex parte* information . . . as a necessary component of the drug court process."<sup>101</sup>
- Drug court judges, as part of participation in and leadership of the drug court process, are privy "to a considerable amount of information about the defendant's conduct that would not normally be relevant to adjudicating a probation revocation"<sup>102</sup> and will likely be aware of other challenges or problems such as a "participant's mental illnesses, sexually transmitted diseases, domestic violence, unemployment, and homelessness."<sup>103</sup>

Accordingly, the court in *Stewart* concluded that a drug court judge who participated as part of, and presided over, a defendant's drug court team could not "function as a 'neutral and detached' hearing body . . . for alleged probation violations that . . . [were] based on the same or related subject matter" that the drug court team had previously reviewed.<sup>104</sup> In reaching its decision, the court specifically rejected the reasoning of both the Idaho Supreme Court in *State v. Rogers*<sup>105</sup> and the New Hampshire Supreme

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<sup>100</sup> *Id.* at \*20. The court suggested that a drug court judge might subordinate his or her views to those of the treatment team, could put certain decisions up to a vote of the treatment team members, and generally be personally invested in "prior collaborative team decisions" that could "cloud the exercise of his or her own individualized, detached, and impartial review" of later adjudicatory processes. *Id.* at \*21.

<sup>101</sup> *Id.* at \*22. The court identified as troubling potential *ex parte* contacts such as frequent treatment team communications about a defendant's program participation, and "frequent interactions between the participants and drug court judges, in which the participants will not be represented by counsel." *Id.* at \*23–25. The court further opined that "it simply strains credulity to believe that judges could or would consistently set aside all of the considerable amount of information they receive in this *ex parte* manner at a later probation revocation." *Id.* at \*23–24.

<sup>102</sup> *Id.* at \*25.

<sup>103</sup> *Id.* at \*25 (quoting Key Components, *supra* note 4, at 7).

<sup>104</sup> *Id.* at \*30.

<sup>105</sup> *See id.* at \*30–\*31 (rejecting the approach of *State v. Rogers*, 170 P.3d 881, 886 (Idaho 2007), and reasoning that the Idaho court had not considered "all of the due process problems attendant to permitting judges to play . . . dual roles with respect to the same subject matter"). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

Court in *State v. Belyea*.<sup>106</sup> In addition, given that the court in *Stewart* reached its conclusion on due process grounds, the court found it “unnecessary to address whether the [Tennessee] Code of Judicial Conduct . . . would also generally require recusal” in similar cases.<sup>107</sup>

Of note, approximately six months following the Tennessee Court of Criminal Appeals’ decision in *Stewart*, the state’s Judicial Ethics Committee provided an advisory opinion on the very question left unaddressed in *Stewart*: whether the state’s Code of Judicial Conduct will “permit a judge, who is a member of a drug court team, to preside over the revocation/sentencing hearing of a defendant who is in the drug court

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<sup>106</sup> See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*31–34 (declining to follow the decision in *State v. Belyea*, 999 A.2d 1080 (N.H. 2010), and observing that it was “similarly unpersuaded” by *Belyea*’s treatment of the court’s “constitutional concerns”). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text. The *Stewart* court also noted that its decision was consistent with an earlier 2008 Tennessee decision. See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*28–29 (citing *State v. Stewart*, No. M2008-00474-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. Oct. 6, 2008)). In the 2008 *Stewart* case (which coincidentally involved a different defendant with the surname Stewart), the court found a due process violation when the drug court judge delegated decisions about probation revocation and appropriate sentencing to members of the drug court team who had been present at the revocation hearing. *Id.* at \*5–6, \*10. After presiding at the revocation hearing, the judge asked the team members to deliberate and provide a recommendation. *Id.* at \*5–6. The team met without the judge and thereafter provided a recommendation for termination and that the defendant ““serve his original sentence.”” *Id.* at \*6. The trial judge adopted ““the ruling of the team.”” *Id.* The appellate court held this to be reversible error and found “telling that the trial judge instructed the drug court team at the hearing, ‘I have no thoughts or opinions on what you should do, should you decide that [the defendant] should come back with no sanctions whatsoever, or if he should be revoked and dismissed from the program or anything between.’” *Id.* at \*11. Moreover, the appellate court ordered that the matter be heard by a different judge on remand because of concerns that the drug court judge had received *ex parte* communications in his role with the drug court team, which could have impacted his impartiality in later proceedings. *Id.* at \*12. In particular, the court declared that “the trial judge received communication outside the presence of the parties concerning the matter and relied on that communication in disposing of the defendant’s case.” *Id.* Thereafter, in the 2010 *Stewart* case, the court relied on its earlier holding in the 2008 *Stewart* decision with regard to finding due process concerns pertaining to exposure to *ex parte* communications during drug court team activities. See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*28–30. See also *Alexander v. State*, 48 P.3d 110, 115 (Okla. 2002) (recognizing “the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant,” and declaring that in future cases involving the termination of drug court participation, a “defendant’s application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution”).

<sup>107</sup> See *Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*12–13.



program.”<sup>108</sup> In contrast to the court’s sweeping language in *Stewart*, the state’s ethics committee opined that the state’s Code of Judicial Conduct “does not automatically require recusal,” and that recusal is required “only if the judge determines that he/she cannot be impartial.”<sup>109</sup> In contrast to *Stewart*, the ethics committee relied favorably on both the New Hampshire Supreme Court’s decision in *State v. Belyea*<sup>110</sup> and the Idaho Supreme Court’s opinion in *State v. Rogers*,<sup>111</sup> and quoted both cases with approval.<sup>112</sup> Moreover, the ethics committee added that “[i]t appears that judicial ethical considerations are moving in the direction taken in *Belyea* as to allowing ‘special’ courts to receive ex parte communications.”<sup>113</sup> As for *Stewart*, the ethics committee merely referenced the case and its holding, and then observed that the Tennessee Court of Criminal Appeals had decided the case “upon constitutional rather than ethical grounds and . . . [took] no position as to the latter.”<sup>114</sup>

Somewhat inexplicably, the Tennessee ethics committee made no attempt to reconcile its decision, which focused on judicial ethics, with the *Stewart* holding that was grounded on due process considerations.<sup>115</sup>

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<sup>108</sup>Tenn. Judicial Ethics Comm., Advisory Op. 11-01, at 1 (Mar. 23, 2011), available at <http://www.tncourts.gov/sites/default/files/docs/11-01.pdf>.

<sup>109</sup>*Id.*

<sup>110</sup>See *Belyea*, 999 A.2d at 1085–86 (finding no prejudice of the facts or question as to a drug court judge’s impartiality where the judge had acquired information and knowledge while serving in a judicial capacity on the drug court team). For a further discussion of *Belyea*, see *supra* notes 47–61 and accompanying text.

<sup>111</sup>See *State v. Rogers*, 170 P.3d 881, 886 (Idaho 2007) (determining that a drug court judge may serve in subsequent program termination proceedings and sentencing hearings). For a further discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

<sup>112</sup>Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2.

<sup>113</sup>*Id.*, at 4. In support of this proposition, the committee referenced the 2007 ABA Model Code of Judicial Conduct and quoted from the ABA’s comments to “Rule 2.9 the special considerations granted in this regard to ‘problem-solving’ courts.” *Id.* See also *supra* notes 31–43 and accompanying text (discussing the 2007 ABA Model Code and provisions included therein pertaining to specialty courts).

<sup>114</sup>Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4. The committee did recognize that *Stewart* had held that “the due process clause prevented a judge who had been a member of the defendant’s drug court team from later conducting a probation revocation hearing as to the defendant” for alleged violations “‘based on the same or related subject matter that has been reviewed’ by the judge as a member of the drug court team.” See *id.* (quoting *State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Aug. 18, 2010)).

<sup>115</sup>*Id.*

Instead, the ethics committee declared that in Tennessee the courts follow “the same ‘reasonableness’ standard as was applied in *Belyea*.”<sup>116</sup> “That is, the judge must take the more objective, rather than subjective, approach and ‘ask what a reasonable, disinterested person knowing all the relevant facts would think about his or her impartiality.’”<sup>117</sup> In turn, a judge’s decision on recusal should be made on a “case-by-case basis,” and for a drug court judge “the outcome would necessarily depend upon the specific information the judge acquired as a member of the drug court team.”<sup>118</sup> Accordingly, the ethics committee concluded “that serving as a functioning member of the drug court team does not in and of itself require recusal of the judge in a revocation hearing.”<sup>119</sup> This opinion, of course, appears to run directly counter to the Tennessee Court of Criminal Appeals decision in *Stewart* in which the court sweepingly declared that due process precludes a judge who was a member of a drug court team from later presiding over a probation revocation hearing in which the probation violations are the same as those that were before the drug court team.<sup>120</sup>

Can the 2011 Tennessee ethics opinion and the court’s due process decision in *Stewart* be reconciled? Although the court’s language in *Stewart* was broad, the specific facts are instructive. Upon reviewing the record, the court observed, “[W]e are additionally troubled by the four or five occasions where the defendant in this case was ‘sanctioned’ to significant jail time by the drug court team during the two years he participated in the program.”<sup>121</sup> This resulted in the defendant being “appreciably worse off from a punitive perspective than if he had chosen not to participate in the drug court program at all.”<sup>122</sup> Finding this problematic, the court urged

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<sup>116</sup> *Id.*

<sup>117</sup> See *id.* (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998), and referencing the New Hampshire Supreme Court’s approach in *State v. Belyea*, 999 A.2d 1080, 1085–86 (N.H. 2010)).

<sup>118</sup> *Id.* The committee added that under “the ‘reasonableness’ standard, recusal may be required in one case and not required in another.” *Id.*

<sup>119</sup> *Id.* at 5. The committee added further that recusal would be necessary “only if the appearance of impartiality should surface in the face of a fair and honest ‘objective standard’ analysis by the judge predicated upon the specific facts developed in each particular case.” *Id.*

<sup>120</sup> See *State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, \*30 (Tenn. Crim. App. Aug. 18, 2010).

<sup>121</sup> *Id.* at \*37. The court added that “the net effect of these sanctions appears to be that approximately a half-year has been tacked onto the overall defendant’s sentence.” *Id.*

<sup>122</sup> *Id.* The court seemed troubled that a therapeutic form of process could result in the addition of “significant amounts of jail time” as sanctions. *Id.* at \*39.

judges who oversee drug court programs to assure that the programs “focus[] on drug addiction therapy and treatment, and recogniz[e] that, for good reason, punishment with substantial periods of incarceration is [the] bailiwick of the traditional criminal justice system.”<sup>123</sup> By way of contrast, the ethics committee referenced no comparable egregious facts pertaining to the matter under its review.<sup>124</sup> Instead, the ethics committee noted that individuals who participated in the drug court program pertaining to the matter then under review each executed a detailed “waiver, consenting to the drug court judge’s receiving a broad range of ex parte communications regarding the matter.”<sup>125</sup> After quoting the waiver in full, the ethics committee concluded that the waiver authorized the drug court judge “to have what would appear to be access to all relevant documents and records but limits its use to ‘status hearings, progress reports, and sentencing hearings.’”<sup>126</sup> Accordingly, the ethics committee declined to require an automatic recusal and determined that a case-by-case review was appropriate.<sup>127</sup>

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<sup>123</sup> *Id.* at \*41. The court added, “When necessary, truly recalcitrant participants may be swiftly returned to the traditional system via the drug court expulsion process.” *Id.*

<sup>124</sup> Indeed, the committee identified virtually no facts with regard to the specific matter for which the drug court judge had requested an ethics opinion. *See* Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 2 (setting forth the only references in the opinion to the underlying case).

<sup>125</sup> *Id.* at 2. The waiver authorized disclosure to drug court team members of communications such as “progress notes, medical diagnosis, testing, drug results, attendance records, results of medical testing and drug screens, HIV medical records, counselor and social worker notes and summaries, . . . and all other records associated with rehabilitation and treatment.” *Id.* at 3 (quoting waiver).

<sup>126</sup> *Id.* at 3–4. Moreover, the waiver provided that recipients of information obtained throughout the process could “rediscover it only in connection with their official duties as members of the . . . Drug Court Team.” *Id.* at 3 (quoting waiver). By way of contrast, although there had been references to a signed waiver in the record before the court in *Stewart*, the record did “not contain a copy, and consequently” the court did “not know the extent of the rights . . . [the defendant] purportedly waived prior to his participation” in the drug court program.” *See Stewart*, 2010 Tenn. Crim. App. LEXIS 691, at \*39–\*40 n.4. The court expressed doubt, however, as to whether—as a matter of due process—the defendant had the power to waive constitutional rights pertaining to “deprivations of his absolute right to liberty, such as those that may have occurred” in the case. *See id.* (discussing same in the context of the court’s concern about the drug court having imposed additional jail time for program violations).

<sup>127</sup> Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

## B. State Codes of Judicial Conduct

Roughly half the states have adopted the 2007 ABA Model Code of Judicial Conduct.<sup>128</sup> As discussed above, the 2007 Model Code recognizes the unique nature of specialty courts and includes some coverage of ex parte communications rules for such courts.<sup>129</sup> As described in this Section, however, a number of states have promulgated variations of the 2007 Model Code to address specialty courts more specifically.

### 1. Tennessee

Subsequent to both *Stewart* and the 2011 Tennessee Ethics Committee opinion discussed above,<sup>130</sup> the Tennessee Supreme Court adopted a new Code of Judicial Conduct that became effective on July 1, 2012.<sup>131</sup> Tennessee's new judicial conduct code is modeled in large part on the 2007 ABA Model Code of Judicial Conduct, but with some differences.<sup>132</sup> With regard to specialty courts such as drug courts and mental health courts, like the 2007 ABA Model Code, the revised Tennessee Code includes a general recognition of these courts in the Code's "application" section.<sup>133</sup> In

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<sup>128</sup> See GEYH ET AL., *supra* note 8, § 1.03, at 1-6-1-7 (observing that "[b]y 2013, 24 jurisdictions had adopted the 2007 Model Code of Jud. Conduct, although most with revisions to various sections"). For links to documents that describe the differences between the various state enactments and the text of the 2007 Model Code, see American Bar Ass'n, Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct, available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/comparison.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html).

<sup>129</sup> See *supra* notes 30-43 and accompanying text.

<sup>130</sup> *Stewart*, 2010 Tenn. Crim. App. LEXIS 691; Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 1. See *supra* notes 83-127 and accompanying text.

<sup>131</sup> See *In re: Petition to Amend New Rule 10, RJC 4.1, Rules of the Tenn. Supreme Court*, Order No. M2012-01031-SC-RL2-RL, at 1 (Tenn. June 26, 2012), available at [http://www.tba.org/sites/default/files/rule\\_10\\_rjc4.1.pdf](http://www.tba.org/sites/default/files/rule_10_rjc4.1.pdf) (adopting a "comprehensive revision of the Tennessee Code of Judicial Conduct").

