**SCAC MEETING AGENDA**
**Friday, February 28, 2020 [9:00 a.m. – 4:00 p.m.]**

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

**1. WELCOME (C. 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 November 1-2, 2019 meetings.

**3. COMMENTS FROM JUSTICE BLAND**

**4. PROTECTIVE ORDER REGISTRY FORMS**

***E-Filing Sub-Committee Members:***

***Richard Orsinger – Chair***
***Lamont Jefferson – Vice Chair***
***Hon. Tracy Christopher***
***Kimberly Phillips***
***Sharena Gilliland***
***David Jackson***
***Kim Piechowiak – Office of Court Administration***

(a) October 29, 2019 Subcommittee Report on Protective Order Registry
(b) SB 325 Summary
(c) SB 325 Protective Order Registry Highlights
(d) Existing DPS Form For Entry Of Protective Order Data Into TCIC – Form 2017
(e) DRAFT Protective Order Registry Request To Grant/Remove Publicly Viewable Info (with MER edits KP edits)

**5. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP & OUT OF TIME APPEALS IN PARENTAL RIGHTS TERMINATION CASES**

***Appellate Sub-Committee Members:***

***Pamela Baron – Chair***
***Professor William Dorsaneo – Vice Chair***
***Hon. Bill Boyce***
***Professor Elaine Carlson***
***Frank Gilstrap***
***Charles Watson***
***Evan Young***
***Scott Stolley***

(f) February 28, 2020 Memo re: Appeals in Parental Termination Cases

**6. PARENTAL LEAVE CONTINUANCE RULE**

***216-299a Sub-Committee Members:***

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

(g) February 17, 2020 Memo re Parental Leave Continuance Subcommittee Discussion Draft
(h) State Bar Of Texas Committee On Court Rules Proposal With Changes Noted Draft 3 Feb 7
(i) Discussion Draft Comment To TRCP 253-February 25, 2020
(j) In re Amends to FL Rules of Judicial Administration Parental Leave
(k) Rule 26 North Carolina Secure Leave Parental Leave
(l) North Carolina Appellate Rule 33
(m) North Carolina Secure Leave Form Local Rule
(n) Family Medical Leave Act 2019 Section 2612 Leave Requirement
(o) 2613 Certification
(p) October 23, 2018 Letter from State Bar - Parental Leave
(q) ABA Resolution

**7. PROCEDURES TO COMPEL A RULING**

***Judicial Administration Sub-Committee Members:***

***Nina Cortell - Chair***
***Kennon Wooten – Vice Chair***
***Hon. David Peeples***
***Michael A. Hatchell***
***Prof. Lonny Hoffman***
***Hon. Tom Gray***
***Hon. Bill Boyce***
***Hon. David Newell***

(r) February 28, 2020 Memo re Mechanisms For Obtaining a Trial Court Ruling

**8. EXPEDITED ACTIONS**

***171-205 Sub-Committee Members:***

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

(s) February 28, 2020 Memo re New Rules for Civil Actions-$250,000
(t) Survey Answers From Selected County and District Court Judges

# Tab A

October 29, 2019

# RULE 16-165a SUBCOMMITTEE PRELIMINARY REPORT ON CREATION OF PROTECTIVE ORDER REGISTRY

1. Senate Bill 325, adopted by the Texas Legislature in 2019, called "Monica's Law," requires the Office of Court Administration (OCA) by June 2020 to (i) establish a protective order registry that allows case management systems to interface, restricted access authorized users (police, prosecutors, etc.) to access PO info and images, and (ii) establish and supervise training programs for all authorized users. The statute also mandates that starting 9-1-2020, the public will have limited public access to information on protective orders issued under Tex. Fam. Code Chapter 85, but only where the victim requests public access.

2. The OCA has started into action on this project, but work is at the discussion stage so far.

3. Attached to this Preliminary Report are five items: (1) a summary of SB 325; (2) highlights of the requirements for the protective order registry; (3) a memo on the four databases that need information pertaining to protective orders, which perhaps can be consolidated into one form; (4) a sample "Brady checklist" used in Nebraska to collect information for Federal firearms database; and (5) the present DPS TCIC Protective Order Data Entry Form presently being used to capture information about protective orders for entry into the Texas Crime Information Center Database.

4. A working relationship has been established between the Subcommittee and Kimberly A. F. Piechowiak, Domestic Violence Training Attorney with the Texas Office of Court Administration.

5. It too early to suggest specific edits to the Brady Checklist or the TCIC Protective Order Data Entry Form. At this point, it would be most helpful for Committee members to make high-level comments and suggestions about possible options.

Richard R. Orsinger
Subcommittee Chair

# Tab B

# SB 325 Summary
# (Protective Order Registry)

Chapter 72, Government Code, Subchapter F

**Sec. 72.151 Definitions**

**Authorized user**: person to whom the office has given permission and the means to submit records to or modify or remove records in the registry.

**Peace officer:** meaning assigned by Article 2.12, Code of Criminal Procedure.

**Protective order:** an order issued by a court in this state to prevent family violence, as defined by Section 71.004, Family Code. Qualifying orders are issued pursuant to

- Chapters 83 or 85, Family Code; or
- Article 17.292, Code of Criminal Procedure, with respect to a person who is arrested for an offense involving family violence.

**Protective order registry or registry**: protective order registry established under Section 72.153.

**Race or ethnicity**: a particular descent, including Caucasian, African, Hispanic, Asian, or Native American descent.

**Sec. 72.152. Applicability**

- Applications for a protective order filed under:
  - Chapter 82, Family Code; or
  - Article 17.292, Code of Criminal Procedure, with respect to a person who is arrested for an offense involving family violence; and
- Protective orders issued under:
  - Chapter 83 or 85, Family Code; or
  - Article 17.292, Code of Criminal Procedure, with respect to a person who is arrested for an offense involving family violence.

**Sec. 72.153. Protective Order Registry.**

OCA must consult with DPS and the courts to establish and maintain a centralized Internet-based registry for applications for protective orders filed in this state and protective orders issued in this state and allows municipal and county case management systems to easily interface with the registry.

**Sec. 72.154. Public Access to Protective Order Registry (limited access)**

(a) Subject to Subsections (c) and (d) and Section 72.158, the registry must allow a member of the public to electronically search for and receive publicly accessible

information contained in the registry regarding each protective order issued in this state.

The registry must be:

- Free of charge, and
- Searchable by:
    - Issuing county
    - Name of respondent
    - Birth year of respondent

(b) and (c) publicly accessible information must include **ONLY** the following:

- Issuing court;
- Case number;
- Respondent's information
    - full name
    - county of residence
    - birth year, and
    - race or ethnicity;
- Date issued
- Date served;
- Date the order was vacated, if applicable; and
- Date of expiration.

**(c) No public access to any information regarding the following types of orders will be allowed:**

- Magistrate's Orders of Emergency Protection (Art. 17.292 CCP)
- Temporary Ex Parte Orders (Chp. 83, FC)

**Sec. 72.155. Restricted Access to Protective Order Registry.**

(a) The registry must include:

- a copy of each application for a protective order filed in this state, and;
- a copy of each protective order issued in this state, including a vacated or expired order.

(b) and (c) Only the following persons may access that information under the registry, and be able to search for and receive a copy of a filed application or issued protective order through the registry's website:

- an authorized user,
- the attorney general,
- a district attorney,
- a criminal district attorney,
- a county attorney,
- a municipal attorney,
- or a peace officer.

**Sec. 72.156. Entry of Applications**

(a) The clerk shall enter a copy of the application into the registry as soon as possible but not later than 24 hours after an application for a protective order is filed.
(b) A clerk may delay entering information into the registry only to the extent that the clerk lacks the specific information required to be entered.
(c) The public is not allowed access through the registry's Internet website the application or any information related to the application entered into the registry.

**Sec. 72.157. Entry of Orders**

(a) After the time a court issues an original or modified protective order, or extends the duration of a protective order, the clerk shall enter into the registry:
- a copy of the order and, if applicable, a notation regarding any modification or extension of the order;
- Issuing court;
- Case number;
- Respondent's information
  - full name
  - county of residence
  - birth year, and
  - race or ethnicity;
- Date issued
- Date served;
- Date the order was vacated, if applicable; and
- Date of expiration.

(b) For a protective order that is vacated or that has expired, the clerk of the applicable court shall modify the record of the order in the registry to reflect the order's status as vacated or expired.
(c) A clerk may delay entering information into the registry only to the extent that the clerk lacks the specific information required to be entered.

**Sec. 72.158. Request for Grant or Removal of Public Access.**

(a) OCA shall ensure that the public may access information about protective orders issued pursuant to Chapter 85, Family Code only if:
- a protected person requests that the office grant the public the ability to access the information, and
- OCA approves the request.

(b) After the request is approved, the protected person may later request to remove the public's ability to access the information pertaining to the order. OCA then shall

remove the ability of the public to access the information not later than the third business day after the office receives the removal request.

(c) The Supreme Court of Texas:
- Shall prescribe a form for use by the protected person to grant or remove of public access to the protective order; and
- May prescribe procedures for requesting a grant or removal of public access.

**Timelines**

- By **June 1, 2020,** OCA shall:
  - Establish the Protective Order Registry. This deadline may be delayed by up to 90 days if authorized by resolution of the Texas Judicial Council.
  - Establish and supervise a training program for magistrates, court personnel, and peace officers on the use of the protective order registry and make all materials for use in the training program available to trainees.
- OCA shall not allow public access until **September 1, 2020.**
- Registry only applies to applications and orders issued on or after **September 1, 2020.**

# Tab C

# SB 325 Protective Order Registry
# Highlights

A. SB 325, AKA “Monica’s Law”, named in honor of Monica Deming who was killed by her ex-boyfriend in Odessa in 2015. The ex-boyfriend had prior protective orders against him, but Monica was not aware of this. After her murder, Monica’s family approached Rep. Landgraf to author legislation to create a statewide searchable data base that allow the public to look up domestic violence protective orders filed by Texas courts.
B. By June 2020, the Office of Court Administration must:
    a. Establish protective order registry that allows case management systems to interface, and restricted access authorized users (police, prosecutors, etc.) to access PO info and images.
    b. Establish and supervise training program for all authorized users.
    c. Beginning September 1, 2020, <u>limited</u> public access to information for protective orders issued pursuant to TFC Chapter 85 will be allowed only if victim requests such access.
    d. Deadline may be delayed by up to 90 days if authorized by resolution of the Texas Judicial Council.
C. Information available to the public with permission from the applicant:
    a. Issuing court;
    b. Case number;
    c. Respondent’s information
        i. full name
        ii. county of residence
        iii. birth year, and
        iv. race or ethnicity;
    d. Date issued
    e. Date served;
    f. Date the order was vacated, if applicable; and
    g. Date of expiration.
D. The following participants will have restricted access to protective order applications and protective orders issued pursuant to TFC Chapter 83 (ex parte protective orders), Chapter 85 (protective orders), and Article 17.292, CCP (magistrates’ orders of emergency protection) for persons arrested for an offense involving family violence:
    a. an authorized user,
    b. the attorney general,
    c. a district attorney,
    d. a criminal district attorney,
    e. a county attorney,
    f. a municipal attorney, or

g. a peace officer.
h. Required forms to be prescribed by the Supreme Court:
    i. Petitioner's request to grant public access (should also be part of PO kit), and
    ii. Petitioner's request to remove public access.

## Important Considerations:

A. The Protective Order Registry will not replace the current requirements for entry of protective orders into the Texas Crime Information Center (TCIC), but will rather expand access and complement currently available information.
B. SB 325 also provides that a copy of the protective orders will be uploaded to the database for access by authorized users, and other justice personnel. The public will not be able to access these images.
C. An information form, though not required under SB 325, would facilitate timely and accurate entry of information into both the registry and TCIC. Existing resources to create to create such a document include:
    a. TCIC Protective Order Data Entry Form (2017), created by the Texas Department of Public Safety, and
    b. A sample checklist to determine if the order disqualifies the respondent from possessing a firearm under the Brady Act and/or Texas law.

