SCAC MEETING AGENDA-AMENDED
Friday, April 16, 2021 [9:00 a.m. – 5:00 p.m.]
VIA ZOOM

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 December 4, 2020 meeting.

3. COMMENTS FROM JUSTICE BLAND

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

Appellate Sub-Committee Members:

Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Connie Pfeiffer
Richard Phillips
Scott Stolley
Charles Watson
Evan Young

(a) April 12, 2021 Memo re: Parental Termination Cases
(b) Appeals in TPR

5. BRIEFING RULES – "Update on Rules"

Appellate Sub-Committee Members:

Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Connie Pfeiffer
Richard Phillips
Scott Stolley
Charles Watson
Evan Young

(c) August 20, 2020 Memo re: Briefing Rule (handout used from last meeting)

7. JURY RULES "Deep Thoughts"

216-299a Sub-Committee Members:

Prof. Elaine Carlson – Chair
Thomas Riney – Vice Chair
Hon. David Peeples
Robert Meadows
Kent Sullivan
Hon. Cathy Stryker

(d) March 29, 2021 Referral letter with background information

Tab A

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **April 12, 2021**

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 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 a conservator for the child is requested, an indigent parent is entitled by statute 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 §§ 107.013(a), 107.016(3). In termination cases, this right extends to the filing of a petition for review in the Texas Supreme Court. *In the interest of P.M.*, 520 S.W.3d 24 (Tex. 2016) (per curiam).[1]

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

[1] The Supreme Court has not addressed whether there is a constitutional or statutory right to appointed counsel in private parental termination suits, or whether such a right extends to a non-indigent parent. The Court also has not addressed whether appointed counsel must be provided for an indigent parent at the petition for review stage in cases in which a governmental entity seeks the appointment of a conservator for a child.

> 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, and then (2) sign an order based on the results of that hearing.

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 discussed using Rule 306 as the vehicle for any procedure that may be implemented, and 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 has reviewed a proposed revision to Rule 306.

Under this proposal, non-appearance at trial would give rise to a permissible inference that the terminated parent does not wish to appeal 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.

Discussion of revisions to Rule 306 during the June 19, 2020 full committee meeting generated multiple comments and suggestions aimed at making the revised rule more streamlined and easier to implement at the trial court level.

Additional discussion occurred during the November 6, 2020 full committee meeting. The November 2020 discussion included input from the Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families; on behalf of the Commission, Judge Dean Rucker and Judge Rob Hofmann offered a further proposed revision of the draft Rule 306 that was circulated and discussed by the full committee.

The subcommittee met in April 2021 to review the comments to the revised draft of Rule 306. A new draft of revised Rule 306 is presented for consideration based on the comments at prior meetings and the language proposed by the Commission. The redline changes below show the differences between (1) the Commission-sponsored draft of Rule 306 discussed during the November meeting; and (2) the revised draft now presented after further consideration within the subcommittee.

[Current] Rule 306 Recitation of Judgment

> The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator.

[Draft] Rule 306 Judgment in Suit Affecting the Parent-Child Relationship

> 1. 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 judgment must state the specific grounds for termination or for appointment of the managing conservator. **[Same as the current rule.]**

~~1.~~ 2. The following provisions apply in a suit filed by a governmental entity that seeks the termination of the parent-child relationship or appointment of the entity as a child's conservator. The attorney ad litem will continue the representation for appellate proceedings unless the judgment contains one of the following express statements:~~The judgment must contain one of the following express statements regarding appointment of an attorney ad litem to pursue a parent's or alleged father's appeal.~~

~~a. The attorney ad litem will continue the representation for appellate proceedings; or~~

a~~b~~. The attorney ad litem is replaced by another attorney who will continue the representation for appellate proceedings; or

b~~c~~. The attorney ad litem is discharged without continuing the representation for appellate proceedings based upon a finding of good cause. For purposes of this subpart, "good cause" means the following:

i. The parent or alleged father failed to appear after service under Texas Rule of Civil Procedure 106(a)~~proper personal citation~~; or

ii. The attorney ad litem appointed for the parent or alleged father was unable despite diligent efforts to ~~identify or~~ locate the parent or alleged father; or

iii. After being located by the attorney ad litem, the parent or alleged father failed to appear at the trial on the merits; or

iv. After being located by the attorney ad litem, the parent or alleged father never expressed to the attorney ad litem a desire to exercise the right to appeal the judgment to the court of appeals or to the Supreme Court of Texas.