<sup>132</sup> For a detailed chart comparing the 2012 Tennessee Code with the 2007 ABA Model Code, see *Comparison between final revised Tennessee Code of Judicial Conduct and ABA Model Code of Judicial Conduct (2007)* (Aug. 8, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/tennessee\\_mjcjc\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/tennessee_mjcjc_final.authcheckdam.pdf).

<sup>133</sup> See TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, Application § I cmt. 3 (2012), available at <http://www.tsc.state.tn.us/rules/supreme-court/10>, which states:

Some states, including Tennessee, have created courts in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be

addition, and specifically with regard to ex parte communications, the new Tennessee Code provides the following:

When serving on a mental health court or a drug court, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others. However, if this ex parte communication becomes an issue at a subsequent adjudicatory proceeding in which the judge is presiding, the judge shall either (1) disqualify himself or herself if the judge gained personal knowledge of disputed facts . . . or the judge's impartiality might reasonably be questioned . . . or (2) make disclosure of such communications subject to the [Code's] waiver provisions . . . .<sup>134</sup>

Accordingly, Tennessee's Supreme Court has adopted an approach that is closer to the 2011 Ethics Committee opinion's advisory opinion that judges in specialty courts are to consider recusal motions on a case-by-case basis,<sup>135</sup> rather than the Tennessee Court of Criminal Appeals' categorical approach based on due process considerations set forth in *Stewart*.<sup>136</sup>

## 2. Idaho

By way of contrast, consider the Idaho Supreme Court's approach to the same issue. In 2008, the court amended the ex parte contacts provisions of the Idaho Code of Judicial Conduct by adding the following subsection that focuses specifically on specialty courts:

(f) A judge presiding over a criminal or juvenile problem solving court may initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings, or by written documents provided to

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authorized and even encouraged to communicate directly with social workers, probation officers and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. Judges serving on such courts shall comply with this Code except to the extent laws or court rules provide and permit otherwise.

*Id.*

<sup>134</sup> *Id.* Canon 2, R. 2.9 cmt. 4 (internal citations to other sections of the Code omitted).

<sup>135</sup> Tenn. Jud. Ethics Comm., Advisory Op. 11-01, *supra* note 108, at 4.

<sup>136</sup> *State v. Stewart*, No. W2009-00980-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 691, \*30 (Tenn. Crim. App. Aug. 18, 2010).

all members of the problem solving court team. A judge who has received any such ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.<sup>137</sup>

The Idaho Supreme Court added the foregoing provision following a very restrictive March 2008 Idaho Judicial Council ethics opinion which “stated that ‘e-mails, telephone calls or written communications from counselors, drug court coordinators, [or] prosecutors done in an ex parte manner are all prohibited except for those limited situations permitted by the [former] Canons.’”<sup>138</sup> The opinion also directed that the parties must have representation in attendance when the specialty court judge is present at a staffing.<sup>139</sup> The ethics opinion accordingly created a challenge for Idaho specialty courts described as follows: “If counsel does not attend all court sessions and staffings, how can judges [ethically] participate as part of the problem-solving court team . . . ?”<sup>140</sup> Another concern was the “possible infringement of a defendant’s rights when a judge who had been exposed to ex parte communications presides over subsequent proceedings involving the termination of the defendant from a problem-solving court, a probation revocation hearing, or sentencing.”<sup>141</sup>

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<sup>137</sup> IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), available at <http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf>. The term “staffing,” as used in the subsection, was added in 2012 and is defined to mean “a regularly scheduled, informal conference not occurring in open court, the purpose of which is to permit the presiding judge and others, including counsel, to discuss a participant’s progress in the problem solving court, treatment recommendations, or responses to participant compliance issues.” See *id.* at Terminology (including the term in a list of “Terminology” definitions, and noting an adoption date of Nov. 30, 2012, with an effective date of Jan. 1, 2013).

<sup>138</sup> See Michael Henderson, *Ex Parte Communications – Adapting an Adversarial Rule to the Problem-Solving Setting*, THE ADVOCATE (Idaho), Vol. 51, Sept. 2008, at 48, 48 (quoting ethics opinion).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* Recall that in *State v. Rogers*, 170 P.3d 881, 885–86 (Idaho 2007), the Idaho Supreme Court recognized that an individual participating in a drug court program has a protected liberty interest at stake in determinations whether to terminate that person’s participation; however, the court also concluded that although the defendant was entitled to a due process hearing, the drug

In response to the 2008 ethics opinion that called into question these practices in the specialty courts, the Idaho Supreme Court “sought a wide range of views” and ultimately adopted amendments to its Code of Judicial Conduct specifically regarding special courts.<sup>142</sup> The new subsection—Canon 3(b)(7)(f)—both recognizes the role of specialty courts, and also authorizes the court to consider *ex parte* communications at staffings and via written documents that are provided to all members of the specialty court team.<sup>143</sup> The court also added a provision allowing a judge to “initiate, permit, or consider communications dealing with substantive matters or issues on the merits in the absence of a party who had notice . . . and did not appear” at scheduled court proceedings “including a conference, hearing, or trial.”<sup>144</sup> Finally, however, the Idaho Supreme Court elected to adopt a blanket rule that any specialty court judge “who has received any . . . *ex parte* communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent” proceeding for program termination, a probation violation, or sentencing . . . .<sup>145</sup>

### 3. Additional States

Like Idaho, a number of other states have gone beyond the 2007 Model Code’s provisions relating to *ex parte* communications in specialty courts to provide expanded or more specific coverage. Ten of these states, in addition to Idaho, have adopted specific subsections or unique comments that focus

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court judge could “preside over the termination hearings.” For a detailed discussion of *Rogers*, see *supra* notes 62–68 and accompanying text.

<sup>142</sup> See Henderson, *supra* note 138, at 48 (also indicating that the court consulted with judges, court administrators, prosecutors, defense lawyers, and the state’s Drug Court and Mental Health Court Coordinating Committee).

<sup>143</sup> See IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013).

<sup>144</sup> See *id.* Canon 3(B)(7)(e). See also Henderson, *supra* note 138, at 48 (observing that this “provision clarifies *ex parte* prohibition” with regard to scheduled court proceedings).

<sup>145</sup> See IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f). This decision, of course, represented a reversal, of sorts, from the same court’s 2007 decision in *Rogers* that due process did not require that a subsequent termination proceeding must always be considered by a judge different from the previously presiding drug court judge. See *Rogers*, 170 P.3d, at 885–86. See also Neitz, *supra* note 34, at 124 (suggesting that this aspect of the “Idaho approach recognizes that *ex parte* communications can sometimes be useful, but should not be a determining factor in the resolution of a case”).

on activities in specialty courts.<sup>146</sup> For example, Arizona's 2009 Code of Judicial Conduct added an additional subsection to Rule 2.9 covering ex parte communications, which provides:

(6) A judge may engage in ex parte communications when serving on problem-solving courts, if such communications are authorized by protocols known and consented to by the parties or by local rules.<sup>147</sup>

Similarly, in adopting the 2007 Model Code, Hawaii crafted the following additional subsection regarding ex parte communications:

(6) A judge may initiate, permit, or consider an ex parte communication when serving on a therapeutic or specialty court, such as a mental health court or drug court, provided that the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication and any factual information received that is not part of the record is timely disclosed to the parties.<sup>148</sup>

Ohio has promulgated a comparable provision, which states:

(6) A judge may initiate, receive, permit, or consider an ex parte communication when administering a *specialized docket*, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the ex parte communication.<sup>149</sup>

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<sup>146</sup> These additional states with unique provisions include Arizona, Hawaii, Ohio, Nebraska, North Dakota, Oklahoma, Kansas, Maryland, Iowa, and New Mexico. See *infra* notes 147–167 and accompanying text.

<sup>147</sup> ARIZ. REV. STAT. ANN., Sup. Ct. Rule 81, Canon 2, R. 2.9(6) (2009), available at <http://www.azcourts.gov/Portals/37/NewCode/Master%20Word%20Version%20of%20Code.pdf>.

<sup>148</sup> HAW. RULES OF CT. ANN., Ex. B, REV. CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2009), available at [http://www.courts.state.hi.us/docs/court\\_rules/rules/rcjc.htm](http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm).

<sup>149</sup> OHIO REV. CODE ANN., CODE OF JUD. CONDUCT, Canon 2, R. 2.9(6) (2010) (emphasis in original), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf>. The Ohio code defines “specialized docket” to include “drug courts, mental health courts, domestic violence courts, child support enforcement court, sex offender courts, OMVI/DUI courts reentry courts, housing courts, and environmental courts.” See *id.* at 9, Terminology (defining “specialized docket” for purposes of the Ohio Code of Judicial Conduct).



Nebraska has similarly created a variation on the 2007 ABA Model Code by adopting the following additional subsection pertaining to specialty courts:

(6) A judge may initiate, permit, or consider *ex parte* communications when serving on therapeutic or problem-solving courts, mental health courts, or drug courts, if such communications are authorized by protocols known and consented to by the parties. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.<sup>150</sup>

In contrast to the more detailed subsections described above, North Dakota and Oklahoma have promulgated narrower provisions that focus on party consent. Indeed, both North Dakota's and Oklahoma's versions of the *ex parte* rules include the following identical language:

(4) With the consent of all parties, the judge and court personnel may have *ex parte* communication with those involved in a specialized court team. Any party may expressly waive the right to receive that information.<sup>151</sup>

Rather than adding a separate subsection to its version of Rule 2.9, when Kansas adopted the 2007 ABA Model Code, the state promulgated a unique comment that cross-references a different court rule pertaining to specialty courts. In particular, the comment provides:

(4) A judge may initiate, permit, or consider *ex parte* communications as authorized by Supreme Court Rule 109A when serving on therapeutic or problem-solving

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<sup>150</sup>NEB. REV. CODE OF JUD. CONDUCT § 5-302.9(6) (2011), *available at* <http://www.supremecourt.ne.gov/supreme-court-rules/2152/%C2%A7-5-3029-ex-parte-communications>.

<sup>151</sup>N.D. CT. RULES, RULES OF JUD. CONDUCT Canon 2, R. 2.9(4) (2012), *available at* <http://www.ndcourts.gov/rules/judicial/frameset.htm>; OKLA. CODE OF JUDICIAL CONDUCT Chap. 1, App. 4, Rule 2.9(4) (2011), *available at* <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=461667>. Comment 4 to the North Dakota rule adds, "A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts." N.D. COURT RULES, RULES OF JUD. CONDUCT Canon 2, Rule 2.9(4), Comment (4). Similarly, Oklahoma's version includes virtually the same comment, except it refers to "specialized courts" rather than therapeutic or problem-solving courts. OKLA. CODE OF JUD. CONDUCT Chap. 1, App. 4, R. 2.9(4) & cmt. 4 (2011).

courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.<sup>152</sup>

In turn, Kansas Supreme Court Rule 109A sets forth additional provisions authorizing and regulating specialty courts for persons with mental illness or substance addictions.<sup>153</sup> The rule authorizes *ex parte* communications between the specialty court judge and members of the “problem-solving court team, either at a team meeting or in a document provided to all members of the team.”<sup>154</sup> Moreover, the rule specifically allows the specialty court judge who has received *ex parte* communications as part of presiding over the specialty court team to preside over subsequent proceedings involving a defendant provided that the judge discloses “the existence and, if known, the nature of” the *ex parte* information, and both the defendant and the prosecution consent.<sup>155</sup> Accordingly, under this latter provision, if a defendant objects to having the specialty court judge preside over a later program termination, probation revocation, or sentencing proceeding, the rule would require the judge’s recusal.<sup>156</sup> Unlike Idaho’s unique adaptation of the 2007 ABA Model Code, however, the Kansas approach does not create a blanket requirement for recusal, and both parties may consent to allowing the specialty court judge to preside.<sup>157</sup>

Like Kansas, Maryland’s version of the 2007 ABA Model Code pertaining to *ex parte* communications includes a cross-reference to another procedural rule; the Maryland provision states:

(6) When serving in a problem-solving court program of a Circuit Court or the District Court pursuant to Rule 16-206,

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<sup>152</sup>KAN. CODE OF JUD. CONDUCT, R. 601B, Canon 2, R. 2.9 cmt. 4 (2009), available at [http://www.kscourts.org/rules/Judicial\\_Conduct/Canon%202.pdf](http://www.kscourts.org/rules/Judicial_Conduct/Canon%202.pdf).

<sup>153</sup>KAN. SUP. CT. R. 109A, § (a) (2012), available at [http://www.kscourts.org/rules/District\\_Rules/Rule%20109A.pdf](http://www.kscourts.org/rules/District_Rules/Rule%20109A.pdf).

<sup>154</sup>*Id.* § (b).

<sup>155</sup>*Id.* § (c)(1)–(2).

<sup>156</sup>*Id.* § (c)(2).

<sup>157</sup>*See* IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f) (2013), available at <http://www.judicialcouncil.idaho.gov/Idaho%20Code%20of%20Judicial%20Conduct.pdf>. (describing Idaho’s across-the-board requirement that a specialty court judge who has received *ex parte* communications while leading the specialty court *not* preside over subsequent legal proceedings involving the same defendant who was a part of the specialty court program).

a judge may initiate, permit, and consider *ex parte* communications in conformance with the established protocols for the operation of the program if the parties have expressly consented to those protocols.<sup>158</sup>

In turn, Maryland Rule 16-206 sets forth general guidelines for specialty courts in the state, and delineates a process for the planning and approval of specialty courts.<sup>159</sup> The rule also includes official commentary suggesting that a specialty court judge should be sensitive to any prior receipt of *ex parte* communications in any ensuing post-termination proceedings.<sup>160</sup>

Although they did not adopt unique rules pertaining to specialty court judges, two additional states—Iowa and New Mexico—departed from the proffered language in the 2007 ABA Model Code of Judicial Conduct via the adoption of state-specific comments pertaining to specialty courts. First, Iowa modified the official comments to the “Application” section of the Model Code by including a unique comment pertaining almost exclusively to drug courts (and not to other specialty courts).<sup>161</sup> In contrast to the comparable section of the 2007 ABA Model Code, which provides that “local rules” may take priority in authorizing conduct by specialty court judges not otherwise permitted under the rules, the Iowa provision instead references other “law” regarding specialty courts that can take precedence

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<sup>158</sup> MD. RULE 16-813, Rule 2.9(a)(6) (2010).

<sup>159</sup> MD. RULE 16-206(a)–(c) (2013).