# Tab D

# TCIC Protective Order Data Entry Form

*To be completed by the Criminal Justice/Law Enforcement Official and released to authorized agencies only.*

| ORI: | Choose One:<br>Protective Order Emergency Protective Order | |
|---|---|---|
| OCA: | Protective Order Number: | Court Identifier: |
| Issue Date: | Date of Expiration: | Date Signed: Date Rescinded: |

**ALL fields should be completed to ensure timely entry into TCIC. Missing pertinent information will delay entry and will require the entering agency to contact the court to provide the necessary information.**

| Respondent Name**:** | | | | Sex:<br>Male Female |
|---|---|---|---|---|
| Race: (circle one):<br>Indian Asian Black White Unknown | | | | Ethnicity: (circle one)<br>Hispanic Non-Hispanic Unknown |
| Place of Birth: | Citizenship: | Date of Birth: | Height: | Weight: |

Skin: (circle one):
Albino Black Dark Dk Brown Fair Light Lt Brown Medium Med Brown Olive Ruddy Sallow Yellow

Eye Color: (circle one):
Black Blue Brown Gray Green Hazel Maroon Pink Multi-Colored Unknown

Hair Color: (circle one)
Black Blond Brown Gray Red White Sandy Bald Blue Green Orange Pink Purple Unknown

Scars, Marks and/or Tattoos: (please describe in detail)

AKA's:

Caution and Medical Conditions: (circle all that apply)

| | | | | |
|---|---|---|---|---|
| 00 – Armed and Dangerous | 05—Violent Tendencies | 10—Martial Arts Expert | 15—Explosive Expertise | 40-Int'l Flight Risk 55—Alcoholic |
| 20—Known to Abuse Drugs | 25—Escape Risk | 30—Sexually Violent Predator | 50—Heart Condition | |
| 80—Medication Required | 60—Allergies | 65—Epilepsy | 70—Suicidal | |
| | 85—Hemophiliac | 90—Diabetic | 01--Other | |

Protection Order Conditions (PCO): (circle all that apply)

01 Respondent is restrained from assaulting, threatening, abusing, harassing, following, interfering with or stalking the protected person and/or child of the protected person
02 Respondent may not threaten a member of the protected person's family/household
03 The protected person is granted exclusive possession of the residence/household
04 Respondent is required to stay away from the residence, property, school or place of employment of the protected person or other family or household member
05 Respondent is restrained from making any communication with the protected person including, but not limited to, personal, written, or phone contact, or their employers, employees or fellow workers, or others whom the communication would be likely to cause annoyance or alarm
06 Respondent is awarded temporary custody of the children named
07 Respondent is prohibited from possessing and/or purchasing a firearm or other weapon
08 See miscellaneous field for comments regarding terms and conditions of the protection order (add all prohibitions ordered not already assigned a code, e.g. pets, utilities, mutually owned property, distance, bond conditions, visitation details and/or other special prohibitions).
09 The protected person is awarded temporary exclusive custody of the child(ren) named

Brady Record Indicator (BRD): SVC:(circle one) served/not served/unknown
N—Respondent is NOT disqualified Y—Respondent is disqualified U—Unknown SVD:

Relationship To Protected Person: (Not the additional PPNS)

*Please include the following numeric identifiers, if available:*

| Driver License: | DL State: | DL Expiration: |
|---|---|---|
| Texas ID: | Misc ID: | Social Security: |

| Respondent Address: | | | |
|---|---|---|---|
| City: | County: | State: | Zip: |

# Protective Order Data Entry Form – Page 2

| Respondent Name: |
|---|

*Respondent Vehicle Data:*

| License Plate: | LP State: | LP Year: | LP Type: |
|---|---|---|---|
| Vehicle ID: | Year: | Color: | |
| Make: | Model: | Style: | |

*Protected Person Data*

| Protected Person Name: | | Sex: Male Female |
|---|---|---|
| Race: (circle one): Indian Asian Black White Unknown | | Ethnicity: (circle one) Hispanic Non-Hispanic Unknown |
| Date of Birth: | Social Security: | |
| Protected Person Address: | | |
| City: | County: | State: Zip: |

*Protected Person Employer Data*

| Protected Person Employer Name: | Address: | |
|---|---|---|
| City: | State: | Zip: |
| Protected Person Employer Name: | Address: | |
| City: | State: | Zip: |

*Protected Child Data (Use additional pages if necessary)*

| Protected Child Name: | | Sex: Male Female |
|---|---|---|
| Race: (circle one): Indian Asian Black White Unknown | | Ethnicity: (circle one) Hispanic Non-Hispanic Unknown |
| Date of Birth: | School/Child Care Name and Address: | |
| Home Address: | City: | State: Zip: |
| Protected Child Name: | | Sex: Male Female |
| Race: (circle one): Indian Asian Black White Unknown | | Ethnicity: (circle one) Hispanic Non-Hispanic Unknown |
| Date of Birth: | School/Child Care Name and Address: | |
| Home Address: | City: | State: Zip: |

*To be completed by Criminal Justice/Law Enforcement Official:*

| SID: | FBI #: | FPC: | MNU: |
|---|---|---|---|

Notes:
Use of Pseudonyms; Code of Criminal Procedures: Art. 57B.02. (Confidentiality of files and records)
Extension of PO if Respondent is confined or Imprisoned; Family Code: Sec. 85.025 (Duration of Protective Order)
PCO-07-Posession of a firearm; Family Code: Sec. 85.0222 (Requirements of order applying to person who committed family violence).
SB 1242-Chapter 82-FC sect 82.011-3(b)-2(b) the court shall order the clerk to maintain a confidential record of the information for use only by: (A) the court; or (B) a law enforcement agency for purposes of entering the information required by Section 411.042 (b) (6), Govt. Code into the statewide law enforcement information system maintained by the Department of Public Safety. (Eff. 9/1/17)

# Tab E

# PROTECTIVE ORDER REGISTRY
# REQUEST TO GRANT/REMOVE PUBLICLY VIEWABLE INFORMATION

A Protected Party in a final protective order issued pursuant to Chapter 85 of the Texas Family Code (FC), has the right to request that limited information on the order be made accessible to the public through the Office of Court Administration's Protective Order Registry (Registry) website. Information about Magistrate's Orders of Emergency Protection (Art. 17.292 CCP) and Temporary Ex Parte Orders (Chp. 83, FC) will not be publicly viewable on the Registry.

**Information about Protective Orders is NOT publicly viewable through the Registry website unless you (as the Protected Party)** request that the information be made public. If you request it, the following information about your protective order will be viewable by the public on the Registry website:

> Issuing court; Cause number; Respondent's full name, county of residence, birth year and race or ethnicity; and date protective order issued; date protective order served; date the order was vacated, if applicable; and date of expiration.

You may request that the information be removed from the Registry website's public view at any time.
Please complete the information below if you would like to make the information available on the Registry website or if you would like to remove information that is already publicly available on the Registry website.

Cause Number _____ _____

Issuing Court: _____ County: _____

Respondent's Full Name: _____ Respondent's Date of Birth: _____

My name is _____, my date of birth is _____.
First Name Middle Name Last Name Date of Birth

My address is _____, _____, _____, _____.
Street Number and Name City State Zip Code

My phone number is _____; my email address is _____.
Primary Phone Number Email Address

I am the Primary Protected Party in the above referenced cause number and I request the following:

_____ Information about the order referenced above be publicly viewable.

_____ Information about the order referenced above that is currently publicly viewable be removed from public view.

I declare under penalty of perjury that I am the person signing below and I am the Primary Protected Party who was granted protection in the above-referenced cause number.

_____ _____
Protected Party Signature Date

**To Be Completed by Clerk/Notary ONLY**

SUBSCRIBED and SWORN to before me, the undersigned authority, this _____ day of _____, 20____.

_____
Clerk/Notary Public Signature

# Tab F

# MEMORANDUM

**TO:** **Supreme Court Advisory Committee**

**FROM:** **Appellate Rules Subcommittee**

**RE:** **Appeals in Parental Termination Cases**

**DATE:** **February 28, 2020**

## I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3 letter refer the following matter to the Appellate Rules Subcommittee:

> **Out-of-Time Appeals in Parental Rights Termination Cases.** A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:
>
> - a narrow late-appeal procedure;
> - an abate-and-remand procedure like the one proposed in the Phase II Report;
> - a habeas- or bill-of-review-style procedure; and
> - prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.
>
> **Suits Affecting the Parent-Child Relationship.** In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

The HB 7 Phase II Report recommends four changes that affect the appellate rules and also have some bearing on the out-of-time appeal assignment: (1) right to counsel, showing authority to appeal, and frivolous appeals; (2) a procedure in the court of appeals to consider ineffective-

assistance-of-counsel claims discovered by appellate counsel; (3) a rule standardizing the currently unwritten understanding on *Anders* briefs; and (4) opinion templates for use in parental termination cases.

## II. Background

The subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

The subcommittee has not considered or discussed a similar procedure in the courts of appeals, nor has the subcommittee addressed a procedure for bringing late claims of ineffective assistance of counsel, *Anders* briefs, or frivolous appeals.

The Texas Supreme Court has indicated that it will consider the July 2017 proposals regarding late-filed petitions for review in conjunction with any additional recommendations on parental-termination topics identified in the May 31, 2019 referral letter.

## III. Issues for Discussion

The subcommittee has broken down the referral topics into two stages to be addressed in the following order.

1. Stage One: Out-of-time appeals and related issues
    a. HB7 Phase II recommendations: indigent parent's right to counsel on appeal; notice of right to appeal; showing authority to appeal
    b. Assessing proposals for addressing untimely appeals and ineffective claims
        i. HB7 Phase II recommendation: abate and remand for evidentiary hearing in support of IAC claim
        ii. "narrow late-appeal procedure"
        iii. "habeas- or bill-of-review-style procedure" for a collateral attack
        iv. other possible procedures such as a requirement that counsel continue the representation until a notice of appeal has been filed.
2. Stage Two: Briefing and Opinions
    a. Frivolous appeals; *Anders* procedures in the courts of appeals as discussed by the HB7 task force; "Parental Termination Brief Checklist"
    b. Opinion templates as created by the HB7 task force

This memo focuses on Stage One, topic 1(a) with respect to the right to counsel on appeal, notice of right to appeal, and showing authority to appeal. The subcommittee will address Stage One, topic 1(b) and Stage Two in later meetings.

## IV. Discussion

### A. Notice of Right to Appeal and Right to Representation by Counsel

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of the entity as conservator of the child is requested, an indigent parent is entitled to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code § 107.016(3).

The HB7 Task Force made the following recommendations regarding an indigent parent's notice of the right to appeal and the right to counsel on appeal.

> The HB7 Task Force proposes that a defendant in a parental-termination suit be notified in the citation about the right to counsel, including the right to counsel on appeal. This will provide an additional measure of notice in the event appointed counsel later declines to pursue an appeal due to abandonment of the case by the parent. The admonition could be added to the required notice and take the following form:
>
> > "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you."
> >
> > "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."
>
> To the extent the Supreme Court is currently considering a revision of Rule 99 to include standard form citations, the Task Force proposes the creation of a customized form citation, in English and Spanish (and with an internet citation to translations in other languages), to be used in parental termination cases. Such a citation could have language customized to address the availability of default judgments in parental-termination cases.

The subcommittee reviewed and discussed these HB7 Task Force recommendations.

The subcommittee recommends the following revision to the HB7 Task Force's proposed citation language.

> "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you at no cost to you."
>
> "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."

The proposed revision clarifies the practical consequence of being "eligible for appointment of an attorney" and conforms the first paragraph to the second paragraph so they both provide the same information in parallel fashion.

The HB7 Task Force proposal comports with an October 2017 report by the Rules 15-165a Subcommittee entitled, "Modernizing TRCP 99, Issuance and Form of Citation." The full advisory committee discussed this report at its October 2017 meeting, and the proposed revisions to TRCP 99 are pending before the Texas Supreme Court. Among other things, the October 2017 report recommends eliminating from TRCP 99 the description of a citation's mandatory contents and instead promulgating a form citation in plain language that clerks must follow. The Appellate Rules Subcommittee endorses the application of this approach to parental termination cases. The Appellate Rules Subcommittee solicits input from the full advisory committee about whether additional language addressing default judgments or other topics specific to parental termination cases should be considered for inclusion in a form citation for parental termination cases.