Explanation of changes:

1. The first sentence of TRCP 306 is moved to TRCP 301.

2. It is assumed that the proposed changes to citation are approved.

3. Under Family Code §107.013 the court must appoint an attorney ad litem for:

    i. An indigent parent who responds to oppose the termination or appointment;
    ii. A parent served by publication;
    iii. An alleged father who failed to register his parenthood under Chap. 160 and whose location is unknown; and,
    iv. A registered alleged father who cannot be located for service.

    The attorney ad litem must investigate what the petitioner has done to locate an alleged father and do an independent investigation to find him. Tex. Fam. Code §107.0132(a). If the attorney locates him, he must report the address and locating information to the court and each party. Tex. Fam. Code §107.0132(b). If the attorney ad litem cannot locate him, he shall report his efforts to the court; on receipt of the report, the court must discharge the attorney. Tex. Fam. Code §107.0132(d). If the alleged father is adjudicated the parent and is determined to be indigent, the court may continue the appointment on the same basis as an indigent parent. Tex. Fam. Code §107.0132(c). This suggests that after the alleged father appears, he is entitled to continued representation only upon proof of indigency.

4. The attorney ad litem serves until the earliest of:

    i. The date the suit is dismissed;
    ii. The date appeals of a final order are exhausted or waived; or
    iii. The date the attorney is relieved of duties or replaced by another attorney after a finding of good caused rendered on the record.

    Tex. Fam. Code §107.016(3). The Supreme Court has held that once appointed, counsel may withdraw only for good cause, which did not include client disagreement or belief the appeal was meritless. *In the Interest of P.M.*, 520 S.W.3d at 27. Courts have a duty to see that withdrawal not result in foreseeable prejudice to the client; it the court permits withdrawal, it must provide for new counsel. *Id*. However, this was a case where the parent had appeared and actively pursued an appeal. This leaves unresolved whether the court may relieve the attorney ad litem if the parent/putative father never appeared after personal service or service by publication.

    Section 107.0132(d) mandates discharging counsel if the alleged father cannot be located. Section 107.0132(c) suggests the alleged

father who is served is entitled to continued representation on the same basis as a parent who appears. Arguably the *P.M.* decision would permit discharging the attorney ad litem if:

i. The alleged father cannot be located;
ii. The alleged father is served, responds, but fails to prove he is indigent;
iii. The parent is served, responds, but fails to prove indigency.

5. This draft avoids the difficulty of trying to determine whether a party who has never appeared (or has disappeared) wishes to waive the appeal. It focused on determining what is good cause under Texas Family Code section 107.016(3) to relieve the appointed attorney ad litem when the final judgment is signed. It does not address discharging or relieving appointment prior to a final judgment.

6. The revised text in paragraph 2 makes clear what the default outcome is and seeks to avoid difficulty in determining finality or other consequences if the judgment does not contain one of the express statements.

7. Replacing "personal citation" in paragraph 2(b)(i) with an express reference to service under TRCP 106(a) is intended to align this rule with Rule 106(a) to avoid potential confusion.

8. The deletion of "identify or" in paragraph 2(b)(ii) is intended to align the rule with the statutory standard and avoid potential confusion about any differences between identifying vs. locating.

Additional areas for consideration include (1) is Rule 306 the best place to put such a rule; (2) are there other rules that could be more readily adapted for this purpose, such as Rule 308a; (3) should all rules of civil procedure governing the parent-child relationship be assembled in one place as part of "Rules Relating to Special Proceedings" in Part VII of the Texas Rules of Civil Procedure.

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.

Tab B

4. (Draft) Rule 306 Judgment in Suit Affecting the Parent-Child Relationship

2. The following provisions apply in a suit filed by a governmental entity that seeks the termination of the parent-child relationship or appointment of the entity as a child's conservator. The judgment must contain one of the following express statements regarding appointment of an attorney ad litem to pursue a parent's or alleged father's appeal.

    a. The attorney ad litem will continue the representation for appellate proceedings; or

    b. The attorney ad litem is replaced by another attorney who will continue the representation for appellate proceedings; or

    c. The attorney ad litem is discharged without continuing the representation for appellate proceedings based upon a finding of good cause. For purposes of this subpart, "good cause" means ~~either of~~ the following:

        i. The parent or alleged father failed to appear after proper personal citation; or

        ii. The attorney ad litem appointed for the parent or alleged father was unable despite diligent efforts to identify or locate the alleged father; or

        iii. After being located by the attorney ad litem, the parent or alleged father failed to appear at the trial on the merits; or

        iv. After being located by the attorney ad litem, the parent or alleged father never expressed to the attorney ad litem a desire to exercise the right to appeal the judgment to the court of appeals or to the Supreme Court of Texas.