<sup>160</sup> *Id.* at 16-206(e), Committee Note (providing that in the consideration of “whether a judge should be disqualified . . . from post-termination proceedings involving a participant who has been terminated from a problem-solving court program, the judge should be sensitive to any exposure to *ex parte* communications or inadmissible information the judge may have received while the participant was in the program”).

<sup>161</sup> IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Application § I cmt. 3, at 4 (2010). Comment 3, which focuses primarily on drug courts, provides the following:

In Iowa, many districts have formed drug courts. Judges presiding in drug courts may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When the law specifically authorizes conduct not otherwise permitted under these rules, they take precedence over the provisions set forth in the Iowa Code of Judicial Conduct. Nevertheless, judges serving on drug courts and other “problem solving” courts shall comply with this Code except to the extent the law provides and permits otherwise.

*Id.*

over conduct permitted by the Iowa rules.<sup>162</sup> In turn, the Iowa Code defines “law” broadly to include not only “court rules,” but also “statutes, constitutional provisions, and decisional law.”<sup>163</sup> Similarly, New Mexico expanded both the rule pertaining to *ex parte* communications and one of the comments to its version of the *ex parte* rule to provide a broader scope of applicable, permissive source law for specialty courts than under the 2007 ABA Model Code.<sup>164</sup> Like Iowa and the 2007 ABA Model Code, the New Mexico Code defines “law” to “encompass[] court rules as well as statutes, constitutional provisions, and decisional law.”<sup>165</sup> With regard to its version of the *ex parte* communications rule, however, New Mexico goes somewhat further in the text of the rule than the 2007 ABA Model Code by specifically providing in its rule that a “judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by *law, rule, or Supreme Court order* to do so.”<sup>166</sup> In addition, New Mexico’s comment to its *ex parte* rule with regard to judges in specialty courts also specifically references authorization by “law, rule, or Supreme Court order.”<sup>167</sup>

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<sup>162</sup> Compare *id.* (authorizing other “law” to take priority over the Iowa Code provisions), with ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing “local rules” to take priority over conflicting Model Code provisions).

<sup>163</sup> See IOWA CT. R. CH. 51, IOWA CODE OF JUD. CONDUCT, Terminology, at 630 (defining “law”). In this regard, the Iowa Code has the same broad definition of “law” as does the 2007 ABA Model Code. See ABA MODEL CODE OF JUD. CONDUCT, Terminology (2007) (defining “law”). The ABA Code, however, only references “local rules” with regard to specialty courts in the comments to its “application” section. ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011).

<sup>164</sup> See N.M. ST. CT. RULES, RULES OF JUD. CONDUCT R. 21-209(A)(5) & cmt. 4 (2012) (providing an expanded scope of applicable law).

<sup>165</sup> See *id.*, R. Set 21, Terminology (defining “law” for purposes of the code).

<sup>166</sup> Compare *id.* Rule 21-209(A)(5) (quoted in text above with emphasis added), with ABA MODEL CODE OF JUD. CONDUCT, Canon 2, Rule 2.9(5) (2011) (using identical language except for including the phrase “authorized by law”—with “law” being otherwise broadly defined in the Terminology section of the 2007 ABA Model Code).

<sup>167</sup> NMRA, Rule 21-209, cmt. 4. In full, Comment 4 provides:

(4) A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, rule, or Supreme Court order, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

## V. RECOMMENDATIONS TO REVISE THE TEXAS CODE OF JUDICIAL CONDUCT

Texas has not adopted the 2007 ABA Model Code of Judicial Conduct. Nonetheless, jurisdictions around Texas have been actively developing a wide array of specialty courts.<sup>168</sup> In addition, the Texas Legislature has given significant recognition to specialty courts.<sup>169</sup> During the 2013 regular legislative session, the Texas Legislature enacted Senate Bill 462 relating to specialty court programs in the state.<sup>170</sup> In part, the legislation consolidated into a single chapter of the Texas Government Code existing provisions pertaining to drug court programs, family drug court programs, mental health court programs, and veterans court programs that had previously been scattered across the Family Code, the Health and Safety Code, and the Government Code.<sup>171</sup> As noted by the bill's sponsor following the conclusion of the 2013 regular legislative session, however, Senate Bill 462 was also intended to "improve oversight of specialty court programs by requiring them to register with the criminal justice division of the Office of the Governor and follow programmatic best practices in order to receive state and federal grant funds."<sup>172</sup> Moreover, Senate Bill 462 added new language to the Texas Government Code mandating that specialty court

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In contrast, the 2007 ABA Model Code has almost identical language for this comment, but only includes the phrase, "expressly authorized by law" – although "law" has the broad definition set forth in the Code. See ABA MODEL CODE OF JUD. CONDUCT, Canon 2, R. 2.9, R. 2.9 cmt. 4, & Terminology.

<sup>168</sup> See Specialty Courts List, *supra* note 1, at 1.

<sup>169</sup> See Act effective Sept. 1, 2013, 83d Leg., R.S., ch. 747, 2013 Tex. Sess. Law Serv. 1883 (West) (to be codified at Tex. Gov't Code tit. 2, subtit. K (West 2013)), available at <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB00462F.pdf#navpanes=0> [hereinafter S.B. 462].

<sup>170</sup> *Id.*

<sup>171</sup> See House Judiciary & Civil Juris. Comm., Bill Analysis, at 1, Tex. C.S.S.B. 462, 83d Leg., R.S. (2013), available at <http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462H.pdf#navpanes=0> (describing the former law).

<sup>172</sup> Tex. Sen. Research Center, Bill Analysis, at 1, Tex. S.B. 462, 83d Leg., R.S. (2013), available at <http://www.capitol.state.tx.us/tlodocs/83R/analysis/pdf/SB00462F.pdf#navpanes=0>. The statement of intent also indicates that the new law requires the Governor's Specialty Courts Advisory Council "to recommend programmatic best practices to the criminal justice division." *Id.* This is consistent with a gubernatorial executive order also calling for advice on best practices for specialty courts. See The Governor of the State of Tex. Crim. Justice Div., *Ex. Order RP 77 – Relating to the reauthorization of the operation of the Governor's Criminal Justice Advisory Council*, 37 Tex. Reg. 2806 (2012), available at <http://governor.state.tx.us/news/executive-order/16995/>.

programs “shall . . . comply with all programmatic best practices recommended by the Specialty Courts Advisory Council . . . and approved by the Texas Judicial Council.”<sup>173</sup>

The recommended programmatic best practices for Texas specialty courts have included the expectation for “adherence to the Ten Key Components and research-based best practices for specialty courts.”<sup>174</sup> As described by the Texas Criminal Justice Advisory Council, the National Association of Drug Court Professionals developed “the Ten Key Components . . . as essential characteristics specialty programs must embody.”<sup>175</sup> In turn, the Texas Legislature has codified these key components for Texas specialty courts.<sup>176</sup> Of significance to the discussion of a judge’s role in a specialty court, these codified program characteristics contemplate an “ongoing judicial interaction with program participants.”<sup>177</sup> Accordingly, the state legislature has not only recognized that a judge is engaged in a different, non-traditional role when presiding over a specialty court program, but has also codified the expectation that judges in such programs will have ongoing interactions with the participants. Unfortunately, however, the Texas Code of Judicial Conduct, unlike the 2007 Model ABA Code or its implementation in many states, does not address the unique role performed by judges in specialty courts, and it is

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<sup>173</sup>S.B. 462, *supra* note 170, at § 1.01 (enacting TEX. GOV’T CODE ANN. § 121.002(d)(1) (West Supp. 2013)). A failure to comply can result in the program’s ineligibility for state or federal funds. *Id.* § 121.002(e).

<sup>174</sup>See CJAC Report, *supra* note 1, at 2.

<sup>175</sup>See *id.* (referencing Key Components, *supra* note 4) (setting forth ten components identified as keys to successful drug court programs)).

<sup>176</sup>See CJAC Report, *supra* note 1, at 2. See also TEX. GOV’T CODE ANN. § 123.001(a)(1)–(10) (West Supp. 2013) (defining ten “essential characteristics” for Texas drug courts); *id.* § 122.001(1)–(10) (family drug courts); *id.* § 124.001(a)(1)–(10) (veterans courts); *id.* § 125.001(1)–(9) (mental health courts). S.B. 462 re-codified these statutes from their former locations in other parts of the Texas Government Code. S.B. 462, *supra* note 169, at §§ 1.02, 1.04–.06.

<sup>177</sup>TEX. GOV’T CODE ANN. §§ 122.001(7), 123.001(a)(7), 124.001(a)(7), 125.001(5) (West Supp. 2013). See also Key Components, *supra* note 4, at 15 (noting that the “judge is the leader of the drug court team” and is the link for participants from “treatment and to the criminal justice system” and indicating that such “courts require judges to step beyond their traditionally independent and objective arbiter roles”). Another key component, now codified in Texas, creates an expectation for “the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants.” See, e.g., TEX. GOV’T CODE ANN. § 123.001(a)(2) (West Supp. 2013).

therefore time for the Texas Supreme Court to amend the Texas Code of Judicial Conduct to recognize such courts.

What is the best approach for amending the Texas Code of Judicial Conduct to recognize the unique role of judges in specialty courts – particularly with regard to ex parte communications and disqualifications or recusals? By not having acted as of yet, the Texas Supreme Court has the opportunity to study the actions by other states and adopt provisions that best serve the expanding use of specialty courts in Texas. Amending the ex parte communications section of the Texas Code of Judicial Conduct in a manner comparable to several other states' adoption of provisions comparable to the 2007 ABA Model Code would provide a significant improvement over current law with regard to specialty courts.<sup>178</sup> One approach to doing so would be to amend Canon 3(B)(8) of the Texas Code of Judicial Conduct pertaining to the prohibition on ex parte communications by amending the exception set forth in subsection (e) and adding a new subsection (f), as follows:

(e) considering an ex parte communication expressly authorized by law, which for purposes of this exception includes statutes, constitutional provisions, decisional law, and state or local court rules or orders; and

(f) A judge presiding over a specialty court program such as a drug court, family drug court, mental health court, or veterans court may initiate, permit, or consider ex parte communications with members of the specialty court team at staffing conferences or meetings, or by written documents provided to all members of the specialty court team, consistent with waiver and consent protocols developed and implemented by the specialty court program. In presiding over a specialty court, a judge may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.<sup>179</sup>

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<sup>178</sup> The Texas Supreme Court might wish to consider adopting additional portions or all of the 2007 ABA Model Code, but the scope of such a review is beyond the scope of this Article.

<sup>179</sup> The suggested language would amend TEX. CODE JUD. CONDUCT, Canon 3(B)(8). The proposed new language is underlined.

The proposed amendments to subsection (e) represent an amalgam of the Iowa and New Mexico approaches described above.<sup>180</sup> In addition, adopting this language would recognize that specialty court programs are still evolving and different jurisdictions will likely approach problem-solving courts in differing ways.<sup>181</sup> The language suggested for subsection (f) creates an exception specifically addressed to specialty courts, and the text is drawn from the approaches of several states.<sup>182</sup> In addition, the four specific types of specialty courts identified in the proposed language are not intended to be exclusive, but track those four types of programs identified during the 2013 Texas legislative session in S.B. 462.<sup>183</sup> Finally, the proffered language relating to waiver and consent provisions is consistent with one of the Texas Criminal Justice Policy Council's focus areas.<sup>184</sup>

In addition to language pertaining to ex parte communications, the Texas Supreme Court should also consider adding language pertaining to disqualifications or recusals. Canon 3(B)(1) requires that a judge not decide a matter "in which disqualification is required or recusal is appropriate."<sup>185</sup> Moreover, a "judge shall perform judicial duties without bias or prejudice," and a "judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . ."<sup>186</sup> As discussed above, Idaho has adopted a firm rule that if the specialty court judge receives ex parte communications while presiding over the specialty court team, the judge

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<sup>180</sup> See *supra* notes 161–167 and accompanying text.

<sup>181</sup> See CJAC Report, *supra* note 1, at 7 (observing that "the size and diversity of Texas prevents a one-size-fits-all approach"). The Texas Supreme Court could also adopt a comment to the proposed, revised subsection (e) that incorporates the 2007 ABA Model Code's focus on local rules for specialty courts. See ABA MODEL CODE OF JUD. CONDUCT, Application § I cmt. 3 (2011) (authorizing "local rules" to take priority over conflicting Model Code provisions); see also, *supra* note 32 and accompanying text (quoting the ABA comment). For example, the Texas Supreme Court could consider the following approach for such a new comment: "When local rules establishing a specialty court specifically authorize conduct not otherwise permitted under this Code, they take precedence over the provisions set forth in the Code. Nevertheless, judges presiding over specialty courts shall comply with this Code except to the extent local rules provide and permit otherwise." This proffered language closely tracks the 2007 ABA Model Code's comparable comment.

<sup>182</sup> See *supra* notes 137–167 and accompanying text (notably, Idaho, Nebraska, and Kansas).

<sup>183</sup> See S.B. 462, *supra* note 170.

<sup>184</sup> See CJAC Report, *supra* note 1, at 7 (recommending the continued "development of standard consent and waiver forms for use by programs to ensure due process rights of participants are protected").

<sup>185</sup> TEX. CODE JUD. CONDUCT, Canon 3(B)(1).

<sup>186</sup> *Id.* Canon 3(B)(5)–(6).



“shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.”<sup>187</sup> That also appears to be the approach of the Tennessee Court of Criminal Appeals, although not that of the Tennessee Supreme Court.<sup>188</sup> This Article does not advocate a blanket requirement for recusal from subsequent proceedings simply because the specialty court judge received *ex parte* communications in the course of presiding over the specialty court program. Typically, courts consider recusal motions on a case-by-case basis. Why should this type of situation be any different, particularly if the specialty court participant signed a thorough consent and waiver form? Accordingly, one possible approach would be for the Texas Supreme Court to consider adding a new subsection (12) to Canon 3(B) pertaining to a judge’s adjudicative responsibilities, as follows:

(12) If *ex parte* communications permitted by this Canon become an issue at a subsequent adjudicatory proceeding at which a specialty court judge is presiding, the specialty court judge shall either (1) recuse himself or herself if the judge gained personal knowledge of disputed facts outside the context of the specialty court program, or (2) make disclosure of any such *ex parte* communications.<sup>189</sup>

The foregoing language is intended to address the possible need for a recusal depending on the nature and extent of the *ex parte* communications that might arise as part of an individual’s participation in a specialty court program. It calls for a case-by-case assessment, rather than employing a blanket rule. Indeed, depending on the nature of the *ex parte* communications, as well as the extent of any signed waivers or consent documentation, there might be no need for recusal in a particular case.<sup>190</sup> Moreover, if the revised rules permit certain *ex parte* communications from,

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<sup>187</sup> See IDAHO CODE OF JUD. CONDUCT, Canon 3(B)(7)(f), at 11.