**B. Showing Authority to Appeal**

The HB7 Task Force made the following recommendations (footnotes omitted) with respect to requiring an attorney to show authority to pursue an appeal from a termination order.

> The filing of a notice of appeal starts the process of immediately preparing a record for which a court reporter might not be compensated. To avoid initiating the preparation of an appellate record in circumstances when a terminated parent may not actually be seeking to challenge a final order, the HB7 Task Force recommends an amendment to Rule 28.4(c) to require that a notice of appeal include an attorney certification that "the attorney consulted with the appellant and the appellant has directed the attorney to pursue to the appeal." *See Appendix C, Rule 28.4(c)*. The Task Force further proposes a similar certification in a petition for review filed in the Supreme Court. *See Appendix D, Rule 53.2(l)*. As an enforcement mechanism, the Task Force proposes borrowing from the procedure in Texas Rule of Civil Procedure 12 to challenge an attorney's authority but eliminating the requirement of a sworn motion.

The HB7 Task Force's proposed rule revisions read in part as follows.

> HB7 Task Force Proposed Texas Rule of Appellate Procedure 28.4(c):
>
> (c) *Certification by Appointed Counsel and Motion to Show Authority*. A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court's ruling. The court must rule on the motion to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.
>
> HB7 Task Force Proposed Texas Rule of Appellate Procedure 53.2(l):
>
> (l) *Certification by Appointed Counsel*. In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.

The subcommittee reviewed and discussed these HB7 Task Force proposals.

The subcommittee recommends a different approach regarding an enforcement mechanism in proposed TRAP 28.4(c).

Questions arose among the subcommittee members regarding the necessity of creating a motion-to-show-authority procedure. If the full advisory committee concludes such a procedure is necessary, then the subcommittee recommends creating a simpler procedure. Grafting the procedure from TRCP 12 onto TRAP 28.4(c) makes for a lengthy and potentially cumbersome or redundant appellate rule. Instead of adding language to proposed TRAP 28.4(c) delineating the procedure for challenging authority to appeal, the subcommittee recommends (1) adding a second sentence to proposed TRAP 28.4(c) stating that a motion challenging an attorney's authority to pursue a parental-termination appeal will be handled in the trial court under TRCP 12, and (2) supplementing TRCP 12 as necessary to accommodate the accelerated timeframes applicable to parental-termination appeals.

The full committee discussed the questions of authority and intent to appeal at length during the November 1, 2019 meeting. Substantial consideration was given to the issue of "phantom" appeals pursued on behalf of absent parents whose intent to pursue an appeal from a termination order may be difficult for trial counsel or the trial court to confirm because they cannot be located. The full committee votes indicated a preference for a rule-based procedure under which the trial court would (1) conduct a hearing at the conclusion of trial to determine whether the terminated parent wishes to appeal, and then (2) sign an order or "certification" based on the results of that hearing. The order or "certification" would specify that (1) the terminated parent has not indicated an intent to appeal, and discharge trial counsel; or (2) the terminated parent does intend to appeal, and appoint appellate counsel (or continue trial counsel's appointment to pursue the appeal).

The subcommittee considered this procedure based on the vote and recommends a narrow rule to implement it as discussed further below. One possible location for such a rule is as part of current Texas Rule of Civil Procedure 306, which already contains a specific provision addressing the contents of a judgment in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship. The subcommittee recommends using Rule 306 as the vehicle for any procedure that may be implemented, and consideration of moving the first sentence of Rule 306 to Rule 301.

To obtain practical insights on how such a procedure might work and to identify potential pitfalls, the subcommittee reached out to those who have experience handling these cases. Two key pitfalls were identified.

- It is problematic to infer an intent to relinquish parental rights, or to relinquish the right to appeal from a termination order, solely from a terminated parent's absence at trial or periodic absences as a case progresses. Parents subject to termination may "disappear" from a case for periods of time and become unreachable by counsel because they are homeless, or incarcerated, or experiencing domestic violence, or experiencing untreated mental illness, or experiencing the effects of substance abuse. It is not uncommon for parents in these circumstances to re-establish contact with counsel after trial when their circumstances have stabilized and express a desire to challenge a termination order on appeal. For this reason, a

rule permitting the trial court to determine an intent not to appeal based solely on the parent's absence from trial, or trial counsel's inability to communicate with a parent who previously has been participating in the case but has become unreachable, potentially could operate to foreclose the appellate rights of parents who later will express a desire to appeal.

- Parents who are present for trial may be difficult to reach after trial, which counsels in favor of having any hearing and determination with respect to an intent to appeal occur at the close of trial instead of when the judgment is signed.

Based on this input, the subcommittee recommends an addition to Rule 306 addressing intent to appeal from a termination order under which non-appearance at trial would give rise to a permissible inference that the terminated parent does not wish to appeal only when a parent (1) is identified as an "alleged" or "presumed" parent; (2) has never been located or involved in the case; and (3) is represented at trial only because the trial court has appointed an attorney ad litem to represent the "alleged" or "presumed" parent at trial. Otherwise, absence from trial would not be a basis for inferring an intent not to appeal for purposes of an order or "certification" of intent to appeal after trial.

### C. Motions for Extension of Time and Conformity With Revisions to TRAP 4.7

Later subcommittee reports will address issues concerning extensions of time by an indigent parent with a statutory right to appointed counsel if the indigent parent's appointed counsel fails to timely pursue an appeal. At this juncture, the subcommittee recommends that any standards or procedures adopted for earlier appellate proceedings be compatible with those ultimately adopted with respect to petitions for review in the Texas Supreme Court.

As noted earlier, the subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee's July 20, 2017 report on late-filed petitions for review in parental termination cases is attached to this memorandum.

# Tab G

**Memorandum**

To: Texas Supreme Court Advisory Committee

From: Subcommittee (TEX. R. CIV. P. 216-299a)
Professor Elaine Carlson, Chair
Tom Riney, Vice-Chair
Judge David Peeples
Alistair Dawson
Bobby Meadows
Kent Sullivan
Kennon Wooten

Re: Preliminary Discussion Draft

Feb. 17, 2020

At the November 1, 2019 SCAC meeting, the full committee voted 20-1 in favor of proposing a rule addressing parental leave continuance. The subcommittee has met several times and seeks further input from the full committee. A preliminary discussion draft follows. This is not a subcommittee recommendation as we are continuing to study the issues and the options.

Since we last met, Florida and North Carolina have finalized and adopted rules providing for parental leave. Copies of those rules are attached along with State Bar of Texas Committee on Court Rules proposed changes to T.R.C.P. 253 providing for parental leave continuances. The subcommittee was asked by the Court to consider broadening the continuance proposed rule to not only address the birth or adoption of a child but to also include the grounds set forth in the Federal Family & Medical Leave Act. 29 U.S.C. § 2612. A copy of that statute is attached as well.

**Exact wording of existing Rule 253:**

RULE 253. ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE

Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

**PRELIMINARY DISCUSSION DRAFT**

RULE 253. PARENTAL LEAVE OR ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE

(a) For purposes of this rule, "parental leave continuance"[1] means a continuance of a trial setting[2] or a hearing on a dispositive motion in connection with the birth or adoption of a child by an attorney applicant, regardless of the applicant's gender. Three months is the presumptive maximum length of a parental leave continuance, absent a showing of good cause that a longer time is appropriate. This rule does not apply to cases arising under Chapters 54[3] or 262[4] of the Family Code.[5] [Other exclusions?]

(1) Any application made under this rule must be filed at least ninety days before the date of commencement of the parental leave period. But because of the uncertainty of a child's birth or adoption date, the trial court must make reasonable exception to this requirement.

(2) An attorney seeking a parental leave continuance must support his or her application with an affidavit:

(A) affirming counsel is a lead attorney or has substantial responsibility for the preparation and/or presentation of the case [or is first or second chair and has substantial responsibility for the preparation and/or presentation of the case];

(B) that parental leave will be taken by the applicant as allowed by this rule;

---

[1] Alternatively refer to this as "Secure Leave Period" following the North Carolina model.

[2] Fla has other rules for parental leave in Criminal, Juvenile, and Involuntary Civil Commitment of Sexually Violent Predators Cases. North Carolina has separate provisions for Criminal, Special Proceedings and Estate Proceedings, and Juvenile Proceedings

[3] Juvenile Proceedings

[4] Involuntary Parental Termination Proceedings.

[5] Richard Orsinger suggested family violence cases should be excluded from the rule.

(C) that the applicant will be the lead attorney or have substantial responsibility for the preparation and/or presentation of the case [or dispositive motion] when reset;

(D) that the client consents to the continuance; and,

(E) the continuance is not sought merely for delay but to care for the child.

(3) Absent extraordinary circumstances, the trial court must grant the continuance. The trial court must enter a written order resetting the trial date [or the dispositive motion setting] and adjust pending pretrial deadlines in its scheduling order, if any, to correspond with the new trial date.

(b) The trial court has discretion[6] to grant a continuance of a trial [or a dispositive motion] setting for a maximum length of twelve weeks when an attorney supports its application [motion] for continuance with an affidavit [and supporting proof][7] affirming:

(1) counsel must care for the spouse, son, daughter, or parent of the attorney, if such spouse, son, daughter, or parent has a serious health condition; or,

(2) counsel has a serious health condition that makes the attorney unable to perform the functions of trial counsel; or,

(3) counsel is seeking leave due to a qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the attorney is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

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[6] Justice Bland requests the subcommittee consider broadening the continuance proposed rule to not only address the birth or adoption of a child but to include the grounds set forth in the Federal Family & Medical Leave Act. 29 U.S.C. § 2612.

[7] The Federal Family & Medical Leave Act requires certification by the health care provider when leave is sought under the grounds in (b)1 or (b)2 above. 29 U.S.C. § 2613.

(c) Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it may be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

Corresponding Changes to TRAP Rules re Continuance of Oral Argument[8]

**Existing Texas Rule of Appellate Procedure 10.5(c)**

(c) *Motions to Postpone Arguments*. Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone oral argument of a case must be supported by sufficient cause.

**Preliminary Discussion Draft of Texas Rule of Appellate Procedure 10.5(c):**

(c) *Motions to Postpone Arguments*. Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone oral argument of a case must be supported by sufficient cause. Absent exceptional circumstances, the appellate court must find sufficient cause when appellate counsel properly moves for a parental leave continuance of the date and time for oral argument in compliance with this rule. The appellate court should exercise its discretion when the continuance is sought for absence of counsel under (5).

(1) For purposes of this rule, "parental leave continuance"[9] means a continuance of the date and time for oral argument sought by counsel in connection with the birth or adoption of a child by an applicant, regardless of the applicant's gender. Three months is the presumptive maximum length of a parental leave continuance, absent a showing of good cause that a longer time is appropriate. This rule does not apply to appeals arising under Chapters 54 or 262 of the Family Code.[10] [Other exclusions?]

(2) Any application sought under (c)(1) made under this rule must be filed at least ninety days before the date of commencement of the parental

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[8] Should the parental leave continuance also apply to motions to extend time to file Briefs? Notice of Appeal or Petition for Review?

[9] Alternatively refer to this as "Secure Leave Period" as North Carolina does

[10] Richard Orsinger suggested family violence cases should be excluded from the rule. Fla has distinctive rules for parental leave in Criminal, Juvenile, and Involuntary Civil Commitment of Sexually Violent Predators Cases.

leave period. But because of the uncertainty of a child's birth or adoption date, the trial court must make reasonable exception to this requirement.

(3) An attorney seeking a parental leave continuance must support his or her application with an affidavit:

(A) affirming counsel is a lead attorney or has substantial responsibility for the preparation and/or presentation of the oral argument [or is first or second chair and has substantial responsibility for the preparation and/or presentation of the oral argument];

(B) that parental leave will be taken by the applicant as allowed by this rule;

(C) that the applicant will be the lead attorney or have substantial responsibility for the preparation and/or presentation of the oral argument [or dispositive motion] when reset;

(D) [that the client consents to the continuance]; and,

(E) the continuance is not sought merely for delay.

(4) The court must enter a written order resetting the date and time for oral argument [or the dispositive motion setting].