Tab C

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: August 20, 2020

Re: May 18 Referral Relating to Appellate Briefing Practice

I. Matter referred to subcommittee

The Court's May 18, 2020 referral letter and Chairman Babcock's May 20 letter refer the following matter to our committee:

> **Briefing Rules.** The Court asks the Committee to consider whether changes are needed to improve appellate briefing practice and specifically asks the Committee to consider whether to:
>
> - remove paper-copy requirements;
> - remove the requirement to include the court of appeals judgment in the petition appendix;
> - add a reasons-to-grant section in the petition and brief;
> - remove or limit the statement of jurisdiction in the petition and brief;
> - create a standardized record citation format to allow for automated hyperlinking;
> - add a requirement to include argument-preservation citations; and
> - maintain the certificate-of-service requirement for e-filed documents.

No materials were provided with the referral.

II. Relevant rules

The items for consideration in the referral implicate several of the Rules of Appellate Procedure. TRAP 9.3(b) imposes the paper copy requirement for document electronically filed with the Texas Supreme Court and the Court of Criminal Appeals. TRAP 9.5(d) and (e) govern certificates of service in appellate courts. TRAP 53.2 mandates the contents of a petition for review and appendix. TRAP 55.2 sets out the contents of a petitioner's brief on the merits. The full text of these provisions is provided in Appendix A.

III. Discussion and Recommendation

The referred items will be addressed in a different order than listed in the referral letter. Four of the items involve the mechanics of filings and will be addressed first. The remaining three items address the substance of filings and will be addressed last.

A. Whether to remove paper-copy requirements.

TRAP 9.3(b)(2) requires a party e-filing documents in the Supreme Court and Court of Criminal Appeals to also file paper copies with those courts: "Paper copies of each document that is electronically filed with the Supreme Court or the Court of Criminal Appeals must be mailed or hand-delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within three business days after the document is electronically filed. The number of paper copies required shall be determined, respectively, by order of the Supreme Court or the Court of Criminal Appeals." In contrast, TRAP 9.3(a)(2) states that paper copies of e-filed documents are not generally required in the court of appeals: "Unless required by local rule, a party need not file a paper copy of an electronically filed document."

Blake Hawthorne, Clerk of the Supreme Court, has confirmed that the Court no longer requires paper copies of e-filed documents. In an email, Blake stated: "We no longer require paper copies, so I think the rule needs to be updated. People still call and are confused because the rule hasn't changed." Blake also volunteered to contact the Court of Criminal Appeals to see whether they still require paper copies and, if so, whether they want to continue.

Recommendation. According to Blake, the Court of Criminal Appeals is considering whether it still wants paper copies, no final determination has been made, but it seems likely the court will want to continue to receive paper copies. So here are two alternative recommendations:

Assuming the Court of Criminal Appeals wants to continue receiving paper copies, amend TRAP 9.3(b)(2) to delete the requirement to file paper copies of e-filed documents only in the Supreme Court and to parallel TRAP 9.3(a)(2) applicable to the courts of appeals, as follows:

9.3. Number of Copies

(b) Supreme Court and Court of Criminal Appeals.

(1) Document Filed in Paper Form. If a document is not electronically filed, a party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court only an original and one copy must be filed of any motion, response to the motion, and reply in support of the motion, and in the Court of Criminal Appeals, only the original must be filed of a

motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

(2) Electronically Filed Document. Paper copies of each document that is electronically filed with the ~~Supreme Court or the~~ Court of Criminal Appeals must be mailed or hand-delivered to the ~~Supreme Court or the~~ Court of Criminal Appeals~~, as appropriate,~~ within three business days after the document is electronically filed. The number of paper copies required shall be determined~~, respectively,~~ by order of the ~~Supreme Court or the~~ Court of Criminal Appeals. A party need not file a paper copy of an electronically filed document in the Supreme Court.

Assuming instead the Court of Criminal Appeals no longer wants paper copies, amend TRAP 9.3(b)(2) to delete the requirement to file paper copies of e-filed documents and to parallel TRAP 9.3(a)(2) applicable to the courts of appeals, as follows:

9.3. Number of Copies

(b) Supreme Court and Court of Criminal Appeals.