<sup>188</sup> See *supra* notes 83–127 and accompanying text.

<sup>189</sup> This proposal closely tracks language from one of the official comments set forth in the 2012 Tennessee Code of Judicial Conduct. See TENN. CODE OF JUD. CONDUCT, Tenn. S. Ct. R. 10, RJC 2.9 cmt. 4; *supra* notes 130–136 and accompanying text. As an alternative, this proposed language could be included at the end of proposed subsection (B)(8)(f), described above. See *supra* text accompanying note 179.

<sup>190</sup> See, e.g., *supra* notes 108–127, and accompanying text (discussing Tenn. Judicial Ethics Comm., Advisory Op. 11-01, *supra* note 108).

for example, treatment team members at a staffing meeting, the presiding specialty court judge will have received that information while performing a now permissible judicial role—and not gained it via “personal knowledge.”<sup>191</sup>

## VI. CONCLUSION

Specialty courts now comprise a significant and growing part of the Texas judicial landscape. Moreover, given both legislative and gubernatorial support for specialty courts in Texas, this growth will likely continue. To assure that there is appropriate recognition and coverage of this new role for a growing number of Texas judges who preside over specialty courts, it is time for the Texas Supreme Court to follow the lead of a number of states from around the country and amend the Texas Code of Judicial Conduct.

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<sup>191</sup> See Meyer, *supra* note 11, at 205–06 (asserting that “[w]hen a drug court judge receives information from a treatment provider or other source, this would be subject to the rules on ex parte contacts” and “does not qualify as ‘personal knowledge’” requiring disqualification because “the judge has not personally observed the events in question;” but, suggesting that judges should “recuse themselves from any adjudication arising out of events that they did witness, such as a participant appearing in court intoxicated or a participant attempting to escape”). In addition, separate and apart from issues pertaining to ex parte communications, there might exist other reasons by which the specialty court judge should consider whether to recuse himself or herself from an ensuing adversarial proceeding based on possible bias. See, e.g., Arkfeld, *supra* note 10, at 320 (providing the following example of possible bias when the specialty court judge is called to preside at a later sentencing hearing: “The judge who had worked with the defendant throughout the failed treatment process might no longer be in the position to be considered objective and open-minded.”).

MEMORANDUM

Date: April 16, 2019

To: Judicial Administration Subcommittee  
From: Andrew P. Van Osselaer  
Subject: Ex Parte Communication in Specialty Courts

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**EX PARTE COMMUNICATION  
IN TEXAS'S SPECIALTY COURTS**

Specialty courts play an important role in Texas. They exist to give certain classes of cases that evoke important public policy concerns, such as the welfare of children or our veterans, the special attention they deserve. Because specialty courts play a unique role, not all rules befitting a court of general jurisdiction are necessarily appropriate for a specialty court.

To address the needs of specialty courts, the Judicial Administration Subcommittee is considering changes to Judicial Code of Conduct Canon 3, which prohibits ex parte communication with judges. In preparation for its discussion, at Nina Cortell's request, I reached out to five experienced specialty-court judges in Texas to seek their advice. That advice is reflected below.

**I. Introduction to Specialty Courts in Texas**

Specialty courts differ from traditional courts not only in that they are courts with limited jurisdiction, they also differ in that they are tasked with achieving specific policy goals—for example, the protection of children or the rehabilitation of drug addicts. Specialty-court judges, thus, are often more than mere arbiters. They may serve as a source of motivation, as a holder of accountability, as a service coordinator, or as a de facto team lead for various social service agencies. Texas's specialty courts include:

- Drug Court
- Veterans Treatment Court
- Juvenile Court
- Mental Health Court
- Family Drug Court
- Commercially Sexually Exploited Persons Court

Central to almost all specialty-court programs are frequent (often weekly) meetings, known as “staffings,” between the court, law enforcement, the treatment team, the prosecutor, and the defense attorney. The purpose of a staffing is to update the court on the defendant’s progress and to discuss the defendant’s next steps before the defendant’s next hearing, which often occurs later the same day. In some specialty-court programs, the defense attorney represents the defendant. In others, however, the defense attorney serves simply as a defendant-nonspecific advocate for participants in the program. Between staffings, court coordinators receive a flurry of communication from treatment personnel, law enforcement, defense counsel, and other sources, which the coordinator then compiles for the next staffing.

For those with little specialty-court experience, Judge Ruben Reyes forwarded two videos, which provide a look inside specialty courts:

- Judge Reyes Interview: [LINK](#)
- Tom Brokaw news story featuring footage of hearings: [LINK](#)

## II. Canon 3’s Current Prohibition

Under the current canon, ex parte communication is disallowed unless “authorized by law.” Canon 3, Subsection 8 reads:

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:

...

(e) considering an ex parte communication expressly authorized by law.

It is unclear from the face of the rule whether “authorization” may be by local court rule.

### III. Possible Changes to Canon 3

#### A. *Adding a consent exception to Canon 3.B(e)*

For example, Canon 3 may be changed to read: “considering an ex parte communication expressly authorized by law or by party consent.”

#### B. *Adding a comment in the style of the ABA Model Code*

A comment may be added to Canon 3, explaining that the ex parte prohibition is not designed to impede the operations of specialty courts. The ABA Model Code has such a comment. It reads:

A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

MODEL CODE OF JUDICIAL CONDUCT Canon 2, cmt. 4 (Am. Bar Ass’n 1980).

#### C. *Defining “authorized by law” to include local court rules*

Another option is to suggest in a comment that “authorized by law” includes by local rule.

#### IV. Feedback from Judges

I spoke with five specialty-court judges to ask their thoughts on these proposed changes and to ask what role *ex parte* communication plays in their courts. The five judges are:

- Ruben Reyes—Lubbock County drug court
- Ray Wheless—Collin County drug court; chair of the Specialty Courts Advisory Counsel
- Darlene Byrne— Travis County family drug court and juvenile mental health court
- Nancy Hohengarten— Travis County mental health court
- Wayne Christian— Bexar County veterans' court

##### A. *Is ex parte communication a problem?*

Of the five judges interviewed, four believe that Canon 3's *ex parte* prohibition impedes, or at least complicates, their programs. Judge Reyes mentioned that in his court, the defense attorney present at staffings does not represent specific participants. Thus, the staffings themselves may constitute *ex parte* communication. Judge Byrne, Judge Wheless, and Judge Hohengarten stated that although participants have counsel present during staffings, communications outside of staffings—for example, with the court coordinator—are frequently *ex parte* and are essential to the court's operations.

Judge Hohengarten mentioned that the issue with Canon 3 is more than academic. A new-to-town attorney, who was unfamiliar with the processes of Travis County's mental health court, once attempted unsuccessfully to seek disciplinary action against her based on a perceived violation of Canon 3's *ex parte* prohibition.

Judge Christian was the only judge that had no issue Canon 3's *ex parte* prohibition. He expressed that in his court, he goes out of the way to ensure that participants have a representative present during any communication with the court. Therefore, at least in his court, he did not have any issues.

***B. Should a consent exception be added to Canon 3?***

The four judges who believe ex parte communication is an issue approved adding a consent exception. Judge Wheless and Judge Byrne mentioned this would be easy to achieve and document through the program admissions process.

***C. Should an ABA-like comment be added to Canon 3?***

The four judges who believe ex parte communication is an issue approved adding an ABA-like comment. Judge Byrne and Judge Hohengarten mentioned that if the ABA's language is adopted, family treatment courts should be added to the list of examples of specialty courts.

***D. Should Canon 3 (or a comment) explain that “authorized by law” includes by local rules?***

Judge Reyes and Judge Christian approved of allowing local ex parte rules. Both said that would allow rules to be tailored to the specific needs of the program. Judge Byrne and Judge Hohengarten disapproved of a local-rule exception. They said that promulgating local rules is too slow and takes too much effort. Judge Byrne said this is in part because the Supreme Court of Texas must approve local rules.

***E. Additional comments***

I asked the judges if they had additional thoughts they would like to share with the Subcommittee.

Judge Reyes wanted to express that Canon 3's overarching mandate of judicial impartiality is itself out of step with the role of specialty-court judges, who often act more like coaches than arbiters.

Judge Wheless said he cannot properly monitor participants' progress and tailor treatment plans without ex parte communication. The flow of communication must be continuous and quick to make the program work. Judge Wheless also mentioned that providing an exception for specialty

courts should not be problematic because the communication is solely for the benefit of participants.

Judge Byrne mentioned that there is an issue of propriety when a specialty-court judge has presided over a participant's treatment (and has received a stream of inadmissible information about the participant) *and then also* presides over the participant's termination hearing. She said that she recuses herself in those situations despite feeling she could disregard all inadmissible evidence out of respect for the participant. She mentioned, however, that in counties with fewer judges, recusal may not be an option.



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15           SECTION 9.05. Section 121.002, Government Code, is amended  
16 by amending Subsections (c) and (d) and adding Subsections (f) and  
17 (g) to read as follows:

18           (c) Notwithstanding any other law, a specialty court  
19 program may not operate until the judge, magistrate, or  
20 coordinator:

21                   (1) provides to the Office of Court Administration of  
22 the Texas Judicial System [~~criminal justice division of the~~  
23 ~~governor's office~~]:

- 24                           (A) written notice of the program;
- 25                           (B) any resolution or other official declaration  
26 under which the program was established; and
- 27                           (C) a copy of the applicable strategic plan that

1 incorporates duties related to supervision that will be required  
2 under the program; and

3 (2) receives from the office [~~division~~] written  
4 verification of the program's compliance with Subdivision (1).

5 (d) A specialty court program shall:

6 (1) comply with all programmatic best practices  
7 recommended by the Specialty Courts Advisory Council under Section  
8 772.0061(b)(2) and approved by the Texas Judicial Council; and

9 (2) report to the criminal justice division of the  
10 governor's office and the Texas Judicial Council any information  
11 required by the division or council regarding the performance of  
12 the program.

13 (f) The Office of Court Administration of the Texas Judicial  
14 System shall:

15 (1) on request provide technical assistance to the  
16 specialty court programs;

17 (2) coordinate with an entity funded by the criminal  
18 justice division of the governor's office that provides services to  
19 specialty courts;

20 (3) monitor the specialty court programs for  
21 compliance with programmatic best practices as required by  
22 Subsection (d); and

23 (4) notify the criminal justice division of the  
24 governor's office if a specialty court program fails to comply with  
25 programmatic best practices as required by Subsection (d).

26 (g) The Office of Court Administration of the Texas Judicial  
27 System shall coordinate with and provide information to the

1 criminal justice division of the governor's office on request of  
2 the division.

3           SECTION 9.06. (a) The Office of Court Administration of  
4 the Texas Judicial System shall contract with the National Center  
5 for State Courts to conduct a study of the caseloads of the district  
6 and statutory county courts in this state. The study must  
7 concentrate on the weighted caseload of each court, considering the  
8 nature and complexity of the cases heard.

9           (b) Not later than December 1, 2020, the National Center for  
10 State Courts shall report the results of the study required by  
11 Subsection (a) of this section to the Office of Court  
12 Administration of the Texas Judicial System. Not later than  
13 January 1, 2021, the office shall file a report on those results  
14 with the governor, the lieutenant governor, the speaker of the  
15 house of representatives, and the chairs of the standing committees  
16 of the senate and house of representatives with jurisdiction over  
17 the judicial system.

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Vernon's Texas Statutes and Codes Annotated  
Government Code (Refs & Annos)  
Title 2. Judicial Branch (Refs & Annos)  
Subtitle K. Specialty Courts (Refs & Annos)  
Chapter 121. General Provisions

V.T.C.A., Government Code § 121.001

§ 121.001. Definition

Effective: September 1, 2013

[Currentness](#)

In this subtitle, “specialty court” means a court established under this subtitle or former law.

**Credits**

Added by [Acts 2013, 83rd Leg., ch. 747 \(S.B. 462\), § 1.01, eff. Sept. 1, 2013.](#)

V. T. C. A., Government Code § 121.001, TX GOVT § 121.001

Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

Vernon's Texas Statutes and Codes Annotated  
Government Code (Refs & Annos)  
Title 2. Judicial Branch (Refs & Annos)  
Subtitle K. Specialty Courts (Refs & Annos)  
Chapter 121. General Provisions

V.T.C.A., Government Code § 121.002

§ 121.002. Oversight

Effective: September 1, 2015

[Currentness](#)

- (a) The lieutenant governor and the speaker of the house of representatives may assign to appropriate legislative committees duties relating to the oversight of specialty court programs.
- (b) For the purpose of determining the eligibility of a specialty court program to receive state or federal grant funds administered by a state agency, the governor or a legislative committee to which duties are assigned under Subsection (a) may request the state auditor to perform a management, operations, or financial or accounting audit of the program.
- (c) Notwithstanding any other law, a specialty court program may not operate until the judge, magistrate, or coordinator:
- (1) provides to the criminal justice division of the governor's office:
    - (A) written notice of the program;
    - (B) any resolution or other official declaration under which the program was established; and
    - (C) a copy of the applicable strategic plan that incorporates duties related to supervision that will be required under the program; and
  - (2) receives from the division written verification of the program's compliance with Subdivision (1).
- (d) A specialty court program shall:
- (1) comply with all programmatic best practices recommended by the Specialty Courts Advisory Council under [Section 772.0061\(b\)\(2\)](#) and approved by the Texas Judicial Council; and

(2) report to the criminal justice division any information required by the division regarding the performance of the program.

(e) A specialty court program that fails to comply with Subsections (c) and (d) is not eligible to receive any state or federal grant funds administered by any state agency.

**Credits**

Added by [Acts 2013, 83rd Leg., ch. 747 \(S.B. 462\), § 1.01, eff. Sept. 1, 2013](#). Amended by [Acts 2015, 84th Leg., ch. 1051 \(H.B. 1930\), § 5, eff. Sept. 1, 2015](#).

V. T. C. A., Government Code § 121.002, TX GOVT § 121.002

Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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Tab H

## MEMO

To: Trish McAllister

From: Kristen Levins

Re: Name Change Forms

Date: March 25, 2019

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On January 28, 2019, we met with Pete Schenkken about the Uniform Forms Task Force Name Change Forms. He is the Chair of the Supreme Court Advisory Committee standing sub-committee asked to report on these forms.

Below, the statutes and rules we referred to when creating the forms are listed in “Relevant Statutes and Rules” – the text of these statutes or rules are compiled in a separate document. Answers to the subcommittee’s questions are in “Question and Answer”. Edits made directly on the relevant forms are outlined in “Edits Made”. Proposed additions are written in blue under “Suggested Language”. Government website pages are listed under “Links”.