(5) The appellate court has discretion[11] to grant a continuance of the date and time for oral argument [or a dispositive motion] setting [for up to twelve weeks] when the applicant attorney supports its application for continuance with an affidavit [and supporting proof] affirming:

(A) counsel must care for the spouse, son, daughter, or parent of the attorney, if such spouse, son, daughter, or parent has a serious health condition; or,

[11] Justice Bland requests the subcommittee consider broadening the continuance proposed rule to not only address the birth or adoption of a child but to include the grounds set forth in the Federal Family & Medical Leave Act.

(B) counsel has a serious health condition that makes the attorney unable to perform the functions of trial counsel; or,

(C) counsel is seeking leave due to a qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

# Tab H

**Exact wording of existing Rule 253:**

RULE 253. ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE

Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

**PRELIMINARY DISCUSSION DRAFT**

RULE 253. PARENTAL LEAVE OR ABSENCE OF COUNSEL AS GROUND FOR CONTINUANCE

(a) For purposes of this rule, "parental leave continuance"[1] means a continuance of a trial setting[2] or a hearing on a dispositive motion in connection with the birth or adoption of a child by an attorney applicant, regardless of the applicant's gender. Three months is the presumptive maximum length of a parental leave continuance, absent a showing of good cause that a longer time is appropriate. This rule does not apply to cases arising under Chapters 54[3] or 262[4] of the Family Code.[5] [Other exclusions?]

(1) Any application made under this rule must be filed at least ninety days before the date of commencement of the parental leave period. But because of the uncertainty of a child's birth or adoption date, the trial court must make reasonable exception to this requirement.

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[3] Juvenile Proceedings

[4] Involuntary Parental Termination Proceedings.

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(D) that the client consents to the continuance; and,

(E) the continuance is not sought merely for delay but to care for the child.

(3) Absent extraordinary circumstances, the trial court must grant the continuance. The trial court must enter a written order resetting the trial date [or the dispositive motion setting] and adjust pending pretrial deadlines in its scheduling order, if any, to correspond with the new trial date.

(b) The trial court has discretion[6] to grant a continuance of a trial [or a dispositive motion] setting for a maximum length of twelve weeks when an attorney the applicant attorney supports its application for continuance with an affidavit [and supporting proof][7] affirming counsel:

(1) must care for the spouse, son, daughter, or parent of the attorney, if such spouse, son, daughter, or parent has a serious health condition; or,

(2) has a serious health condition that makes the attorney unable to perform the functions of trial counsel; or,

(3) because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

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29 U.S.C. § 2612.

[7] The Federal Family & Medical Leave Act requires certification by the health care provider when leave is sought under the grounds in (b)1 or (b)2 above.

(c) Except as provided elsewhere in these rules, absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it may be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of the judge to be stated on the record.

Corresponding Change to Appellate Rule re Oral Arguments[8]

Existing Texas Rule of Appellate Procedure 10.5(c):

*(c) Motions to Postpone Arguments.* Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone argument of a case must be supported by sufficient cause.

Proposed Texas Rule of Appellate Procedure 10.5(c):

*(c) Motions to Postpone Arguments.* Unless all parties agree, or unless sufficient cause is apparent to the court, a motion to postpone oral argument of a case must be supported by sufficient cause. The appellate court must find sufficient cause when appellate counsel properly moves for a parental leave continuance of the date and time for oral argument and should exercise its discretion when the continuance is sought for absence of counsel under (5).

(1) For purposes of this rule, "parental leave continuance"[9] means a continuance of the date and time for oral argument sought by counsel in connection with the birth or adoption of a child by an applicant, regardless of the applicant's gender. Three months is the presumptive maximum length of a parental leave continuance, absent a showing of good cause that a longer time is appropriate. This rule does not apply to appeals arising under Chapters 54 or 262 of the Family Code.[10] [Other exclusions?]

(2) Any application sought under (c)(1) made under this rule must be filed at least ninety days before the date of commencement of the parental leave period. But because of the uncertainty of a child's birth or adoption date, the trial court must make reasonable exception to this requirement.

(3) An attorney seeking a parental leave continuance must support his or her application with an affidavit:

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(B) that parental leave will be taken by the applicant as allowed by this rule;

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(D) [that the client consents to the continuance]; and,

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(5) The appellate court has discretion[11] to grant a continuance of the date and time for oral argument [or a dispositive motion] setting [for up to twelve weeks] when the applicant attorney supports its application for continuance with an affidavit [and supporting proof] affirming counsel:

(A) must care for the spouse, son, daughter, or parent of the attorney, if such spouse, son, daughter, or parent has a serious health condition; or,

(B) has a serious health condition that makes the ~~employee~~ attorney unable to perform the functions of trial counsel; or,

(C) because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces. 29 U.S.C. § 2612.

[11] Justice Bland requests the subcommittee consider broadening the continuance proposed rule to not only address the birth or adoption of a child but to include the grounds set forth in the Federal Family & Medical Leave Act.

# Tab I

DISCUSSION DRAFT COMMENT TO T.R.C.P. 253

A comment like the following could mention some of the considerations that might inform the court's exercise of discretion when considering a request for ~~a~~ continuance under subsection (b).

## Comment

When considering a request for continuance under subsection (b), the court should take into account the length and degree of the applicant's work on the case, how long the applicant has known about the reason for the request, the role the applicant will play in the rescheduled trial or hearing, and the harm that delay would cause the opposing party. When granting a continuance under subsection (b), the court should always consider issuing interim orders to minimize the harm caused by delay. If a prompt reset date is difficult to fit into the court's schedule, the court should consider seeking the assistance of an assigned judge.

# Tab J

2019 WL 6906467
Only the Westlaw citation is currently available.
Supreme Court of Florida.

# IN RE: AMENDMENTS TO the FLORIDA RULES OF JUDICIAL ADMINISTRATION—PARENTAL LEAVE.

No. SC18-1554
|
December 19, 2019

Original Proceeding – Florida Rules of Judicial Administration

**Attorneys and Law Firms**

Josephine Gagliardi, Chair, Rules of Judicial Administration, Fort Myers, Florida, and Eduardo I. Sánchez, Past Chair, Rules of Judicial Administration, Miami, Florida; and Joshua E. Doyle, Executive Director, and Mikalla Davis, Bar Liaison, The Florida Bar, Tallahassee, Florida, for Petitioner

Catherine Cole of Katz & Doorakian Law Firm, West Palm Beach, Florida; Theodore F. Greene, III, of Law Office of Theodore F. Greene, LC; Orlando, Florida; Glen Gifford, on behalf of Florida Defender Public Defender Association, Inc., Tallahassee, Florida; Tara Scott Lynn of Law Office of Tara J. Scott PA, Oldsmar, Florida; Jane West of Jane West Law, P.L., St. Augustine, Florida; Erin L. Deady of Erin L. Deady, P.A., Delray Beach, Florida; Stephanie C. Zimmerman, on behalf of Department of Children and Families – Children's Legal Services, Bradenton, Florida; Kimberly Kanoff Berman of Marshall Dennehey Warner Coleman & Goggin, Fort Lauderdale, Florida; David R. Bear of Marshall Dennehey Warner Coleman & Goggin, Orlando, Florida; Abbe Sheila Rifkin, on behalf of Board of Directors, Broward County Women Lawyers Association, Fort Lauderdale, Florida; Michelle Renee Suskauer, West Palm Beach, Florida, John M. Stewart, Vero Beach, Florida, Joshua E. Doyle, Tallahassee, Florida, and Christian George, on behalf of The Florida Board of Governors and Young Lawyers Division of The Florida Bar, Jacksonville, Florida; Amanda R. Jesteadt and Christa L. McCann on behalf of Florida Association for Women Lawyers, Palm Beach County, West Palm Beach, Florida; Jennifer Shoaf Richardson on behalf of Florida Association of Women Lawyers, Jacksonville, Florida, and Kyleen Hinkle on behalf of Florida Association of Women Lawyers, Ormond Beach, Florida; Alan F. Abramowitz, Dennis W. Moore and Thomasina F. Moore, on behalf of Statewide Guardian ad Litem Program, Tallahassee, Florida; Michelle Browning Coughlin, on behalf of MothersEsquire, Inc., Louisville, Kentucky; and David Neal Silverstein, on behalf of Juvenile Court Rules Committee, Children's Legal Services, Bradenton, Florida; Responding with comments

**Opinion**

PER CURIAM.

***1** The Florida Bar's Rules of Judicial Administration Committee (RJA Committee) has submitted, for the Court's consideration, new Florida Rule of Judicial Administration 2.570 (Parental-Leave Continuance). *See* Fla. R. Jud. Admin. 2.140(f)(1). We have jurisdiction[1] and adopt a modified version of the parental-leave continuance rule that was submitted.

## BACKGROUND

At the Court's request, the RJA Committee submitted a draft parental-leave continuance rule for the Court's consideration. New rule 2.570, as drafted by the Committee, provided that a court must grant a motion for continuance based on the parental leave of a lead attorney, if the motion is made within a reasonable time of certain events, unless another party demonstrates substantial prejudice. The draft rule also provided three months as the presumptive maximum length of a continuance granted under the rule. A majority of the RJA Committee opposed the adoption of a parental-leave continuance rule, while a minority of the Committee supported the adoption of the draft rule. The Board of Governors of The Florida Bar also supported the adoption of the draft rule.

Before the RJA Committee submitted the draft rule to the Court, the Committee received one comment opposing the rule, two comments supporting the rule, and one comment from the Juvenile Court Rules Committee opposing application of the rule in juvenile proceedings. After the Committee submitted the draft new rule to the Court, the

Court published the rule for comment. The majority of the comments received by the Court strongly support the adoption of the new rule. One attorney filed a comment opposing the adoption of a parental-leave continuance rule. The Department of Children and Families (DCF), the Statewide Guardian ad Litem Program (GAL), and the Florida Public Defender Association, Inc. (FPDA) filed comments opposing the application of the draft rule in criminal, juvenile, and dependency proceedings.

In its response to the comments, the RJA Committee offered a revised rule that exempts criminal, juvenile, and involuntary civil commitment of sexually violent predator cases from the requirements of the rule and provides that a motion for a continuance based on parental leave in those types of cases is governed by rule 2.545(e) (Continuances) and by any applicable rule of procedure governing those proceedings. The revised rule further requires the court to use existing discretion to provide a reasonable accommodation when a parental-leave continuance is requested in an exempt proceeding. The Board of Governors approved the revised rule by a vote of 36-1. After the Court published the revised rule, FPDA filed a comment supporting the revised rule and DCF filed a comment stating it has no objection to the revised rule. The Juvenile Court Rules Committee filed a comment stating the revisions to the rule are acceptable, but it objects to the use of the term "lead attorney" in the revised rule. The attorney who opposed the original draft of the rule filed a comment opposing the revised rule. The GAL opposes the revised rule because of concerns that the added language about a court exercising discretion to reasonably accommodate a parental-leave request could result in unauthorized delays in dependency cases.

***2** After considering the RJA Committee's revisions to the rule, the Committee's majority and minority positions, the Board of Governors' strong support of a parental-leave continuance rule, and the other comments filed with the Court, and having heard oral argument, we adopt new rule 2.570, with several modifications.

As adopted, subdivision (a) of new rule 2.570 requires that absent a finding of one or more of the reasons listed in the rule, a court must grant a timely motion for continuance based on the parental leave of the movant's lead attorney, due to the birth or adoption of a child, if the motion is made within a reasonable time after the later of the movant's lead attorney learning of the basis of the continuance, or the setting of the proceeding(s) or the scheduling of the matter(s) for which a continuance is sought. Subdivision (b) of the new rule sets forth the requirements for the motion. Subdivision (c) of the rule provides the presumptive three-month maximum length of a continuance granted under the rule. Subdivision (d) of the rule addresses the burden of proof. Subdivision (e) of the rule addresses the court's discretion to deny the motion or to grant a continuance different in scope or duration than requested. That subdivision also requires the court to enter a written order setting forth its ruling and the specific grounds for the ruling. Subdivision (f) of the rule exempts criminal, juvenile, and involuntary civil commitment of sexually violent predator cases from the requirements of the new rule and provides that a motion for a parental-leave continuance in those types of cases is governed by rule 2.545(e) (Continuances) and any applicable rule of procedure. That subdivision further provides that in juvenile dependency and termination of parental rights proceedings, a motion for a parental-leave continuance is governed by Florida Rule of Juvenile Procedure 8.240(d) (Continuances and Extensions of Time). Finally, in light of the modifications to the RJA Committee's revised rule, we have omitted the suggested committee note.