(1) Document Filed in Paper Form. If a document is not electronically filed, a party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court only an original and one copy must be filed of any motion, response to the motion, and reply in support of the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

(2) Electronically Filed Document. ~~Paper copies of each document that is electronically filed with the Supreme Court or the Court of Criminal Appeals must be mailed or hand-delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within three business days after the document is electronically filed. The number of paper copies required shall be determined, respectively, by order of the Supreme Court or the Court of Criminal Appeals.~~ A party need not file a paper copy of an electronically filed document.

B. Whether to remove the requirement to include the court of appeals' judgment in the petition appendix.

TRAP 53.2(k)(1)(C) requires that the appendix to the petition for review contain "the opinion and judgment of the court of appeals." While petitioners routinely include the court of appeals' opinion in the appendix, they not infrequently omit the court of appeals' judgment, which is a separate document. Because the judgment is required, petitions are returned for

correction when not included. While a return for correction does not affect the date of filing, it does slow down the processing of the petition.

The subcommittee asked for input from Blake Hawthorne, Clerk of the Supreme Court, who stated that: "Court of appeals judgments are almost always available online and staff attorneys say they no longer need it in the petition. It causes a lot of returns for corrections because many non-appellate practitioners and their staff don't understand the difference between the opinion and the judgment."

If the rule were changed to delete the mandatory inclusion of the court of appeals' judgment in the appendix, petitioners would always be free to include it as optional content under TRAP 53.2(k)(2) ("Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.").

Pragmatically, then, it makes sense to no longer mandate inclusion of the court of appeals' judgment in the appendix. The subcommittee was unanimous on this. But some members of the subcommittee did express regret at its passing. As subcommittee member Evan Young observed, "But it really is the judgment that is the basis for the appeal, not the opinion; there is something discordant to me about omitting the judgment in a petition whose whole purpose is to review that very judgment. I nonetheless do not oppose the recommendation to exclude it as a mandatory part of the appendix given the foregoing."

Recommendation. Amend TRAP 53.2(k)(1) to delete the required inclusion of the court of appeals' judgment in the appendix to the petition for review, as follows:

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(k) Appendix.

(C) the opinion ~~and judgment~~ of the court of appeals; and

C. Whether to maintain the certificate-of-service requirement for e-filed documents.

TRAP 9.5(d) and (e) mandate proof of service and specify the contents of a certificate of service for all appellate court filings. Many Texas appellate courts are using the automated certificate of service generated by the e-filing system. The automated certificates shows who has been served

through the e-filing portal. The automatic certificate of service has been turned on by most Texas appellate courts and an increasing number of trial courts, including:

- Supreme Court
- Criminal Court of Appeals
- 1st, 3rd, 4th, 5th, 6th,7th, 8th, 9th, 11th, 13th, 14th Courts of Appeals
- Collin DC
- Bowie DC
- Nolan DC
- Mitchell DC
- Fisher DC
- Williamson CC/DC
- Brewster DC
- Culberson DC
- Jeff Davis DC
- Hudspeth DC
- Presidio DC
- Travis DC
- Dallas CC/DC

The subcommittee asked for input from Blake Hawthorne, Clerk of the Supreme Court. Blake confirmed that the automated certificate of service accurately states who has been served through the efiling system and is working well:

> You may have seen my tweets promoting this idea. I took this idea through the Judicial Committee on Information Technology and that group signed off on the it before the technology was deployed. Almost all of the appellate courts have turned on the automated certificate of service and it is working well. A page is simply inserted at the end of each document filed. It is also included on documents that are served, but not filed, through eFileTX. It lists the name and the email address of each person actually served. Future improvements will include a hyperlink that shows the online report with the status of delivery (i.e. you'll actually be able to see if and when the document was opened by clicking on the hyperlink).
>
> One thing that the automated certificate has demonstrated is that the certificates that attorneys include are often not accurate. They say they served everyone when in fact they did not serve anyone. Or they say they served all counsel when in fact they did not. The automated certificate is more accurate and will be more convenient if attorneys no longer have to create a certificate. The federal courts have already made this change.

Recommendation. Amend TRAP 9.5(d) and (e) to delete the certificate of service requirement for e-filed documents, as follows:

9.5. Service

(d) Proof of Service and Certificate of Service.

(1) Documents Served Electronically. Proof of service and a certificate of service are not required for a document filed electronically in an appellate court and served electronically.

(2) Documents Not Served Electronically.

(A) A document ~~presented for filing~~ not served electronically must contain a proof of service in the form of either an acknowledgment of service by the person served or a certificate of service. Proof of service may appear on or be affixed to the filed document. The clerk may permit a document to be filed without proof of service, but will require the proof to be filed promptly.