### Relevant Statutes and Rules

Texas Civil Practices and Remedies Code Section 30.014

Texas Family Code Chapter 45

Texas Government Code Section 411.088(a)

Texas Rules of Civil Procedure 21c

### Question and Answer

**Question:** What percentage of name change petitions are filed by a self-represented litigant?

**Answer:** The vast majority. As of today’s date, we only have statistics from Travis County. (We are waiting on the numbers from Harris County District Courts. OCA does not collect data on name changes individually – it is tracked in the “All Other” family category.)

According to a statistician with the Travis County District Court, in 2018, 702 of the 702 name change petitions were filed by a self-represented litigant; in 2017, it was 757 of 757.

Both TexasLawHelp (statewide) and the Harris County Law Library have self-help forms on their websites. The large number of downloads from these websites underscores the number of name change petitions filed by SRLs.

- TexasLawHelp



- 16,461 unique adult name change forms downloads in 2018. The forms and instructions can be downloaded separately, and there are 3 documents total, so this number is probably artificially high.
- 7,235 unique child name change forms downloads in 2018. Like the adult forms, these can be downloaded separately, but there are 4 documents total in this kit.
- Harris County Law Library
  - 11,678 unique adult name change forms downloads in 2018. Unlike TexasLawHelp, the entire kit is downloaded at the same time. This number is of unique downloads of the petition, order, and instructions.
  - 6,689 unique child name change forms downloads in 2018. Again, this number is downloads of a complete kit: petition, child’s consent, order, and instructions.

**Question:** Do petitioners need to include their Social Security and driver’s license numbers on child’s name change petition

**Answer:** Yes, if the petitioner is a “party”. “Party” is undefined in this chapter. Civil Practices and Remedies Code § 30.014(a).

**Question:** Should there be an instruction on how to file a contested name change for a child?

**Answer:** No. If we want to address contested name changes, we need to create a separate form. Adding information on service would unnecessarily complicate the instructions.

Most of the jurisdictions that have name change forms available online have separate forms for agreed and contested name changes.

**Question:** Are the fees for fingerprinting statutorily set?

**Answer:** No.

**Question:** Are background checks required by statute?

**Answer:** No. But fees for background checks are listed in Chapter 411.088 of the Texas Government Code.

**Question:** Do people’s Social Security number change when their name changes?

**Answer:** No. According to the Social Security Administration, there are five instances when a different number is assigned. See <https://faq.ssa.gov/en-US/Topic/article/KA-02220>.

**Question:** Does the order need to include a Social Security number?

**Answer:** No, according to Chapter 45, Texas Family Code. It is only required in the petition.

**Question:** Who redacts sensitive information?

**Answer:** The parties, according to Texas Rule of Civil Procedure 21c.

### Edits Made

#### Adult Name Change Instructions:

- Added sentence under “Do Not Use” to say this form should not be used for a name change simultaneous with a divorce.
- Added a pros/cons section on declaration vs. notary and where a notary can be found.
- Added a fee range for fingerprinting. Added information on where you can be fingerprinted.
- Moved background check information from Step 2 to Step 5.

#### Child Name Change Instructions:

- Added “Agreed” to the title.
- Added a pros/cons section on declaration vs. notary and where a notary can be found.

#### Both sets of instructions:

- Added citations for statutes and/or rules that require the disclosure of sensitive information.
  - The subcommittee wanted an instruction on why sensitive data was required and how it is handled. I am concerned that will lead to information overload and limited the instruction to citations.

#### Both petitions:

- Added “sensitive information” designations per Texas Rule of Civil Procedure 21c(d).

### Suggested Language

- The subcommittee was concerned that the warning language in a red box at the top of each petition may discourage people from using the form. Alternate language:
  - It is always best to hire a lawyer. To get a referral to a lawyer or, if you are poor, to a free Legal Aid program, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690.

If you are poor, you may be able to talk to an attorney online by live chat at [www.TexasLawHelp.org](http://www.TexasLawHelp.org).

- Add pros/cons on declaration vs. notary to instructions
  - Complete the declaration section if you do not want to swear under oath and you are okay with putting your birthdate and address on a court document.
  - Complete the notary section if you do not want to your birthdate and address on a court document, and you want to swear under oath. Many notary public’s charge a fee for their service.

- Define “notary” and explain where to find one
  - A Notary Public witnesses you signing the petition. You must not sign the notary section until you are with a notary. You can find notaries at most banks and many UPS Stores. Some notaries charge a fee for their service.
  
- Explain where to get an FBI fingerprint card
  - [DPS website](#): The petitioner may call 1-888-467-2080 to schedule an appointment to be fingerprinted at a “Print and Go” FAST location or access the website at [www.identogo.com](http://www.identogo.com) and select Option B – Fingerprint Cards. Fingerprints cannot be transmitted to DPS electronically. The fee for this fingerprinting service is \$20.00, includes two fingerprint cards. Petitioner must submit both fingerprint cards and all required information to DPS by mail.

### **Links**

How to change your name on your Social Security card – [faq.ssa.gov](http://faq.ssa.gov)

How to change your name on your driver’s license – [dps.texas.gov](http://dps.texas.gov)

How to get fingerprints taken – [dps.texas.gov](http://dps.texas.gov)

# Tab I

Relevant Statutes and Rules  
Adult and Child Name Change

Texas Civil Practices and Remedies Code Section 30.014

Texas Family Code Chapter 45

Texas Government Code Section 411.088(a)

Texas Rules of Civil Procedure 21c

**TEXAS CIVIL PRACTICES AND REMEDIES CODE**

Sec. 30.014. PLEADINGS MUST CONTAIN PARTIAL IDENTIFICATION INFORMATION. (a) In a civil action filed in a district court, county court, or statutory county court, each party or the party's attorney shall include in its initial pleading:

(1) the last three numbers of the party's driver's license number, if the party has been issued a driver's license; and

(2) the last three numbers of the party's social security number, if the party has been issued a social security number.

(b) A court may, on its own motion or the motion of a party, order that an initial pleading be amended to contain the information listed under Subsection (a) if the court determines that the pleading does not contain that information. A court may find a party in contempt if the party does not amend the pleading as ordered by the court under this subsection.

**TEXAS FAMILY CODE**

Sec. 45.001. WHO MAY FILE; VENUE. A parent, managing conservator, or guardian of a child may file a petition requesting a change of name of the child in the county where the child resides.

Sec. 45.002. REQUIREMENTS OF PETITION. (a) A petition to change the name of a child must be verified and include:

(1) the present name and place of residence of the child;

(2) the reason a change of name is requested;

(3) the full name requested for the child;

(4) whether the child is subject to the continuing exclusive jurisdiction of a court under Chapter 155; and

(5) whether the child is subject to the registration requirements of Chapter 62, Code of Criminal Procedure.

(b) If the child is 10 years of age or older, the child's written consent to the change of name must be attached to the petition.

Sec. 45.003. CITATION. (a) The following persons are entitled to citation in a suit under this subchapter:

(1) a parent of the child whose parental rights have not been terminated;

(2) any managing conservator of the child; and

- (3) any guardian of the child.
- (b) Citation must be issued and served in the same manner as under Chapter [102](#).

Sec. 45.0031. WAIVER OF CITATION. (a) A party to a suit under this subchapter may waive the issuance or service of citation after the suit is filed by filing with the clerk of the court in which the suit is filed the waiver of the party acknowledging receipt of a copy of the filed petition.

(b) The party executing the waiver may not sign the waiver using a digitized signature.

(c) The waiver must contain the mailing address of the party executing the waiver.

(d) Notwithstanding Section [132.001](#), Civil Practice and Remedies Code, the waiver must be sworn before a notary public who is not an attorney in the suit. This subsection does not apply if the party executing the waiver is incarcerated.

(e) The Texas Rules of Civil Procedure do not apply to a waiver executed under this section.

(f) For purposes of this section, "digitized signature" has the meaning assigned by Section [101.0096](#).

Sec. 45.004. ORDER. (a) The court may order the name of a child changed if:

(1) the change is in the best interest of the child; and

(2) for a child subject to the registration requirements of Chapter [62](#), Code of Criminal Procedure:

(A) the change is in the interest of the public; and

(B) the person petitioning on behalf of the child provides the court with proof that the child has notified the appropriate local law enforcement authority of the proposed name change.

(b) If the child is subject to the continuing jurisdiction of a court under Chapter 155, the court shall send a copy of the order to the central record file as provided in Chapter 108.

(c) In this section, "local law enforcement authority" has the meaning assigned by Article [62.001](#), Code of Criminal Procedure.

Sec. 45.005. LIABILITIES AND RIGHTS UNAFFECTED. A change of name does not:

(1) release a child from any liability incurred in the child's previous name; or

(2) defeat any right the child had in the child's previous name.

Sec. 45.101. WHO MAY FILE; VENUE. An adult may file a petition requesting a change of name in the county of the adult's place of residence.

Sec. 45.102. REQUIREMENTS OF PETITION. (a) A petition to change the name of an adult must be verified and include:

(1) the present name and place of residence of the petitioner;

(2) the full name requested for the petitioner;

(3) the reason the change in name is requested;

(4) whether the petitioner has been the subject of a final felony conviction;

(5) whether the petitioner is subject to the registration requirements of Chapter 62, Code of Criminal Procedure; and

(6) a legible and complete set of the petitioner's fingerprints on a fingerprint card format acceptable to the Department of Public Safety and the Federal Bureau of Investigation.

(b) The petition must include each of the following or a reasonable explanation why the required information is not included:

(1) the petitioner's:

(A) full name;

(B) sex;

(C) race;

(D) date of birth;

(E) driver's license number for any driver's license issued in the 10 years preceding the date of the petition;

(F) social security number; and

(G) assigned FBI number, state identification number, if known, or any other reference number in a criminal history record system that identifies the petitioner;

(2) any offense above the grade of Class C misdemeanor for which the petitioner has been charged; and

(3) the case number and the court if a warrant was issued or a charging instrument was filed or presented for an offense listed in Subsection (b)(2).

Sec. 45.103. ORDER. (a) The court shall order a change of name under this subchapter for a person other than a person with a final felony conviction or a person subject to the registration requirements of Chapter 62, Code of Criminal Procedure, if the change is in the interest or to the benefit of the petitioner and in the interest of the public.

(b) A court may order a change of name under this subchapter for a person with a final felony conviction if, in addition to the requirements of Subsection (a), the person has:

(1) received a certificate of discharge by the Texas Department of Criminal Justice or completed a period of community supervision or juvenile probation ordered by a court and not less than two years have passed from the date of the receipt of discharge or completion of community supervision or juvenile probation; or

(2) been pardoned.

(c) A court may order a change of name under this subchapter for a person subject to the registration requirements of Chapter 62, Code of Criminal Procedure, if, in addition to the requirements of Subsection (a), the person provides the court with proof that the person has notified the appropriate local law enforcement authority of the proposed name change. In this subsection, "local law enforcement authority" has the meaning assigned by Article 62.001, Code of Criminal Procedure.

Sec. 45.104. LIABILITIES AND RIGHTS UNAFFECTED. A change of name under this subchapter does not release a person from liability incurred in that person's previous name or defeat any right the person had in the person's previous name.

Sec. 45.105. CHANGE OF NAME IN DIVORCE SUIT. (a) On the final disposition of a suit for divorce, for annulment, or to declare a marriage void, the court shall enter a decree changing the name of a party specially praying for the change to a prior used name unless the court states in the decree a reason for denying the change of name. The court may not deny a change of name solely to keep last names of family members the same.

(b) A person whose name is changed under this section may apply for a change of name certificate from the clerk of the court as provided by Section [45.106](#).

Sec. 45.106. CHANGE OF NAME CERTIFICATE. (a) A person whose name is changed under Section [6.706](#) or [45.105](#) may apply to the clerk of the court ordering the name change for a change of name certificate.

(b) A certificate under this section is a one-page document that includes:

- (1) the name of the person before the change of name was ordered;
- (2) the name to which the person's name was changed by the court;
- (3) the date on which the name change was made;
- (4) the person's social security number and driver's license number, if any;
- (5) the name of the court in which the name change was ordered; and
- (6) the signature of the clerk of the court that issued the certificate.

(c) An applicant for a certificate under this section shall pay a \$10 fee to the clerk of the court for issuance of the certificate.

(d) A certificate under this section constitutes proof of the change of name of the person named in the certificate.

Sec. 45.107. WAIVER OF CITATION. (a) A party to a suit under this subchapter may waive the issuance or service of citation after the suit is filed by filing with the clerk of the court in which the suit is filed the waiver of the party acknowledging receipt of a copy of the filed petition.

(b) The party executing the waiver may not sign the waiver using a digitized signature.

(c) The waiver must contain the mailing address of the party executing the waiver.

(d) Notwithstanding Section [132.001](#), Civil Practice and Remedies Code, the waiver must be sworn before a notary public who is not an attorney in the suit. This subsection does not apply if the party executing the waiver is incarcerated.

(e) The Texas Rules of Civil Procedure do not apply to a waiver executed under this section.

(f) For purposes of this section, "digitized signature" has the meaning assigned by Section [101.0096](#).

## **TEXAS GOVERNMENT CODE**

Sec. 411.088. FEES. (a) Except as otherwise provided by Subsection (a-1), the department [Department of Public Service] may charge a person a fee for processing inquiries for criminal history record information. The department may charge:

(1) a fee of \$10 for each inquiry for criminal history record information on a person that is processed only on the basis of the person's name, unless the inquiry is submitted electronically or by magnetic media, in which event the fee is \$1;



(2) a fee of \$15 for each inquiry for criminal history record information on a person that is processed on the basis of a fingerprint comparison search; and

(3) except as provided by Subsection (b), actual costs for processing all other information inquiries.

(a-1) The department may not charge a fee under Subsection (a) for providing criminal history record information to:

(1) a criminal justice agency;

(2) the office of capital and forensic writs; or

(3) a public defender's office.

(b) The department may not charge for processing an electronic inquiry for information described as public information under Article 62.005, Code of Criminal Procedure, made through the use of the Internet.

(c) The fee a municipality pays under Subsection (a)(1) for an inquiry submitted electronically or by magnetic media may be used to allow the department to make the information available through electronic means under Section 411.129.

## **TEXAS RULES OF CIVIL PROCEDURE**

### **RULE 21c. PRIVACY PROTECTION FOR FILED DOCUMENTS.**

(a) Sensitive Data Defined. Sensitive data consists of: (1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number; (2) a bank account number, credit card number, or other financial account number; and (3) a birth date, a home address, and the name of any person who was a minor when the underlying suit was filed.