Accordingly, we adopt new Florida Rule of Judicial Administration 2.570, as reflected in the appendix to this opinion. The new rule shall become effective January 1, 2020, at 12:01 a.m. The Court thanks the RJA Committee, the Board of Governors of The Florida Bar, and all those who submitted comments for assisting the Court in crafting the new parental-leave continuance rule.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

(1) the movant's lead attorney learning of the basis for the continuance; or

(2) the setting of the specific proceeding(s) or the scheduling of the matter(s) for which the continuance is sought.

**(b) Contents of Motion.** A motion filed under this rule shall be in writing and signed by the requesting party. The motion must state all of the following:

**APPENDIX**
**RULE 2.570. PARENTAL-LEAVE CONTINUANCE**

**(a) Generally.** Absent one or more of the findings listed in subdivision (e) of this rule, a court shall grant a timely motion for continuance based on the parental leave of the movant's lead attorney in the case, due to the birth or adoption of a child, if the motion is made within a reasonable time after the later of:

(1) The attorney who is the subject of the motion is the movant's lead attorney.

(2) The facts necessary to establish that the motion is timely.

***3** (3) The scope and length of the continuance requested.

(4) Whether another party objects to the motion.

(5) Any other information that the movant considers relevant to the court's consideration of the motion.

**(c) Presumptive Length.** Three months is the presumptive maximum length of a parental-leave continuance absent a showing of good cause that a longer time is appropriate.

**(d) Burden of Proof.** If the motion is challenged by another party that makes a prima facie demonstration of substantial prejudice, the burden shall shift to the movant to demonstrate that the prejudice to the requesting party caused by the denial of the motion exceeds the prejudice that would be caused to the objecting party if the requested continuance were granted.

**(e) Court's Discretion; Order.** It is within the court's sound discretion to deny the motion or to grant a continuance different in scope or duration than requested, if the court finds that:

(1) another party would be substantially prejudiced by the requested continuance; or

(2) the requested continuance would unreasonably delay an emergency or time-sensitive proceeding or matter.

The court shall enter a written order setting forth its ruling on the motion and the specific grounds for the ruling.

**(f) Criminal, Juvenile, and Involuntary Civil Commitment of Sexually Violent Predators Cases.** In a case governed by the Florida Rules of Criminal Procedure, by the Florida Rules of Juvenile Procedure, or by the Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators, a motion for continuance based on the parental leave of the lead attorney is governed by rule 2.545(e) and by any applicable Florida Rule of Criminal Procedure, Florida Rule of Juvenile Procedure, or Florida Rule of Civil Procedure for Involuntary Commitment of Sexually Violent Predators, rather than by this rule, except that in a case governed by Part III of the Florida Rules of Juvenile Procedure, a motion for continuance based on the parental leave of the lead attorney is governed by Florida Rule of Juvenile Procedure 8.240(d).

**All Citations**

--- So.3d ----, 2019 WL 6906467 (Mem)

Footnotes

1 Art. V, § 2(a), Fla. Const.

# Tab K

Rule 26 of the General Rules of Practice for the Superior and District Courts, which may be read below, provides to attorneys the guidelines on securing time free from the urgent demands of professional responsibility. Generally referred to as a Designation of Secured Leave, attorneys generally file them with several judicial officials in any jurisdiction in which they regularly conduct business.

SUBMITTING DESIGNATIONS OF SECURED LEAVE ONLINE

The Forsyth County Clerk of Superior Court, currently offers a convenient online service for attorneys to file their designation of secured leave with the Clerk's Office.

**To submit a designation of secured leave online or to view Forsyth County/District 21 policies for online submissions please Click Here.**

***Please be aware that the online form is password protected***. For the password or more information about submitting a Designation of Secured Leave online, please call 336-779-6300.

## ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS | RULE 26

Pursuant to the authority of Article IV of the Constitution of North Carolina and N.C.G.S. §7A-34, the General Rules of Practice for the Superior and District Courts are amended by adding a new Rule 26 to read:

Click Here for the local Forsyth County/District Secured Leave form for MAILING or HAND DELIVERY.

**"26. Secure Leave Periods for Attorneys**

(A) Purpose, Authorization. In order to secure for the parties to actions and proceedings pending in the Superior and District Courts, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) Length, Number. A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure shall not exceed, in the aggregate, three calendar weeks.

(C) Designation, Effect. To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.

(D) Content of Designation. The designation shall contain the following information: (1) the attorney's name, address, telephone number and state bar number, (2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end, (3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure, (4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and (5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, peremptorily set or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(E) Where to File Designation. The designation shall be filed as follows: (1) if the attorney has entered an appearance in any criminal action, in the office of the District Attorney for each prosecutorial district in which any such case or proceeding is pending; (2) if the attorney has entered an appearance in any civil action, either (a) in the office of the trial court administrator for each superior court district and district court district in which any such case is pending or, (b) if there is no trial court administrator for a superior court district, in the office of the Senior Resident Superior Court Judge for that district, (c) if there is no trial court administrator for a district court district, in the office of the Chief District Court Judge for that district; (3) if the attorney has entered an appearance in any special proceeding or estate proceeding, in the office of the Clerk of Superior Court of the county in which any such matter is pending; (4) if the attorney has entered an appearance in any juvenile proceeding, with the juvenile case calendaring clerk in the office of

the Clerk of Superior Court of the county in which any such proceeding is pending.

(F) When to File Designation. To be effective, the designation shall be filed: (1) no later than ninety (90) days before the beginning of the secure leave period, and (2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.

(G) Procedure When Court Proceeding Scheduled Despite Designation. If, after a designation of a secure leave period has been filed pursuant to this rule, any trial, hearing, in-court deposition or other in-court proceeding is scheduled or peremptorily set for a time during the secure leave period, the attorney shall file with the official by whom the matter was calendared or set, and serve on all parties, a copy of the designation with a certificate of service attached. Any party may, within ten days after service of the copy of the designation and certificate of service, file a written objection with that official and serve a copy on all parties. The only ground for objection shall be that the designation was not in fact filed in compliance with this Rule. If no objection is filed, that official shall reschedule the matter for a time that is not within the attorney's secure leave period. If an objection is filed, the court shall determine whether the designation was filed in compliance with this Rule. If the court finds that the designation was filed as provided in this Rule, it shall reschedule the matter for a time that is not within the attorney's secure leave period. If the court finds the designation was not so filed, it shall enter any scheduling, calendaring or other order that it finds to be in the interests of justice.

(H) Procedure When Deposition Scheduled Despite Designation. If, after a designation of a secure leave period has been filed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period. Any dispute over whether the secure leave period was properly designated pursuant to this Rule shall be resolved pursuant to the portions of the Rules of Civil Procedure, G.S. 1A-1, that govern discovery.

(I) Nothing in this Rule shall limit the inherent power of the Superior and District Courts to reschedule a case to allow an attorney to enjoy a leave during a period that has not been designated pursuant to this Rule, but there shall be no entitlement to any such leave.

Adopted by the Court in Conference this 6th day of May, 1999, on the recommendation of the Chief Justice's Commission on Professionalism. This amendment is effective January 1, 2000, and applies to all actions and proceedings pending in the Superior and District Courts on and after that date. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and Court of Appeals and by distribution by mail to each superior and district court judge, district attorney, clerk of superior court, and the North Carolina State Bar.

Wainwright, J.

For the Court

# Tab L

West's North Carolina General Statutes Annotated North Carolina Rules of Court North Carolina Rules of Appellate Procedure Article VI. General Provisions

App. R. 33.1

# Rule 33.1. Secure-Leave Periods for Attorneys

Currentness

**(a) Definition; Entitlement.** A "secure-leave period" is one complete calendar week that is designated by an attorney during which the appellate courts will not hold oral argument in any case in which that attorney is an attorney of record. An attorney is entitled to enjoy a secure-leave period that has been designated according to this rule.

**(b) Allowance.**

(1) Within a calendar year, an attorney may enjoy three different secure-leave periods for any purpose.

(2) Within the twenty-four weeks after the birth or adoption of an attorney's child, that attorney may enjoy twelve additional secure-leave periods for the purpose of caring for the child.

**(c) How to Submit Designation.** An attorney must submit his or her designation of a secure-leave period using the electronic filing site of the appellate courts at https://www.ncappellatecourts.org.

**(d) When to Submit Designation.** An attorney must submit his or her designation of a secure-leave period:

(1) at least ninety days before the secure-leave period begins; and

(2) before oral argument in any of the attorney's cases is scheduled for a time that conflicts with the secure-leave period.

But because of the uncertainty of a child's birth or adoption date, the Supreme Court and the Court of Appeals will make

reasonable exception to these requirements so that an attorney may enjoy leave with the child.

**Credits**

[Adopted: 6 May 1999--effective 1 January 2000 for all actions and proceedings pending in the appellate division on and after that date. Recodified former Rule 33A as Rule 33.1 and Reenacted Rule 33.1 as amended: 2 July 2009--amended 33.1(d) & (e) --effective 1 October 2009 and applies to all cases appealed on or after that date. Amended: 1 March 2018; 4 September 2019--effective 11 September 2019.]

Rules App. Proc., App. R. 33.1, NC R RAP App. R. 33.1
Current with amendments received through September 15, 2019

**End of Document**

# Tab M

**STATE OF NORTH CAROLINA** IN THE GENERAL COURT OF JUSTICE

COUNTY OF MECKLENBURG

| | |
|---|---|
| *Attorney Name* | **SECURE LEAVE FORM** |
| *Address* | |
| *Telephone Number* | |
| *State Bar Number* | *Rule 26.- Rule 33A Rules of Appellate Procedure* |

*Notice: Secure Leave shall consist of one or more calendared weeks, but in any event shall not consist of more than three (3) calendared weeks during any calendar year.*

Statement of Attorney

I hereby certify that the secure leave period designated below is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding.

I further certify that no action or proceeding in which I have entered an appearance has been scheduled, Peremptorily set or noticed for trial hearing, deposition or other proceeding during the designated leave period.

Designated Secure Leave Dates

Indicate the dates you are noticing as Secure Leave Dates

| | | | |
|---|---|---|---|
| **Monday** | *Beginning Date* | **Until Friday** | *Ending Date* |

Indicate any previously designated Secure Leave periods during the current calendar year that have previously been designated pursuant to Rule 26 and Rule 3A of the Rules of Appellate Procedure:

| | | |
|---|---|---|
| | *Beginning Date* | *Ending Date* |

*This Secure Leave Notification must be filed not later than ninety (90) days before the beginning of the secured leave period and before any trial, hearing deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.*

| | |
|---|---|
| *Date* | |
| | **Attorney Signature** |

**This form is required** to be filed in each of the following offices if the attorney has entered an appearance of record as follows: *(please check the offices filed.)*

☐ District Attorney *[Criminal cases]*

☐ Clerk of Superior Court *(Special Proceeding/Estate cases]*

☐ TCA – Caseflow Management Division *[Civil cases]*

☐ TCA - Family Court Director *[Domestic/Juvenile cases]*

**NOTICE TO ATTORNEY:** Should any matter be set during your Secure Leave Period, you are required to service notice on the official calendaring the matter, and the parties of record to the matter. This Notice shall contain the following: (1) A copy of this form (2) The case number and name of case set (3) A certificate of service.

# Tab N

United States Code Annotated Title 29. Labor Chapter 28. Family and Medical Leave (Refs & Annos)
Subchapter I. General Requirements for Leave (Refs & Annos)

29 U.S.C.A. § 2612

# § 2612. Leave requirement

Effective: December 21, 2009

Currentness

## (a) In general

### (1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

**(A)** Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

**(B)** Because of the placement of a son or daughter with the employee for adoption or foster care.

**(C)** In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

**(D)** Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

**(E)** Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

**(2) Expiration of entitlement**

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

**(3) Servicemember family leave**

Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

**(4) Combined leave total**

During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

**(5) Calculation of leave for airline flight crews**

The Secretary may provide, by regulation, a method for calculating the leave described in paragraph (1) with respect to employees described in section 2611(2)(D) of this title.

**(b) Leave taken intermittently or on reduced leave schedule**

**(1) In general**

Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and subsection (b)(5) or (f) (as appropriate) of section 2613 of this title, leave under subparagraph (C) or

(D) of subsection (a)(1) or under subsection (a)(3) may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e)(3) and section 2613(f) of this title, leave under subsection (a)(1)(E) may be taken intermittently or on a reduced leave schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

**(2) Alternative position**

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

**(A)** has equivalent pay and benefits; and

**(B)** better accommodates recurring periods of leave than the regular employment position of the employee.

**(c) Unpaid leave permitted**

Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

**(d) Relationship to paid leave**

**(1) Unpaid leave**

If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a)(3)), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this subchapter may be provided without compensation.

**(2) Substitution of paid leave**

**(A) In general**

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

**(B) Serious health condition**

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3) for any part of the 26-week period of such leave under such subsection, except that nothing in this subchapter requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

**(e) Foreseeable leave**

**(1) Requirement of notice**

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

**(2) Duties of employee**

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) or under subsection (a)(3) is foreseeable based on planned medical treatment, the employee--

**(A)** shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, parent, or covered servicemember of the employee, as appropriate; and

**(B)** shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

**(3) Notice for leave due to covered active duty of family member**

In any case in which the necessity for leave under subsection (a)(1)(E) is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.

**(f) Spouses employed by same employer**

**(1) In general**

In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

**(A)** under subparagraph (A) or (B) of subsection (a)(1); or

**(B)** to care for a sick parent under subparagraph (C) of such subsection.

**(2) Servicemember family leave**

**(A) In general**

The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) may be limited to 26 workweeks during the single 12-month period described in subsection (a)(3) if the leave is--

**(i)** leave under subsection (a)(3); or

**(ii)** a combination of leave under subsection (a)(3) and leave described in paragraph (1).

**(B) Both limitations applicable**

If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

**CREDIT(S)**

(Pub.L. 103-3, Title I, § 102, Feb. 5, 1993, 107 Stat. 9; Pub.L. 110-181, Div. A, Title V, § 585(a)(2), (3)(A) to (D), Jan. 28, 2008, 122 Stat. 129; Pub.L. 111-84, Div. A, Title V, § 565(a)(1)(B), (4), Oct. 28, 2009, 123 Stat. 2309 to 2311; Pub.L. 111-119, § 2(b), Dec. 21, 2009, 123 Stat. 3477.)

**VALIDITY**

<The United States Supreme Court has held that Congress did not, under the Enforcement Clause of Fourteenth Amendment, validly abrogate states' sovereign immunity from suits for money damages in enacting FMLA's self-care provision (section 102(a)(1)(D) of the Family Medical Leave Act of 1993, Pub.L. 103-3; 29 U.S.C.A. § 2612(a)(1)(D)). Coleman v. Court of Appeals of Maryland, 566 U.S. 30, 132 S.Ct. 1327, 182 L.Ed. 2d 296 (2012).>

Notes of Decisions (224)

29 U.S.C.A. § 2612, 29 USCA § 2612
Current through P.L. 116-91.



**FMLA allows eligible employees to take up to 12 work weeks of unpaid leave during any 12-month period to care for a new child (through birth, adoption, or foster care), to care for a family member's illness (a spouse, son, daughter, or parent), or to care for their own serious health condition.**

# Tab O

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 29. Labor
Chapter 28. Family and Medical Leave (Refs & Annos)
Subchapter I. General Requirements for Leave (Refs & Annos)

29 U.S.C.A. § 2613

§ 2613. Certification

Effective: October 28, 2009

Currentness

**(a) In general**

An employer may require that a request for leave under subparagraph (C) or (D) of paragraph (1) or paragraph (3) of section 2612(a) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual in the case of leave taken under such paragraph (3), as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

**(b) Sufficient certification**

Certification provided under subsection (a) shall be sufficient if it states--

**(1)** the date on which the serious health condition commenced;

**(2)** the probable duration of the condition;

**(3)** the appropriate medical facts within the knowledge of the health care provider regarding the condition;

**(4)(A)** for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

**(B)** for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

**(5)** in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

**(6)** in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

**(7)** in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

**(c) Second opinion**

**(1) In general**

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave.

**(2) Limitation**

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

**(d) Resolution of conflicting opinions**

**(1) In general**

In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a), the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

**(2) Finality**

The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

**(e) Subsequent recertification**

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

**(f) Certification related to covered active duty or call to covered active duty**

An employer may require that a request for leave under section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer.

**CREDIT(S)**

(Pub.L. 103-3, Title I, § 103, Feb. 5, 1993, 107 Stat. 11; Pub.L. 110-181, Div. A, Title V, § 585(a)(3)(E), Jan. 28, 2008, 122 Stat. 130; Pub.L. 111-84, Div. A, Title V, § 565(a)(1)(C), Oct. 28, 2009, 123 Stat. 2310.)

Notes of Decisions (57)

29 U.S.C.A. § 2613, 29 USCA § 2613
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

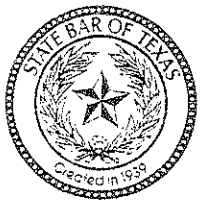
§ 2613. Certification, 29 USCA § 2613

# Tab P

# STATE BAR OF TEXAS

RANDALL O. SORRELS
2019-20 PRESIDENT




*Direct Correspondence to:*
ABRAHAM, WATKINS, NICHOLS,
SORRELS, AGOSTO & AZIZ
800 Commerce St., Houston 77002
(713) 222-7211
rsorrels@abrahamwatkins.com



October 23, 2018

Jaclyn Daumerie
Supreme Court of Texas
201 W. 14th St.
Austin, TX 78711

Dear Ms. Daumerie:

I am writing concerning the consideration of implementing a statewide policy pertaining to maternity and adoption issues that arise in a litigation setting. I have asked the Court Rules Committee of the State Bar to look into developing and drafting a policy that will address some of the issues parents face in an upcoming birth or adoption of a child. Giana Ortiz is the current chair of this committee and she has agreed to put this topic on her committee's next agenda. I am hopeful the committee will develop a policy that works for most Texas lawyers who are would be parents, and if so, we will be seeking the Court's guidance on the next step. At this time, we also both felt it prudent to communicate with the Court to share what is being considered. I have spoken with Justice Guzman about the issue and she too suggested I contact the Court in writing to relay this information.

As always, we look to the Court's direction and guidance on how to approach this issue. If the Court wishes for the Court Rules Committee to stand down on examining the issue, and/or has any other guidance or direction it wishes us to follow, please let us know.

Thanks in advance for your help with this important issue.

Very truly yours,

Randall O. Sorrels

cc: Justice Eva Guzman
Supreme Court of Texas
PO Box 12248
Austin, TX 78711

Giana Ortiz
1304 W. Abram St., Suite 100
Arlington, TX 76013-1752

Trey Apffel, III
PO Box 12487
Austin, TX 78711

Laura Gibson
Denton's
1221 McKinney, Suite 1900
Houston, TX 77010

Joe Longley
Attorney at Law
3305 Northland Dr., Suite 500
Austin, TX 78731

# Tab Q

# 101B

**AMERICAN BAR ASSOCIATION**

**YOUNG LAWYERS DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

RESOLVED, That the American Bar Association urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

## REPORT

### I. Why Do We Need This Rule?

This Resolution addresses the absence of a rule of practice providing for a rebuttable presumption that a continuance should be granted in a matter where the primary or secondary attorney is on parental leave following the birth or adoption of a new child at home. Parental leave,[1] which refers to time away from work for the specific and significant purpose of providing care to a newly-arrived child, is undeniably important to the health of new and growing families. For both mothers and fathers, "time at home during the first precious months after birth or adoption is critical to getting to know their babies." [2] Parental leave provides long-term benefits that improve a child's brain development, social development, and overall well-being.[3] It "results in better prenatal and postnatal care and more intense parental bonding over a child's life." [4] And it "improves the chance that a child will be immunized; as a result, it is associated with lower death rates for infants."[5]

New parents therefore often find themselves in a situation where they are left to choose between caring for their new child and doing their job. The fairly recent case of a young female attorney from Georgia serves as an illustration. As an expectant new mother, a young litigator moved for a continuance of an immigration hearing one month before it was scheduled to occur on the basis of her pregnancy and the fact that the hearing fell within the six-week leave that her treating physician had recommended she take off from work following her due date.[6] She was a solo practitioner and did not have anyone in her office who could assist her, so her request was seemingly reasonable.[7] One week before the hearing—after her child had already been born—the judge denied her motion, specifically finding "[n]o good cause. Hearing set prior to counsel accepting representation."[8]

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[1] Parental leave is a type of family leave, which is leave from work used to care for a family member. It includes both maternity and paternity leave.

[2] "Expecting Better: A State-by-State Analysis of Parental Leave Programs," Jodi Grant, Taylor Hatcher & Nirali Patel, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, at 3 (2005), at https://www.leg.state.nv.us/App/NELIS/REL/79th2017/ExhibitDocument/OpenExhibitDocument?exhibitId=29512&fileDownloadName=0330ab266_ParentalLeaveReportMay05.pdf (last visited Oct. 29, 2018).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Staci Zaretsky, *Judge Refuses To Postpone Hearing Because Maternity Leave Isn't A Good Enough Excuse*, ABOVE THE LAW Blog (Oct. 15, 2014), at https://abovethelaw.com/2014/10/judge-refuses-to-postpone-hearing-because-maternity-leave-isnt-a-good-enough-excuse/?rf=1 (last visited Oct. 29, 2018).

[7] She filed her motion less than one week before her due date and indicated that she would only be taking six weeks off before returning to work, both feats that deserve recognition in and of themselves.

[8] See Zaretsky, *supra* note 11 (quoting the court's decision).

Left with the choice of either abandoning her client or abandoning her child, the attorney made the only reasonable decision she could think of: she attended the hearing with her newborn baby.[9] After that hearing, the attorney filed a formal complaint against the judge, noting that when he saw her with her child in court:

> He was outraged. He scolded [her] for being inappropriate for bringing [the baby]. He questioned the fact that day care centers do not accept infants less than 6 weeks of age. He then questioned [her] mothering skills as he commented how [her] pediatrician must be appalled that [she is] exposing [her] daughter to so many germs in court. He humiliated [her] in open court.[10]

What happened to this attorney is unfortunately not uncommon. Less than a month after giving birth, this attorney was still physically recovering from the traumatic experience of giving birth, and she was taking care of a newborn baby with around-the-clock needs.[11] She was a solo practitioner without family nearby to care for her child for her.[12] Yet she was forced to attend the hearing because the judge found that the birth of her child did not constitute good cause for continuing the hearing date.

Put simply, it is not reasonable to expect parents—including new mothers—to stop practicing law when they become pregnant or give birth. A rule that protects new parents from having to make the choice between caring for their new child or practicing law is imperative. Where a parent who is lead counsel, or is otherwise integrally involved in a matter moves to continue a court date or deadline on the basis of her or his parental leave, there should be a presumption in her or his favor that the continuance will be granted. It is only where substantial prejudice to the opposing party, or where a client's speedy trial rights—if any—are prejudiced that this presumption should be rebutted.[13]

The proposed resolution recognizes that continuances may be necessary not only for a lead attorney's parental leave, but also for the leave of another attorney who is integrally involved in the matter. This recognizes that many new parents may be young partners who do not quality for leave under the FMLA,[14] junior associates, or other young lawyers who are neither first-chairing a trial nor primarily responsible for the matter but who nevertheless are necessary to the successful representation of the client. For example, where a partner serves as the lead trial counsel in a complex matter but a junior associate is the repository of the facts concerning the case, the junior associate would need to be present to assist at trial. Absent this extension of the rule, an attorney in this position could face unnecessary and overwhelming internal pressure to continue working

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[9] See Zaretsky, *supra* note 11.