(b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents filed under seal, containing sensitive data may not be filed with a court unless the sensitive data is redacted.

(c) Redaction of Sensitive Data; Retention Requirement. Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

(d) Notice to Clerk. If a document must contain sensitive data, the filing party must notify the clerk by: (1) designating the document as containing sensitive data when the document is electronically filed; or (2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

(e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.

(f) Restriction on Remote Access. Documents that contain sensitive data in violation of this rule must not be posted on the Internet.

Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

Tab J

# Texas Adult Name Change Forms

## INSTRUCTIONS

**This Adult Name Change Forms Set Contains** instructions and three forms: a Statement of Inability to Afford Payment of Court Costs, a Petition to Change the Name of an Adult, and a Final Order to Change the Name of an Adult. The chart below describes each form and when to use it.

### Do Not Use This Adult Name Change Form Set if:

- You want to change someone else’s name instead of your own.
- You are younger than 18 years old.
- You have a felony conviction(s) and you have not been pardoned; OR it has not yet been two years since you were discharged or completed probation.
- You are required to register as a sex offender and have not yet turned in a Sex Offender Update form to your local law enforcement authority.
- You have gotten divorced and you already changed your name in the divorce decree. You may use a certified copy of the divorce decree instead of the name change order as proof of name change.
- You are getting divorced or plan to get divorced soon. You can change your name in your divorce decree.
- You are a victim of domestic violence, and you are concerned about disclosing your current address. A name change petition is a public document, and your abuser could find out where you live. Seek advice from a lawyer to do this safely.

### Use This Adult Name Change Form Set if:

- You want to change your own name, not someone else’s name.
- You are at least 18 years old.
- You have no felony convictions.
- You have a felony conviction(s) and you attach proof:
  - o That you have been pardoned; OR
  - o That it has been at least two years since you were discharged or completed probation.
- You are not a sex offender, OR you are required to register as a sex offender and:
  - o You submit a Sex Offender Update Form to your local law enforcement authority notifying them that you are asking the Court to change your name, and
  - o You attach proof that you have done so to your Petition.
- You got divorced but your name wasn’t changed in the divorce decree.

### Contents of Adult Name Change Forms Set:

Name of Form	What It Is and How to Use It
<b>Statement of Inability to Afford Payment of Court Costs</b>	If you are poor, or on government benefits because you are poor, or you cannot pay court fees, you may fill out this form to ask the Court if you can file for a name change without paying the court and filing fees. The Court may ask you to present evidence of your income and expenses at a hearing. The Court may or may not decide to let you file without paying. It is sometimes called a “Pauper’s Oath” or an “Affidavit of Inability to Pay Costs.”
<b>Petition to Change the Name of an Adult</b>	<b>You must swear that the information in this form is true by completing a sworn declaration.</b> It informs (tells) the court that you want to change your name, why you want to change your name, and what you want the Court to change your name to. It also notifies the Court of any criminal history.

<b>Final Order to Change the Name of an Adult</b>	This form changes your name once the Court signs it. Fill it out and bring it with you to court.
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### Need Help?

- It is always best to hire a lawyer. To get a referral to a lawyer or, if you are poor, to a free Legal Aid program, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690.
- If you are a victim of domestic violence, or if at any time you feel unsafe, you can get confidential help from the National Domestic Violence Hotline at 1-800-799-7233 or legal help from the Texas Advocacy Project Family Violence Hotline by calling 1-800-374-4673.
- If you are poor, you may be able to talk to an attorney online by live chat at [www.TexasLawHelp.org](http://www.TexasLawHelp.org).

### How to Use this Set:

#### Step 1: Read These General Instructions

- Do not change the forms to change the name of a child or another adult. This Set is NOT to be used for those situations.
- Use blue ink to complete the forms. Pencil and other color ink will not scan clearly.
- Fill out all the spaces on the forms unless instructed otherwise. The judge and court personnel will not fill them out for you. The judge may require you to correct errors that you may make, or may deny the name change if the information is inaccurate or incomplete.
- Make a copy of each form you complete and keep it for your records.
- Find out whether name changes are filed in the district court or county court in your county by calling the district court clerk's office and asking.

#### Step 2: Collect the Following Items to File with Your Petition

- **Fingerprints:** Get a legible and complete set of your fingerprints made on either a Texas Department of Public Safety or a Federal Bureau of Investigation fingerprint card. Write "**Exhibit A**" at the top.
  - There is a fee for this service. Typically, it's \$10-\$20 but can be more if you also get a criminal background check.
  - You can make an appointment with the Texas Department of Public Safety by calling 1-888-467-2080 to schedule an appointment at a "Print and Go" FAST location, or by visiting [www.identogo.com](http://www.identogo.com) and selecting Option B – Fingerprint Cards. The Texas Department of Public Safety may require you to include a copy of the name change petition when you ask to get your fingerprints taken. If so, file the name change petition and then submit a copy to them.
  - Your local police department may also be able to take your fingerprints.
- **If you have a felony conviction(s):** Get proof that you have been pardoned OR that it has been at least two years since you were discharged or completed probation. Write "**Exhibit B**" at the top.
- **If you are required to register as a sex offender:** Get a copy of the *Sex Offender Update Form* that you submitted to your local law enforcement authority notifying them that you are asking to have your name changed. Write "**Exhibit C**" at the top.

#### Step 3: Fill out the Petition to Change the Name of an Adult and, if you are poor, the Statement of Inability to Afford Payment of Court Costs

- Fill out the Petition to Change the Name of an Adult. You are the Petitioner. You must swear the information in your Petition to Change the Name of an Adult is true by completing a **sworn declaration**.
- Your full Social Security number and driver's license number are required by Texas Family Code Section 45.102 and Texas Rule of Civil Procedure 21c.
- You will need to list the Class A or B misdemeanors or felonies you have been **charged** with. You will also need to list Class A or B misdemeanors or felonies you have been **convicted** of.
- If you are poor, are receiving public assistance, or do not think you have enough money to pay the court costs for your name change, fill out the Statement of Inability to Afford Payment of Court Costs.
- Make one copy of the Petition to Change the Name of an Adult and, if you are using it, the Statement of Inability to Afford Payment of Court Costs.

#### **Step 4: File (turn in) your Petition to Change the Name of an Adult, and if applicable, your Statement of Inability to Afford Payment of Court Costs**

- Take the following documents to the courthouse and file them (turn them in) with the District or County Court Clerk in the county where you live:
  - The original and the copy of your Petition to Change the Name of an Adult;
  - If applicable, your Statement of Inability to Afford Payment of Court Costs. NOTE: If you are using a Statement of Inability to Afford Payment of Court Costs, you must file the Petition to Change the Name of an Adult and the Statement of Inability to Afford Payment of Court Costs at the same time.
  - If you have a felony conviction(s), attach proof that you have been pardoned OR that it has been at least two years since you received a certificate of discharge or completed court ordered community supervision or juvenile probation to your Petition to Change the Name of an Adult.
  - If you are required to register as a sex offender, attach a copy of the *Sex Offender Update Form* that you submitted to your local law enforcement authority notifying them that you are asking to have your name changed to your Petition to Change the Name of an Adult.
- Ask the clerk:
  - If there are local rules that you need to know for your name change case.
  - For a Civil Case Information Sheet. Fill it out and file it with your Petition.
  - To "file-stamp" your copy. The clerk will stamp your papers with the date and time you turned them in. The clerk will keep the original and give you back your file-stamped copy.
- If you are not filing a Statement of Inability to Afford Payment of Court Costs, you will need to pay a filing fee. The fee may be between \$150- \$300, depending on where you live.

#### **Step 5. Complete Final Forms and Prepare for Court.**

- Some courts may require a criminal background check. Check the Court's policy to see if it's needed. If so, you will need to mail your fingerprint card to the Texas Department of Public Safety to get a criminal background check done. They will send the results directly to the court. There is a fee for this service. See the Texas Department of Public Safety website for specific instructions on submitting fingerprint cards for a legal name change.
- Fill out the Final Order to Change the Name of an Adult form.
  - Note: Some courts require you to file the Final Order prior to scheduling the final hearing.
- Prepare for Court.

- You will need to give testimony when talking to the judge. Some judges will ask you questions, others want you to “prove up” your case by reading a “script” of testimony. You can find sample “prove up” testimony for an adult name change online at [www.TexasLawHelp.org](http://www.TexasLawHelp.org).
- Learn tips on what to do when you go to court and when the judge calls your case online at [www.TexasLawHelp.org](http://www.TexasLawHelp.org) and [www.TexasCourtHelp.org](http://www.TexasCourtHelp.org).
- Bring proof of identification the judge may want. Some examples include: passport, state issued identification card, driver’s license, etc.
- Some judges will require you to testify that you are not attempting to change your name in order to evade creditors or criminal prosecution.

### **Step 6. Go to Court to Present Your Adult Name Change Case to the Judge**

- Ask the clerk how to get an uncontested hearing and bring the following to court with you on that day:
  1. A file-stamped copy of your Petition to Change the Name of an Adult and all the exhibits you filed with your Petition;
  2. If you’ve been convicted of a felony, your proof as discussed above; and
  3. If you are required to register as a sex offender, a copy of the *Sex Offender Update Form* that you submitted to your local law enforcement authority.
- When you go to the court, stop by the clerk’s office:
  - Ask if you need the court file, a docket sheet (list of what has been filed), or anything else from their office to bring with you to court.

### **Step 7. Finalize Your Name Change**

- Once the judge has signed your Final Order to Change the Name of an Adult, you may need to take it to the clerk’s office and file it (turn it in). Your name change will not be recorded until you do so.
- Get a certified copy of the Final Order to Change the Name of an Adult from the clerk while you are there. There is a fee to get a certified copy, but you will need one to get official documents changed to your new name, such as Social Security card, driver’s license, and voter registration certificate.
- Check with the clerk to see if you need to do anything else to finalize your name change. Each county is different.

### **Step 8. Change Official Documents to Show Your New Name**

- To change the name on your social security card, you must have a certified copy of the Final Name Change Order and an Application for Social Security Card. For more details go to <https://faq.ssa.gov/en-US/Topic/article/KA-01981> You must change your social security card before you can change your driver’s license.
- To change the name on your driver’s license, you must take a certified copy of the Final Name Change Order to a Texas Department of Public Safety office. See <http://www.txdps.state.tx.us/driverlicense/changes.htm#Name> for more details. There is a fee to have your driver’s license changed.
- To change your name on your voter registration certificate, notify your County Voter Registrar in writing. For more information, visit <http://www.sos.state.tx.us/elections/pamphlets/largepamp.shtml>.

### **Step 9. Change Your Birth Certificate to Show Your New Name (Not Required)**

- After the judge approves your name change, you may want to change your birth certificate to reflect your new name. It is not required.

- If you wish to change your birth certificate, you will need to get an Application for Amended Birth Certificate based on a Court Ordered Name Change form from the Bureau of Vital Statistics. You can find it online at the Bureau of Vital Statistics website at <http://www.dshs.state.tx.us/VS/>. There is a fee to have your birth certificate changed.



# Tab K

**WARNING:** It is always best to hire a lawyer. To get a referral to a lawyer or, if you are poor, to a free Legal Aid program, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690.  
If you are poor, you may be able to talk to an attorney online by live chat at [www.TexasLawHelp.org](http://www.TexasLawHelp.org).

(Print your answers in blue ink.)

Cause Number: \_\_\_\_\_  
(The Clerk's office will fill out the cause number when you file the form.)

Petitioner: \_\_\_\_\_

In the: \_\_\_\_\_ (check one)  District Court  County Court of \_\_\_\_\_ County, Texas  
(Court Number) (County)

### Petition to Change the Name of an Adult

(Use this form only if you are changing your own name)

#### I. Petitioner

1. My current legal name is:

\_\_\_\_\_  
First Middle Last

2. I ask the Court to change my legal name to:

\_\_\_\_\_  
First Middle Last

3. The reason I want to change my name is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

#### II. Discovery

The discovery level in this case is Level 1.

#### III. Personal Information

1. Home Address: \_\_\_\_\_  
Address

\_\_\_\_\_  
City County State ZIP Code

2. My complete driver's license number is: \_\_\_\_\_. My driver's license was issued in \_\_\_\_\_.  
State

**Or**  I do not have a driver's license number.

List any other driver's licenses you have had in the past 10 years:

Issuing State	License Number
_____	_____
_____	_____
_____	_____

3. My complete social security number is: \_\_\_\_\_.

Or  I do not have a social security number.

4. My date of birth is: \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
Month Day Year

5. My place of birth was: \_\_\_\_\_  
City County State Country

6. My sex listed on my birth certificate:  Male  Female

7. My race is: \_\_\_\_\_.

**IV. Criminal History**

1. Have you ever been **charged** with a Class A or B misdemeanor or a felony?  Yes  No

*If yes, write your FBI and State Identification Number (SID) numbers, if known:*

FBI # \_\_\_\_\_ SID # \_\_\_\_\_

*List all Class A or B misdemeanors and felonies with which you have been charged, whether or not you were convicted. If you need more space, attach an additional page.*

Offense (CHARGED)	Cause Number	County	Court number	Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court

2. Have you ever been **convicted** of a felony?  Yes  No

*If yes, the court may order your name changed if you have been pardoned, or it has been at least 2 years since you were discharged or completed probation. Attach proof. See below.*

*List all of your felony convictions here. If you need more space, attach an additional page.*

Offense (CONVICTED)	Cause Number	County	Court number	Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> County Court

3. Are you required to register as a sex offender?  Yes  No

*If yes, you are required to submit to your local law enforcement authority a copy of the Sex Offender Update Form to notify them that you are trying to change your name. You also must attach a copy of the Sex Offender Update Form you submitted to local law enforcement authority to this Petition.*

**V. Prayer**

- I believe this name change is in my interest or benefit and in the interest of the public.
- I ask the Court to make an Order to change my name, and any other Orders I may be entitled to.

I swear under oath under penalty of perjury that the facts stated in this Petition are true and correct. I understand I could be prosecuted for lying on this form.

**VI. Declaration:**

I declare under penalty of perjury that everything in this petition is true and correct.

My name is \_\_\_\_\_ . My birthdate is: \_\_\_\_/\_\_\_\_/\_\_\_\_ .

My address is \_\_\_\_\_  
Street City State ZIP Country

\_\_\_\_\_ signed on \_\_\_\_/\_\_\_\_/\_\_\_\_ in County \_\_\_\_\_ , \_\_\_\_\_  
Signature Month/Day/Year County Name State

You must attach these documents to your Petition:

- A legible and complete set of your fingerprints on a Texas Department of Public Safety or Federal Bureau of Investigation fingerprint card. Write **“Exhibit A”** at the top.
- If you were convicted of a felony and have been pardoned, or if it has been at least 2 years since you were discharged or completed probation, attach proof of these facts. Write **“Exhibit B”** at the top.
- If you are required to register as a sex offender, a copy of the *Sex Offender Update Form* you submitted to your local law enforcement authority notifying them you are asking the Court to change your name. Write **“Exhibit C”** at the top.

Tab L

# Texas Forms for An Agreed Name Change of a Child

## INSTRUCTIONS

**This Child Name Change Forms Set Contains** instructions and four forms: a Statement of Inability to Afford Payment of Court Costs, an Agreed Petition to Change the Name of a Child, a Child’s Consent to Name Change, and a Final Order to Change the Name of a Child. The chart below describes each form and when to use it.

### Do Not Use This Child Name Change Form Set if:

- You want to change your name or the name of a person who is 18 years old or older.
- You are not the biological, legal, or adoptive parent, managing conservator, or legal guardian of the child. You cannot change the child’s name if your only legal relationship to the child is as a stepparent.
- The child is at least 10 years old and does not agree to the name change.
- The child is required to register as a sex offender and a Sex Offender Update Form has not yet been turned in to your local law enforcement authority notifying them of the name change request.
- Any other person with a legal relationship to the child (parent, managing conservator, etc.) does not agree to the petition and refuses to sign.

### Use This Child Name Change Form Set when:

- All people with a legal relationship to the child (parent, managing conservator, etc.) agree to the name change.
- You want to change the name of a child under the age of 18.
- You are the biological, legal, or adoptive parent, managing conservator, or legal guardian of the child. You cannot change the child’s name if your only legal relationship to the child is as a stepparent.
- The child is 10 years old or older, and the child agrees to the name change in writing.
- The child is not a sex offender, OR the child is required to register as a sex offender and:
  - o You submit a *Sex Offender Update Form* to your local law enforcement authority notifying them that you are asking the Court to change the child’s name, and
  - o You attach proof that you have done so to your Petition.

### Contents of Child Name Change Forms Set:

Name of Form	What It Is and How to Use It
<b>Statement of Inability to Afford Payment of Court Costs</b>	If you are poor, or on government benefits because you are poor, or you cannot pay court fees, you may fill out this form to ask the Court if you can file for a name change without paying the court and filing fees. The Court may ask you to present evidence of your income and expenses at a hearing. The Court may or may not decide to let you file without paying. It is sometimes called a “Pauper’s Oath” or an “Affidavit of Inability to Pay Costs.”
<b>Petition to Change the Name of a Child</b>	<b>You must swear that the information in this form is true by completing a sworn declaration.</b> It informs (tells) the court that you want to change your name, why you want to change your name, and what you want the Court to change your name to. It also notifies the Court of any criminal history.
<b>Child’s Consent to Change Name</b>	This form must be filled out if the child is 10 years old or older. It shows that the child agrees to the name change. It must be signed by the child and attached to the Petition.
<b>Final Order to Change the Name of a Child</b>	This form finalizes the child’s name change once the Court signs it. Fill it out and bring it to the final hearing on the child’s name change.

## Need Help?

- It is always best to hire a lawyer. To get a referral to a lawyer or, if you are poor, to a free Legal Aid program, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690.
- If you are a victim of domestic violence, or if at any time you feel unsafe, you can get confidential help from the National Domestic Violence Hotline at 1-800-799-7233 or legal help from the Texas Advocacy Project Family Violence Hotline by calling 1-800-374-4673.
- If you are poor, you may be able to talk to an attorney online by live chat at [www.TexasLawHelp.org](http://www.TexasLawHelp.org).

## How to Use this Set:

### Step 1: Read These General Instructions

- Do not change the forms to change the name of an adult. This Set is NOT to be used for an adult name change.
- Use blue ink to complete the forms. Pencil and other color ink will not scan clearly.
- Fill out all the spaces on the forms unless instructed otherwise. The judge and court personnel will not fill them out for you. The judge may require you to correct errors that you may make, or may deny the name change if the information is inaccurate or incomplete.
- Make enough copies of each form you complete for each person with a legal relationship to the child, including yourself. Keep one copy. The other copies are for the other parent(s), or anyone else with a legal relationship to the child. If no other person has a legal relationship to the child, e.g. the other parent is deceased, make only one copy for your records.
- Find out whether name changes are filed in the district court or county court in your county by calling the district court clerk's office and asking.

### Step 2: If the Child is Required to Register as a Sex Offender:

- Get a copy of the *Sex Offender Update Form* that you submitted to your local law enforcement authority notifying them that you are asking to have the child's name changed. Write "**Exhibit A**" at the top. You will need to file it with the Petition to Change the Name of a Child.

### Step 3: Fill out the Petition to Change the Name of a Child and, if you are low-income, the Statement of Inability to Afford Payment of Court Costs

- Fill out the Petition to Change the Name of a Child. You are the Petitioner. You and all Co-Petitioners must swear that the information in your Petition to Change the Name of a Child is true by completing a sworn declaration. Your full Social Security number and driver's license number are required by Texas Civil Practices and Remedies Code Section 30.014(a) and Texas Rule of Civil Procedure 21c.
- If the child is 10 years old or older, complete the Child's Consent to Change Name and have the child sign it. It needs to be attached to, and filed with, the Petition.
- If you are low-income, are receiving public assistance, or do not think you have enough money to pay the court costs to change the child's name, fill out the Statement of Inability to Afford Payment of Court Costs.
- Make copies of the Petition to Change the Name of a Child, the Child's Consent to Change Name, and, if you are using it, the Statement of Inability to Afford Payment of Court Costs.

**Step 4: File (turn in) the Petition to Change the Name of a Child, and if applicable, the Statement of Inability to Afford Payment of Court Costs**

Take the following documents to the courthouse and file them (turn them in) with the District or County Court Clerk in the county where the child resides:

- The original and the copy of the Petition to Change the Name of a Child.
- The Child's Consent to Change Name, attached to and filed with the Petition.
- If the child is required to register as a sex offender, attach a copy of the *Sex Offender Update Form* that you submitted to your local law enforcement authority notifying them that you are asking to have the child's name changed to the Petition to Change the Name of a Child.
- If applicable, a Statement of Inability to Afford Payment of Court Costs. NOTE: If you are using a Statement of Inability to Afford Payment of Court Costs, you must file the Petition to Change the Name of a Child and the Statement of Inability to Afford Payment of Court Costs at the same time.
- Ask the clerk:
  - If there are local rules that you need to know to change a child's name.
  - For a Civil Case Information Sheet. Fill it out and file it with your Petition.
  - To "file-stamp" your copy. The clerk will stamp your papers with the date and time you turned them in. The clerk will keep the original and give you back your file-stamped copy.
- If you are not filing a Statement of Inability to Afford Payment of Court Costs, you will need to pay a filing fee. The fee may be between \$150- \$300, depending on where you live.

**Step 5. Complete Final Forms and Prepare for Court.**

- Check with the Court to see if the child who is ten years of age or older should be brought to court.
- Fill out the Final Order to Change the Name of a Child form.
  - Note: Some courts require you to file the Final Order prior to scheduling the final hearing.
- Prepare for Court.
  - You will need to give testimony when talking to the judge. Some judges will ask you questions, others want you to "prove up" your case by reading a "script" of testimony. You can find sample "prove up" testimony for changing a child's name online at [www.TexasLawHelp.org](http://www.TexasLawHelp.org).
  - Learn tips on what to do when you go to court and when the judge calls your case online at [www.TexasLawHelp.org](http://www.TexasLawHelp.org) and [www.TexasCourtHelp.org](http://www.TexasCourtHelp.org).

**Step 6. Go to the Court to Present the Child's Name Change Case to the Judge**

- Ask the clerk how to get an uncontested hearing and bring the following to court with you on that day:
  - A file-stamped copy of your Petition to Change the Name of a Child signed by all persons with a legal relationship to the child;
  - Your completed Order to Change the Name of a Child;
  - If the child is required to register as a sex offender, a copy of the *Sex Offender Update Form* that you submitted to your local law enforcement authority about the child's name change.
- When you go to the court for the uncontested docket, stop by the clerk's office:
  - Ask if you need the court file, a docket sheet (list of what has been filed), or anything else from their office to bring with you to the uncontested docket.
- Ask the Court if the child should be there.



**Step 7. Finalize the Child's Name Change**

- Once the judge has signed the Final Order to Change the Name of a Child, you may need to take it to the clerk's office. The name change will not be recorded until you do so.
- Get a certified copy of the Final Order to Change the Name of a Child from the clerk while you are there. There is a fee to get a certified copy, but you will need one to get official documents changed to the child's new name.
- Check with the clerk to see if you need to do anything else to finalize the name change. Each county is different.

**Step 8. Change Official Documents to Show the Child's New Name**

- To change the name on the child's social security card, you must have a certified copy of the Final Order. For more details go to [http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/315/~/change-a-name-on-a-social-security-card](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/315/~/change-a-name-on-a-social-security-card). You must change the child's social security card before you can change the child's driver's license.
- To change the name on the child's driver's license, you must take a certified copy of the Final Order to a Texas Department of Public Safety office. See <http://www.txdps.state.tx.us/driverlicense/changes.htm#Name> for more details. There is a fee to have the child's driver's license changed.
- After the judge approves the child's name change, you may want to change the child's birth certificate to reflect the child's new name. It is not required.
  - If you wish to change the child's birth certificate, you will need to get an Application for Amended Birth Certificate based on a Court Ordered Name Change form from the Bureau of Vital Statistics. You can find it online at the Bureau of Vital Statistics website at <http://www.dshs.state.tx.us/VS/>. There is a fee to have the birth certificate changed.

Tab M

**WARNING:** It is always best to hire a lawyer. To get a referral to a lawyer or, if you are poor, to a free Legal Aid program, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690.  
If you are poor, you may be able to talk to an attorney online by live chat at [www.TexasLawHelp.org](http://www.TexasLawHelp.org).

(Fill out every blank on this form. Print your answers in blue ink.)

Cause Number: \_\_\_\_\_  
(The Clerk's office will fill out the cause number when you file the form.)

In the Matter of Change of Name of a Child: \_\_\_\_\_  
(Print child's current first, middle, and last legal name.)

In the: \_\_\_\_\_ (check one)  District Court  County Court of \_\_\_\_\_ County, Texas  
(Court Number) (County)

### Agreed Petition to Change the Name of a Child

I. **Discovery:** The discovery level in this case is Level 1.

II. **Parties**

1. **Petitioner** (Person filing this petition)

a. My name is:

\_\_\_\_\_ First Middle Last

b. I am the child's: (Check all boxes that apply)

parent (biological, legal, or adoptive; *not the stepparent*).

managing conservator as ordered by a court.

legal guardian as ordered by a court.

c. My complete social security number is: \_\_\_\_\_.

Or  I do not have a social security number.

d. My complete driver's license number is: \_\_\_\_\_. It was issued in \_\_\_\_\_.

Or  I do not have a driver's license number.

2. **Other Parties** (Check and complete either a or b)

a.  **No Other Party Exists:** No other adult has a legal relationship with this child because: (check all that apply)

The other parent is dead. (Attach a copy of the death certificate.)

Parental rights were terminated. (Attach a certified copy of the court order of termination.)

No other person has been named by a court as a managing conservator or a legal guardian of the child.

- b.  **Co-Petitioner 1:** The following person has a legal relationship to this child and has signed this Petition to show s/he agrees to the child's name change. (Co-Petitioner must sign this Petition in front of a notary or sign a declaration to show s/he agrees with this name change.)

\_\_\_\_\_  
First Middle Last

Co-Petitioner is the child's: (Check all boxes that apply)

parent (biological, legal, or adoptive; *not the stepparent*).

managing conservator as ordered by a court.

legal guardian as ordered by a court.

Co-Petitioner's complete social security number is: \_\_\_\_\_.

**Or**  Co-Petitioner does not have a social security number.

Co-Petitioner's complete driver's license number is: \_\_\_\_\_. It was issued in \_\_\_\_\_.

**Or**  Co-Petitioner does not have a driver's license number.

- c.  **Co-Petitioner 2:** The following person has a legal relationship to this child and has signed this Petition to show s/he agrees to the child's name change. (Co-Petitioner must sign this Petition in front of a notary or sign a declaration to show s/he agrees with this name change.)

\_\_\_\_\_  
First Middle Last

Co-Petitioner is the child's: (Check all boxes that apply)

parent (biological, legal, or adoptive; *not a stepparent*).

managing conservator as ordered by a court.

legal guardian as ordered by a court.

Co-Petitioner's complete social security number is: \_\_\_\_\_.

**Or**  Co-Petitioner does not have a social security number.

Co-Petitioner's complete driver's license number is: \_\_\_\_\_. It was issued in \_\_\_\_\_.

**Or**  Co-Petitioner does not have a driver's license number.

**III. Jurisdiction.** The Court has jurisdiction over this case, the parties, and the child.

**IV. Information about the Child**

If the child is 10 or older, the *Child's Consent to Name Change form* must be filled out and **signed** by the child.

1. The child's current legal name is:

\_\_\_\_\_

*First* *Middle* *Last*

2. The child resides in:

\_\_\_\_\_

*City* *County* *State*

3. The child's date of birth is:

\_\_\_\_/\_\_\_\_/\_\_\_\_

*Month* *Day* *Year*

4. The child's place of birth was:

\_\_\_\_\_

*City* *County* *State* *Country*

5. The sex listed on child's birth certificate:  Male  Female

6. This child:  is  is not required to register as a sex offender.

If the child is required to register as a sex offender, you must fill out and submit a *Sex Offender Update Form* to local law enforcement authority stating that you are asking the Court to change the child's name. Attach a copy of that form to this Petition and write **Exhibit A** at the top.

**v. Court Order Involving Child** *(Check one)*

- No court order currently exists that involves, or is about, this child.
- A court has made orders involving this child, in the following case(s) (include divorce decree or orders obtained through the Office of the Attorney General or Child Protective Services):

\_\_\_\_\_

*Case number* *County & State* *Type of case (child support, custody, adoption, divorce, CPS, etc.)*

\_\_\_\_\_

*Case number* *County & State* *Type of case (child support, custody, adoption, divorce, CPS, etc.)*

\_\_\_\_\_

*Case number* *County & State* *Type of case (child support, custody, adoption, divorce, CPS, etc.)*

**VI. Name Change Request**

1. I/We ask the Court to change this child's current legal name to:

\_\_\_\_\_

*First* *Middle* *Last*

2. The reason I/we want to change this child's current legal name is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

We believe the requested name change is in the child's best interest.