[10] See Zaretsky, *supra* note 11 (quoting the subject complaint).

[11] The U.S. Department of Health & Human Services advises that it takes approximately six weeks for a woman's body to recover physically after giving birth vaginally. See *Recovering From Birth*, OFFICE OF WOMEN'S HEALTH, U.S. DEPT. OF HEALTH & HUMAN SERVICES (June 6, 2018), at https://www.womenshealth.gov/pregnancy/childbirth-and-beyond/recovering-birth (last visited Oct. 29, 2018).

[12] See Zaretsky, *supra* note 12.

[13] Allowing such a rebuttal permits consideration by the court of the reasonable expectation that litigation can move forward in a timely manner, and that justice will be efficiently served.

[14] See *supra* note 6.

despite the need for parental leave simply because a continuance under this rule would not be available. This result is contradictory to the resolution's purpose.

The absence of a parental leave rule affects both men and women, but women are disproportionately affected. One of the reasons for the disparate effect on women is that women are more likely to take parental leave than men.[15] Hence, there is a higher likelihood that not having a rule allowing for a parental leave continuance will affect women. In addition to being more likely to take leave, women also take more time on leave.[16] This is because the leave that men are offered is typically more limited than it is for women.[17] A 2007 study reveals that 89% of U.S. fathers in opposite sex two-parent households took some parental leave after the birth or adoption of a new child.[18] A 2014 survey of "highly paid professional U.S. fathers" revealed that only about 5% took no paternity leave, but over 80% took two weeks of leave or less.[19] Additionally, women who give birth must recover from the physical stresses put on their bodies during pregnancy and delivery, and time off from work allows them to do so. Moreover, the lack of such a rule adds to the list of obstacles that women lawyers face. These include unequal pay, low-quality work assignments, lack of access to mentoring and networking opportunities, and harassment.[20] The lack of a parental leave rule can exacerbate the negative ramifications women lawyers already face in the legal workplace.

Despite the profound effects the absence of a parental leave rule has on women, men also are negatively affected. Parental leave for men is of critical importance to fathers. There are social, familial, and health benefits to having parental leave for fathers, which include improved cognitive and mental health outcomes for the children.[21] Moreover, the taking of paternity leave by men increases the female labor force participation and wages. Parental leave for men helps allow parents are working professionals, and need to split the time away from work in a manner that maximizes time with family and minimizes impact on work and career.[22]

The enactment of this type of rule is consistent with Goal III of the Association, which is to "[p]romote full and equal participation in the association, our profession, and

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[15] Jacob Alex Klerma, et al. 2012. *Family and Medical Leave in 2012: Technical Report.* (Prepared for U.S. Department of Labor.) Cambridge: Abt Associates, at https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf.

[16] See generally *Paternity Leave: Why Parental Leave For Fathers Is So Important For Working Families*, DOL Policy Brief, U.S. DEPT. OF LABOR, at https://www.dol.gov/asp/policy-development/paternitybrief.pdf (last visited Oct. 30, 2018).

[17] See *id.*

[18] *Id.* at 5 n.3.

[19] *Id.* at 5 n.3.

[20] See Joan C. Williams *et al., You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (Am. Bar Ass'n Commission on Women & Minority Corp. Counsel Ass'n, 2018), at http://www.abajournal.com/files/Bias_interrupters_report-compressed.pdf.

[21] See *supra* note 21.

[22] Brad Harrington, et al., *The New Dad: Take Your Leave*, Boston College Ctr. for Work & Family, at http://www.thenewdad.org/yahoo_site_admin/assets/docs/BCCWF_The_New_Dad_2014_FINAL.157170735.pdf

the justice system by all persons."[23] The risk of having to threat of having to hand off a case after months or even years of preparation may discourage attorneys from seeking parental leave at all, or discourage female attorneys from working on significant cases.[24]

Parental leave in the United States is, as noted above, neither widely protected nor widely offered. The enactment of this type of rule will help ensure that at the very least, when it is offered, it remains widely used—by *all* new parents, regardless of their gender, regardless of the type of law that they practice, and regardless of the length of parental leave that they take. Urging the enactment of a rule that facilitates the equal participation in the legal profession of *all* new parents after the birth or adoption of a new child at home, regardless of how long those parents take leave, falls precisely within the scope of Goal III's directive. The support of the Association for this rule is thus both timely and critical.

## II. Current Legal Framework

There is anecdotal evidence from across the country concerning incidents where continuances are denied for pregnancy or birth-related issues.[25] This is likely because most, if not all, rules of practice regarding continuances are generally left to the court's broad discretion with no direction to the court to expressly consider as a factor in exercising that discretion the pregnancy, adoption, or parental leave of the involved attorneys.[26] No jurisdiction in the country has yet to adopt a rule such as the one proposed in this resolution—which in and of itself demonstrates the need for one. At the forefront of this issue is Florida, where such a rule is currently under consideration by their Supreme Court. The Florida Bar Board of Governors and its Young Lawyers Division counterpart have been shepherding through the approval process a new Rule of Judicial Administration codifying a model parental leave rule.[27] That rule will be considered by the

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[23] See ABA Mission and Goals, AMERICAN BAR ASSOCIATION, at https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Oct. 30, 2018).

[24] Barbara Busharis. *The Rules of the Game*, 36 No. 1 Trial Advoc. Q. 4 (Winter 2017).

[25] This is in addition to the circumstances described above. See, e.g., *Survey Results: Parental Leave Continuance Rule*, Anonymous, NEW HAMPSHIRE WOMEN'S BAR ASSOCIATION (Sept. 11, 2018), at https://nhwba.org/page-8689/6664848 (last visited Oct. 31, 2018) (noting experiences of women lawyers in New Hampshire).

[26] Most state rules regarding continuances provide that the trial court may grant one upon motion and for good cause shown or as justice may require. See, e.g., ARK. R. CIV. P. 40 (Arkansas); KANS. STAT. § 60-240 (b) (Kansas); MD. R. CIV. PROC. 2-508 (a) (Maryland); MASS. R. CIV. PROC. 40 (Massachusetts); MO. R. CIV. PROC. 9.1 (c) (Missouri); N.M. R. MUN. CT. PROC. 8-506 (2) (New Mexico); OR. R. CIV. P. 52 (Oregon). The same is true for federal court, although the language is typically a bit stronger. See, e.g., D. CONN. R. 16 ("A trial ready date will not be postponed at the request of a party except to prevent manifest injustice.").

[27] See *In re Amendments to the Florida Rules of Judicial Administration—Parental Leave*, Case No. SC 18-1554, Docket available at http://onlinedocketssc.flcourts.org/DocketResults/CaseByYear?CaseNumber=1554&CaseYear=2018 (last visited Oct. 31, 2018). The docket contains links to the subject petition for amendment to the rules, as well as the official comments submitted to the Court for consideration.

Florida Supreme Court in late 2018 or early 2019.[28] The Florida Bar is presently in the process of soliciting comments from all interested persons on the subject of the proposed parental-leave rule.[29] The proposed rule, Rule 2.570, provides:

> Unless substantial prejudice is demonstrated by another party, a motion for continuance based on the parental leave of a lead attorney in a case must be granted if made within a reasonable time after the later of:
>
> a. the movant learning of the basis for the continuance; or
>
> b. the setting of the proceeding for which the continuance is sought.
>
> Three months is the presumptive maximum length of a parental leave continuance absent a showing of good cause that a longer time is appropriate. If the motion for continuance is challenged by another party that makes a prima facie demonstration of substantial prejudice, the burden shifts to the movant to demonstrate that the prejudice caused by denying the continuance exceeds the burden that would be caused to the objecting party if the continuance were to be granted. The court shall enter a written order setting forth its ruling on the motion and, if the court denies the requested continuance, the specific grounds for denial shall be set forth in the order.

Again, this proposed rule has not yet been adopted, although it is clearly leading the way for similar rules elsewhere.

This is no more apparent than in the adoption of a standing order by Judge Ravi K. Sandill of the 127th Civil District Court in Harris County, Texas, who was directly inspired to issue such an order after learning of Florida's proposed parental-leave rule.[30] Judge Sandill's *Standing Order on Continuances Based on the Birth or Adoption of a Child* provides:

> The Court recognizes the value and importance of working parents spending time with their families, particularly following the birth or adoption of a child.
>
> Thus, any lead counsel who has been actively engaged in the litigation of a matter may seek an automatic continuance of a trial setting for up to 120 days for the birth or adoption of a child.[31]

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[28] See *id.*

[29] *Proposed Parental-Leave Continuance Rule*, The Florida Bar News, FLORIDA BAR (Oct. 15, 2018), at https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2F8c9f13012b96736985256aa900624829%2Ff2885d1289ecc2d885258314004af6de (last visited Oct. 31, 2018).

[30] *Trial Date v. Due Date: Courts Make Rule For Parental Leave*, Bloomberg Law (July 31, 2018), at https://news.bloomberglaw.com/daily-labor-report/trial-date-v-due-date-courts-make-room-for-parental-leave (last visited Oct. 31, 2018).

[31] *See* Standing Order on Continuances Based on the Birth or Adoption of a Child, https://www.justex.net/JustexDocuments/7/STANDING%20ORDER%20ON%20CONTINUANCE%20BASED%20ON%20THE%20BIRTH%20OR%20ADOPTION%20OF%20A%20CHILD.pdf (July 26, 2018).

Unless and until the proposed Florida rule is adopted, this standing order is the only authority the drafters are aware of nation-wide concerning this issue.[32]

None of the federal district courts have a local rule specifically addressing continuances based on parental leave. However, many federal courts have loval rules that allow continuances for "good cause," with certain conditions, such as having the motion for continuance filed as soon as counsel learns that a continuance will be needed, filing an accompanying affidavit with the motion that sets forth the facts on which the continuance request is based, or that the motion for a continuance be supported by a medical certificate.

The instances of attorneys being denied continuances based on the need for parental leave following the birth or adoption of a child shows that the ABA's voice and opinion is necessary to lead the way on this matter. Here, the proposed rule both protects clients' unfettered rights to counsel of their choice[33] and helps give effect to the FMLA and the policies behind parental leave. It also balances courts' and litigants' shared interest in the efficient resolution of legal matters. There is no reason why these considerations need to be mutually exclusive.

**III. Conclusion**

This resolution, if adopted, will remind stakeholders of the importance of accommodating parental leave needs, and erase the stigma associated with asking for a continuance because of such circumstances.

Respectfully submitted,

Tommy D. Preston, Jr.
Chair, Young Lawyers Division
January 2019

[32] For the reasons laid out in Section I, the FMLA does not provide the necessary protections that the rule proposed by this Resolution does.

[33] See, e.g., *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) ("Deprivation of the [Sixth Amendment] right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.").

## GENERAL INFORMATION FORM

**1. Summary of Resolution**

This Resolution urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

**2. Approval by Submitting Body**

The ABA Young Lawyers Division ("YLD") Council approved this resolution unanimously on November 9, 2018.

**3. Has this or a similar Resolution been submitted to the House or Board previously?**

No.

**4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

In 1988, the ABA passed Resolution 88A121, which recognized the barriers that exist that deny women the opportunity to achieve full integration and equal participation in the legal profession, affirmed the principle that there is no place in this profession for those barriers, and called upon members of the profession to eliminate those barriers. This Resolution is a natural extension of the policy adopted in 88A121.

**5. If this is a late Report, what urgency exists which requires action at this meeting of the House?**

N/A.

**6. Status of Legislation (if applicable).**

N/A.

**7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

After adoption, the Young Lawyers Division will work with the Governmental Affairs Office to determine the most effective way to advocate for this Resolution

**8. Cost to the Association (both indirect and direct costs).**

None.

**9. Disclosure of Interest.**

None.

**10. Referrals**

Conference of Chief Justices
Center on Children and the Law
Criminal Justice Section
Government and Public Sector Lawyers Division
Judicial Division
Law Student Division
Section of Civil Rights and Social Justice
Section of Family Law
Section of Litigation
Standing Committee on Gun Violence
Tort, Trial, and Insurance Practice Section

**11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)**

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ABA YLD Past Chair
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**12. Contact Name and Address Information. (Who will present the Resolution with Report to the House?**

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# 101B

## EXECUTIVE SUMMARY

1. **Summary of Resolution.**

This Resolution urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance unless: (1) substantial prejudice to another party is shown; or (2) the criminal defendant's speedy trial rights are prejudiced.

2. **Summary of the Issue which the Resolution addresses.**

This Resolution addresses the absence of a rule of practice providing for a rebuttable presumption that a continuance should be granted in a matter where the primary or secondary attorney is on parental leave following the birth or adoption of a new child at home.

3. **An explanation of how the proposed policy position will address the issue.**

The policy will encourage the bodies charged with regulating the legal profession to enact a rule providing that a motion for continuance based on parental leave of the primary or secondary attorney in the matter shall be granted if made within a reasonable time after learning the basis for the continuance with limited exceptions.

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.

# Tab R

# MEMORANDUM

**TO:** **Supreme Court Advisory Committee**

**FROM:** **Judicial Administration Subcommittee**

**RE:** **Mechanisms for Obtaining a Trial Court Ruling**

**DATE:** **February 28, 2020**

## I. Matter Referred

Chief Justice Hecht's September 4, 2019 referral letter and Chairman Babcock's September 6, 2019 letter to the Judicial Administration Subcommittee address the following matter:

> **Procedures to Compel a Ruling.** In the attached letter, Chief Justice Gray points out that litigants, particularly self-represented inmates, are often unable to get trial courts to timely rule on pending motions and proposes rule changes to address the issue. The Committee should consider Chief Justice Gray's proposals and other potential solutions.

## II. Background

As requested in the referral, the Judicial Administration Subcommittee has discussed issues related to the difficulty that incarcerated pro se litigants encounter in obtaining rulings on motions. As a practical matter, the inability of incarcerated pro se litigants to communicate with courts and court staff by means other than the United States Postal Service leaves few options if a court fails to act on motions and requests for rulings on previously filed motions.

These circumstances lead to pro se mandamus proceedings seeking to compel a ruling. In turn, these mandamus petitions frequently are denied due to (1) procedural deficiencies; or (2) the relator's inability to demonstrate that the motion at issue was brought to the trial court's attention but the trial court nonetheless failed to act on it. *See, e.g., In re Jerry Rangel*, 570 S.W.3d 968 (Tex. App.—Waco 2019, orig. proceeding).

Procedural issues surrounding difficulty in obtaining rulings is not limited to criminal cases. The subcommittee also received input from Justice Tracy Christopher, who noted that the Houston appellate courts have encountered repeated mandamus filings in connection with failures to rule in civil cases.

## III. Discussion

The subcommittee identified two threshold questions on which the full committee's input was solicited at the November 2019 meeting to provide direction for the subcommittee's further deliberations.

The first question was whether the discussion should focus solely on the specific circumstances discussed in *In re Rangel* involving pro se inmate litigants, or instead should encompass the full range of situations in which a failure to rule may prompt mandamus proceedings.

The second question focused on the optimal approach to use in addressing failures to rule. Multiple potential approaches were identified based on discussions within the subcommittee and informal polling of the chief justices of the intermediate appellate courts.

- Create a universal request-for-a-ruling form, which would start the clock running for purposes of a deemed ruling denying the motion by operation of law occurring a certain number of days after the request is submitted.

- Require the trial court clerk to present a report of all ruling requests to the judge at least once monthly to create a presumption that the trial court had been informed of the motion and request. A litigant could rely upon this presumption in mandamus proceedings to establish that the trial judge had been made aware of the motion or request at issue.

- Reliance on a default rule under which a motion is denied by operation of law a certain number of days after filing. This approach already is used in a number of specific circumstances. *See, e.g.,* Tex. R. Civ. P. 329b(c) (motion for new trial overruled by operation of law 75 days after filing in absence of an express order); Tex. R. App. P. 21.8(c) (motion for new trial in a criminal case is deemed denied 75 days after imposing or suspending sentence in open court); Tex. Civ. Prac. & Rem. Code § 27.008(a) (TCPA motion to dismiss overruled by operation of law if trial court does not rule by 30th day following the date on which the hearing on the motion concludes).

- All Texas judges are under a duty to analyze their dockets and take action to bring overdue or pending matters to a conclusion pursuant to the Rules of Judicial Administration and the Code of Judicial Conduct. In conjunction with these existing duties, judges could be required to provide quarterly reports to the presiding judge of their administrative judicial region (or to the Office of Court Administration) identifying matters submitted for more than a threshold number of days and still awaiting a decision. Presiding judges would bear responsibility to determine the reasons for a failure to rule and appropriate follow up steps, perhaps including appointment of visiting judges to address a backlog. Reliance on this administrative approach would avoid concerns that may arise due to the reluctance of litigants to "remind" judges about long-pending but unresolved motions out of concern for provoking an adverse response.

These approaches were discussed at the November 2019 meeting, along with additional approaches suggested by Justice Christopher. These additional approaches included requiring trial judges to create a mechanism for reviewing motions without an oral hearing; educating trial judges and clerks regarding continuing jurisdiction to rule on motions after a final judgment is signed; creating a reminder mechanism that parties can send to judges; requiring judges to file a response

to a failure-to-rule mandamus; and reporting mechanisms to the judicial conduct commission for repeated failures to rule. Discussion at the November 2019 meeting considered whether this issue should be approached solely in a criminal context, or in a civil context as well.

After the meeting, the subcommittee received additional guidance from the Court of Criminal Appeals and the Texas Supreme Court about the scope of this inquiry. This guidance indicated that the subcommittee should focus its efforts on circumstances in civil cases rather than criminal cases. The Texas Supreme Court's guidance asked the subcommittee to consider a civil rule that (1) applies generally, not just to self-represented litigants; (2) focuses on a request-for-a-ruling mechanism to trigger an operation-of-law event; and (3) encompasses a result other than a deemed ruling, such as a presumption that the trial court has been informed of the motion and request.

The subcommittee conferred again after receiving this guidance and reached a consensus that a request-for-a-ruling mechanism in the civil context should: (1) create a presumption that the trial court is aware of the motion and requested relief, which would establish a basis for seeking mandamus relief to compel a ruling; and (2) exclude any circumstance in which a deadline to rule or a deemed ruling already is provided for under existing rules or statutes, such as motions for new trial and anti-SLAPP motions to dismiss under the TCPA. The subcommittee believes the better course is to create a narrower mechanism limited to creating a presumption of trial court awareness that will allow a mandamus to be filed seeking to compel a ruling, as opposed to creating a deemed denial situation that could result in unintended consequences such as (1) loss of substantive rights from a deemed denial/overruling on the merits; (2) missed appellate deadlines triggered by a request to rule resulting in a deemed denial; and (3) anomalies such as rulings being deemed to have occurred after the trial court has lost plenary power.

# Tab S

# Memorandum

**To:** Supreme Court Advisory Committee

**From:** Rule 171-205 Subcommittee

**Date:** February 26, 2020

**Re:** New Rules for Civil Actions —$250,000

Section 22.004 of the Government Code was amended in 2019 and requires the Supreme Court to adopt rules to promote the "prompt, efficient and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000." Our subcommittee was assigned this task. We sent a survey to various judges to serve as resources for the committee. Their answers are attached.

Given the overlap between county and district courts, the SCAC concluded at our June 2019 meeting that the rules should not just apply to county courts but should also apply in district courts.

Our committee has several ideas for preliminary discussion.

1. Create a new Rule 190.2, level 1A for these cases.
2. Put these cases in either level 1 or 2.
3. Put these cases in level 2 but lower the deposition limits for all level 2 cases.

In addition, we urge the adoption of our previous changes to the discovery rules that have been vetted by the SCAC. In particular, we would like to urge the court to adopt the following changes that we believe promote the "prompt, efficient and cost-effective resolution of cases".

1. Automatic disclosures instead of a request for disclosure.
2. No discovery with the petition.
3. Level 1 changes—increasing the amount to $100,000.
4. Level 2 changes—rewording the discovery period and adding a limit to the number of Requests For Production to 25
5. Changing the scope of discovery and limitations. (Rules 192.3 and 192.4)

# Tab T

Survey answers from selected county and district court judges:
Judge A—Judge Robert Ramirez-CCAL, civil only, not concurrent with district
Judge B—Judge David Hall, rural CCAL (multi county)
Judge C—Judge Jennifer Rymell, CCAL civil only
Judge D—Judge Laura Betancourt CCAL general jurisdiction.
Judge E—Judge Pamela Sirmon CCAL judge for 20 years and now a district judge
Judge F—Judge Matt Martindale-CCAL general
Judge G—Judge Piper McCraw—district court

1. Do parties use Rule 169 in your court? Have you had any problems with Rule 169? If so, please describe those.

A. Yes. No problems that are worth mentioning other than issues relating to mediation, discussed later.
B. Not used
C. Seldom used. Plaintiffs use it to challenge late discovery or to get a special setting. Defendants then ask to get out of the rule. (See other comments in answer to question 7)
D. No.
E. Only once
F. No
G. Courts are unable to try the case within the time required in the rule.

2. With respect to the cases with higher dollar limits, would you support limiting discovery? If so, in what way? Deposition time? Number of interrogatories? Number of Admissions? Number of Request for Productions? Would you make it less than the current Rule 190.3 Level 2 discovery limits?

A. In cases with less than $250,000 in controversy I would support Rule 190.2's limitations (Level 1) with leave to be given by the trial court if requested for additional discovery.
B. I support Level 2 for my cases
C. Level 2 is good.
D. Yes to limits-less than level 2
E. Would not limit
F. Yes to limits
G. Would not limit

3. With respect to the cases with higher dollar limits, would you support limiting experts? If so, in what way?

A. No, I have never had an issue with the excessive use of experts in this court.
B. Yes, but it would be hard to do since the type of cases are so different.
C. No.
D. No.
E. No
F. No
G. No

4. With respect to the cases with higher dollar limits, would you support limiting trial time? If so, in what way?

A. Yes, I believe that case within the jurisdictional limits of a county court at law can be effectively handled in the amount of time proscribed by the current expedited rule. However, I would be in favor of allowing the attorneys to request additional time for their case prior to the beginning of trial.
B. No. Courts can do this on their own.
C. No. The time limits for those who are in Rule 169 are never followed. The parties do not ask for it and acting as a timekeeper for a judge is distracting. The trial judge can do this already, so no additional rules are needed.
D. Yes
E.
F. No. Leave this up to the judge.
G. No. Leave this up to the judge.

5. Would you support a requirement that all cases have mandatory disclosure requirements, rather than using the request for disclosure method of Rule 194?

A. Yes, I think that would be more efficient.
B. Yes.
C. Yes. Within 50 days of filing suit.
D. Yes.
E.
F. Yes
G. No. I have concerns how this will impact the self-represented.

6. Would you change other dispositive motions such as summary judgments?

A. No.

B. No.
C. No.
D. No.
E.
F. No.
G. No.

7. If you could, what other rule might you change? (We cannot change any rules required by law—such as Rule 91a) Or new rule that you would want to see implemented?

A. With regard to Rule 169, I would allow the trial court more latitude when it comes to mediation.

- I think that a ½ day of mediation is less likely to be successful. Lawyers and parties are sometimes late, it takes them a beat to get settled in and for the mediator to get to know them.
- This would be especially true when the court refers the parties to a nonprofit mediation service such as we have in Denton County. The vast number of cases would be mediated by an attorney volunteer for only $150.00 per side for the entire day.
- I would also remove any reference to the parties agreeing not to mediate, ADR is a useful tool and should not be limited, other than prevent the court from ordering multiple mediations in the same case.

B. Nothing at this time.
C. Eliminate Rule 169(d)(2). We can rarely reach a case on its first setting. The deadline is unrealistic due to the volume of cases. Other colleagues in Tarrant County agree—it is virtually ignored because it is not possible to achieve. Also Rule 169(d)(5) should allow challenges to experts before trial. Expert challenges during trial is a waste of juror time. And a pretrial strike of an expert may resolve the case without a trial.
D. mandatory mediation for all cases.
E.
F. Nothing at this time
G. I would like to see jurisdictional minimums so that cases with very low dollar amounts are not in district court or even county court when they would be more appropriate in a justice of the peace court.