**VII. Prayer**

The change of name is in the best interest of the child. If the child is required to register as a sex offender, the change of name is also in the best interest of the public. Notice was provided to the local law enforcement authority.

I/We ask the Court to make an Order to change the child's current legal name and any other Orders the child may be entitled to. I/We swear under oath that the facts stated in this *Petition* are true and correct.

**VI. Petitioner's Declaration:**

I declare under penalty of perjury that everything in this petition is true and correct.

My name is \_\_\_\_\_ . My birthdate is: \_\_\_\_/\_\_\_\_/\_\_\_\_ .

My address is \_\_\_\_\_  
Street City State ZIP Country

\_\_\_\_\_ signed on \_\_\_\_/\_\_\_\_/\_\_\_\_ in County \_\_\_\_\_  
Signature Month/Day/Year County Name State

**VII. Co-Petitioner's Declaration:**

I declare under penalty of perjury that everything in this petition is true and correct.

My name is \_\_\_\_\_ . My birthdate is: \_\_\_\_/\_\_\_\_/\_\_\_\_ .

My address is \_\_\_\_\_  
Street City State ZIP Country

\_\_\_\_\_ signed on \_\_\_\_/\_\_\_\_/\_\_\_\_ in County \_\_\_\_\_  
Signature Month/Day/Year County Name State

Tab N

**WARNING:** Without the advice and help of an attorney, you may be putting yourself, your personal property, and your money at risk. To get a referral to an attorney, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690. If you are a victim of domestic violence, or if at any time you feel unsafe, you can get confidential help from the National Domestic Violence Hotline at 1-800-799-7233 or legal help from the Texas Advocacy Project Family Violence Legal Line at 1-800-374-4673.

*Print court information exactly as it appears on your Petition to Change the Name of an Adult and use blue ink.*

Cause Number: \_\_\_\_\_  
*(The Clerk's office will fill out the cause number when you file the form.)*

Petitioner: \_\_\_\_\_

In the: \_\_\_\_\_ (check one)  District Court  County Court of \_\_\_\_\_ County, Texas  
*(Court Number) (County)*

### Final Order to Change the Name of an Adult

A hearing took place today.

#### I. Appearances

The Petitioner was present without an attorney.

#### II. Jurisdiction

The Court finds that it has jurisdiction over this case and the Petitioner.

#### III. Record

*The court fills out this box.*

- A court reporter did not record today's hearing because the parties and judge agreed not to make a record.
- A court reporter recorded today's hearing

#### IV. Findings

The Court finds that Petitioner's personal information is as follows:

1. Petitioner's current legal name is:

\_\_\_\_\_  
*First Middle Last*

2. Petitioner's home address is:

\_\_\_\_\_  
*Address City County State ZIP*

3. Petitioner's complete driver's license number is: \_\_\_\_\_. Petitioner's driver's license was issued in \_\_\_\_\_.  
*State*

**Or**  Petitioner does not have a driver's license number.

All driver's license numbers issued to Petitioner during the past 10 years:

Issuing State	License Number
_____	_____
_____	_____
_____	_____



4. Petitioner's complete social security number is: \_\_\_\_\_.

Or  Petitioner does not have a social security number.

5. Petitioner's date of birth is: \_\_\_\_ / \_\_\_\_ / \_\_\_\_  
Month Day Year

6. Petitioner's place of birth was:  
\_\_\_\_\_  
City County State Country

7. Petitioner's gender at birth was: (check one)  
 Female  Male

8. Petitioner's race is: \_\_\_\_\_.

9. Petitioner (check all that apply):  
 does **not** have FBI number or SID number.  
 Petitioner's FBI (Federal Bureau of Investigations) number is: \_\_\_\_\_  
 Petitioner's SID (State Identification) number is: \_\_\_\_\_

10. Petitioner (check one):  
 has **not** been **charged** with a Class A or B misdemeanor or a felony.  
 has been **charged** with a Class A or B misdemeanor or a felony. Listed below is the case number and court for each of these crimes (attach more pages if necessary):

Offense (CHARGED)	Cause Number	County	Court number	Court
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> <u>County Court</u>
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> <u>County Court</u>
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> <u>County Court</u>
_____	_____	_____	_____	<input type="checkbox"/> District Court <input type="checkbox"/> <u>County Court</u>

11. Petitioner (check one):  
 has not been convicted of a felony.  
 has been convicted of a felony and has been pardoned.  
 has been convicted of a felony and at least two years have passed since Petitioner has received a certificate of discharge or completed a court-ordered period of community supervision or juvenile probation.

12. Petitioner (check one):  
 is **not** a sex offender.  
 is required to register as a sex offender, has submitted a Sex Offender Update Form to local law enforcement authority of this proposed name change, and provided proof to the court of the submission.

13. Petitioner's *Petition to Change the Name of an Adult* included a legible and complete copy of Petitioner's fingerprints.

14. Petitioner's change of name is in Petitioner's interest or benefit and is in the interest of the public.

**V. Orders**

The Court orders the Petitioner's name be changed from:

Current name: \_\_\_\_\_  
*First Middle Last*

To this name: \_\_\_\_\_  
*First Middle Last*

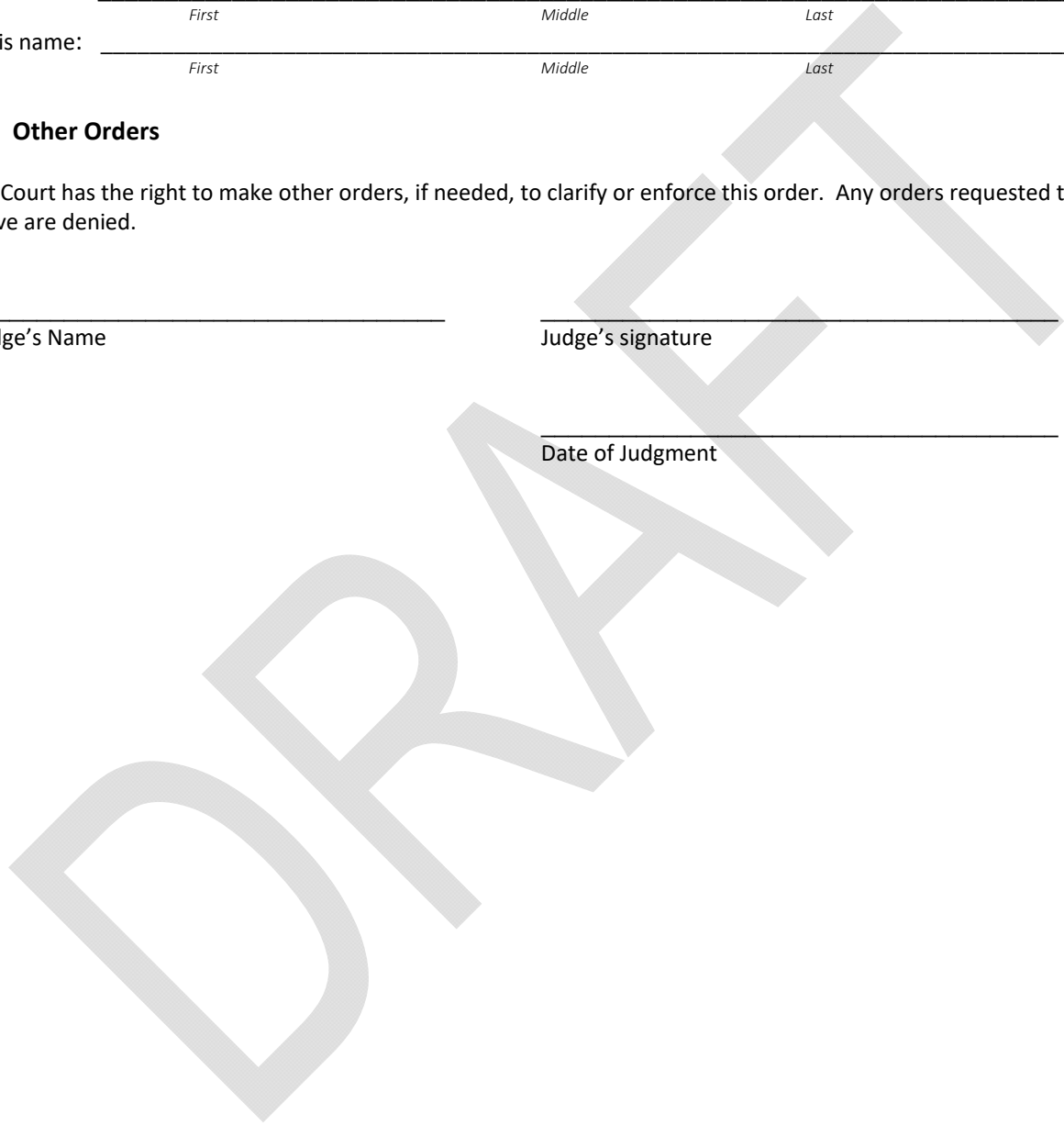
**VI. Other Orders**

The Court has the right to make other orders, if needed, to clarify or enforce this order. Any orders requested that do not appear above are denied.

\_\_\_\_\_  
Judge's Name

\_\_\_\_\_  
Judge's signature

\_\_\_\_\_  
Date of Judgment



Tab 0

**WARNING:** Without the advice and help of an attorney, you may be putting yourself, your personal property, and your money at risk. To get a referral to an attorney, call the State Bar of Texas Lawyer Referral Information Service at 1-800-252-9690. If you are a victim of domestic violence, or if at any time you feel unsafe, you can get confidential help from the National Domestic Violence Hotline at 1-800-799-7233 or legal help from the Texas Advocacy Project Family Violence Legal Line at 1-800-374-4673.

Print court information exactly as it appears on your Petition to Change the Name of an Adult and use blue ink.

Cause Number: \_\_\_\_\_  
(The Clerk's office will fill out the cause number when you file the form.)

In the Matter of Change of Name of a Child: \_\_\_\_\_  
(Print child's current first, middle, and last legal name.)

In the: \_\_\_\_\_ (check one)  District Court  County Court of \_\_\_\_\_ County, Texas  
(Court Number) (County)

### Agreed Order to Change the Name of a Child

A hearing took place on \_\_\_\_\_. No party requested a jury. There was no jury.

#### I. Appearances

The following parties appeared:

##### **Petitioner**

The Petitioner's name is: \_\_\_\_\_  
First Middle Last

The Petitioner **was present**, representing himself/herself.

##### **Co-Petitioner(s)**

**None:** There is no Co-Petitioner because the child's other parent is dead or parental rights have been terminated by court order.

**Co-Petitioner 1:**

The Co-Petitioner's name is: \_\_\_\_\_  
First Middle Last

(Check one box)

- The Co-Petitioner **was present**, representing himself/herself, and has agreed to the terms of this Order.
- The Co-Petitioner **was not present** but has signed below, agreeing to the terms of this Order.
- The Co-Petitioner **was not present** but has signed the Petition, agreeing to the change of name for the child, as listed in the verified Petition.

**Co-Petitioner 2: (if any)**

The Co-Petitioner's name is: \_\_\_\_\_  
First Middle Last

(Check one box)

- The Co-Petitioner **was present**, representing himself/herself, and has agreed to the terms of this Order.
- The Co-Petitioner **was not present** but has signed below, agreeing to the terms of this Order.
- The Co-Petitioner **was not present** but has signed the Petition, agreeing to the change of name for the child, as listed in the verified Petition.

**Child** (Child should come to court only if required by the judge)

The Child's current legal name is: \_\_\_\_\_  
First Middle Last

- The Child **was present** and agrees to the terms of this Order.
- The Child **was not present**. If the child is 10 years or older, the child has signed the Child's Consent to Change Name as required by law.

**II. Jurisdiction**

The Court heard evidence and finds that it has jurisdiction over this case and the parties, that notice requirements have been met, and that the Petition meets all legal requirements.

*The court fills out this box.*

**III. Record**

- A court reporter did not record today's hearing because the parties and judge agreed not to make a record.
- A court reporter recorded today's hearing

**IV. Findings**

The Court makes the following findings about the child.

1. The child's current legal name is:

\_\_\_\_\_ First Middle Last

2. The child resides in:

\_\_\_\_\_ City County State

3. The child's date of birth is:

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_ Month Day Year

4. The child's place of birth was:

\_\_\_\_\_ City County State Country

5. The sex listed on child's birth certificate:  Male  Female

6. This child:

- is **not** required to register as a sex offender.
- is required to register as a sex offender, and the Petitioner notified the appropriate local law enforcement authority of the proposed name change and provided proof of that notification to the Court. The request to change the name of this child is in the interest of the public.

7. Court Order Involving Child

- No court order currently exists that involves, or is about, this child.
- A court has made orders involving this child, in the following case(s) (include divorce decree or orders obtained through the Office of the Attorney General or Child Protective Services):

_____	_____	_____
<i>Case number</i>	<i>County &amp; State</i>	<i>Type of case (child support, custody, adaption, divorce, CPS, etc.)</i>
_____	_____	_____
<i>Case number</i>	<i>County &amp; State</i>	<i>Type of case (child support, custody, adaption, divorce, CPS, etc.)</i>
_____	_____	_____
<i>Case number</i>	<i>County &amp; State</i>	<i>Type of case (child support, custody, adaption, divorce, CPS, etc.)</i>

8. The request to change the name of this child is in the best interest of the child.

**V. Orders**

The Court orders the child’s name be changed from *(current legal name)*:

Current legal name: \_\_\_\_\_  
*First Middle Last*

To this name: \_\_\_\_\_  
*First Middle Last*

**VI. Other Orders**

The court reserves the right to make further orders to clarify the above orders, if needed. Any orders requested that do not appear above are denied.

The Court has the right to make other orders, if needed, to clarify or enforce this order. Any orders requested that do not appear above are denied.

\_\_\_\_\_  
Judge’s Name

\_\_\_\_\_  
Judge’s signature

\_\_\_\_\_  
Date of Judgment

**By signing below, the Petitioner agrees to the form and substance of this *Order*.**

\_\_\_\_\_  
*Petitioner's Name (print)*

\_\_\_\_\_  
*Petitioner's Signature*

\_\_\_\_\_  
*Date*

Mailing Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**By signing below, the Co-Petitioner agrees to the form and substance of this *Order*.**

\_\_\_\_\_  
*Co-Petitioner's Name (print)*

\_\_\_\_\_  
*Co-Petitioner's Signature*

\_\_\_\_\_  
*Date*

Mailing Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**By signing below, the Co-Petitioner agrees to the form and substance of this *Order*.**

\_\_\_\_\_  
*Co-Petitioner's Name (print)*

\_\_\_\_\_  
*Co-Petitioner's Signature*

\_\_\_\_\_  
*Date*

Mailing Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_