~~(e)~~ (B) Certificate Requirements. A certificate of service must be signed by the person who made the service and must state:

(~~1~~i) the date and manner of service;

(~~2~~ii) the name and address of each person served; and

(~~3~~iii) if the person served is a party's attorney, the name of the party represented by that attorney.

D. Whether to create a standardized record citation format to allow for automated hyperlinking.

The Fifth Circuit requires that all filings use a uniform citation to the appellate record to permit automatic hyperlinking using the court's technology. Unlike in Texas appeals, the appellate record in the Fifth Circuit combines both the clerk's record and the reporter's record in a single file with pages consecutively numbered.

The appellate record in Texas consist of multiple volumes of the reporter's transcript and also multiple volumes of the clerk's documents. In Texas appellate courts, there is no standard record citation form, and briefs use a wide variety of citation approaches. Currently, there is no state court technology for automatic hyperlinking to the record. A party must manually add hyperlinks and record excerpts, and hyperlinking to the record is optional.

The subcommittee asked for input from Blake Hawthorne, Clerk of the Supreme Court, who confirmed that automatic hyperlinking is not currently feasible:

> I think [one of the justices] suggested the standardized record citation format thinking that was all that was needed for us to be able to hyperlink to the record like the 5th Circuit does. The trouble is that the technological solution doesn't exist yet. So while this would need to be done to be able to hyperlink, we still won't be able to do this even when there is a standard format. I'm certainly not opposed to it though as it will eventually need to be done in order to create hyperlinks. I just wish there was some work going on on the technology side of this.

So, while the TRAPs could impose a uniform record citation requirement, there would be two problems: (1) it would not permit hyperlinking at this time because there is no technology to support it; and (2) it is unclear whether any uniform format instituted now would be compatible with whatever technology is eventually developed. It might be useful to the appellate courts to have consistent record citations in briefs notwithstanding these issues. If a uniform record citation were adopted, the format should not include spaces that would increase the word count of a document. For example, 2.CR.24 or 2CR24 counts as one word but 2 CR 24 counts as three words. However, any format developed now might have to be changed when the technology is in place to automatically hyperlink to the record.

Recommendation. The subcommittee agreed that it would be better to wait for technology to catch up. The subcommittee urges the Office of Court Administration to explore options for developing the technology necessary for Texas appellate courts to be able to automatically hyperlink to the record and further encourages OCA to launch a pilot project to further that goal.

E. Whether to remove or limit the statement of jurisdiction in the petition and brief.

TRAP 53.2(e) and TRAP 55.2(e) require that the petition for review and petitioner's brief on the merits include a Statement of Jurisdiction that states "without argument, the basis of the Court's jurisdiction."

The Court's jurisdictional statutes were amended in 2017. The bases for the Court's jurisdiction are much simpler now than they were at the time TRAP 53.2 and 55.2 were adopted. The Court's primary jurisdictional statute, Tex. Gov't Code § 22.001, which previously listed multiple grounds for the Court's jurisdiction, such as dissent and conflict, now only contains a single basis – the case presents an issue of importance to the jurisprudence of the State. In addition, former Tex. Gov't Code § 22.225 made certain cases final in the court of appeals, including appeals from interlocutory trial court orders. Those limitations were deleted from Section 22.225 in 2017 and the Supreme Court may exercise jurisdiction under the 22.001 importance standard. There remain a handful of special statutes that grant the Court jurisdiction in other situations – such as direct appeals from the trial court and original jurisdiction over some types of cases. These appeals are governed by TRAP 57, which sets out the procedures for the parties to brief the basis for the Court accepting (or rejecting) jurisdiction.

The effect of the 2017 amendments to the Court's jurisdictional statutes thus made traditional appeals from a court of appeals within the Court's discretionary jurisdiction. Because there is only one basis for jurisdiction, and that basis is discretionary, the issue is not whether the Court has jurisdiction. It does. The question is whether it will accept discretionary jurisdiction over the case based on importance of the issues.

Many practitioners use the Statement of Jurisdiction to argue whether the issues are in fact important and whether the Court should accept the case. The Statement of Jurisdiction is not included when determining the document's word count for purposes of the limits in TRAP 9.4. So it is like a Free Space in Bingo.

Recommendation. The Statement of Jurisdiction is no longer necessary and should be deleted as a requirement. TRAP 53.2(e) and 55.2(e) should be deleted and subsequent sections re-lettered. The reference to Statement of Jurisdiction should also be deleted from respondents' filings – the response to the petition for review and respondent's brief on the merits. TRAP 53.3(d) and TRAP 55.3(d) provide that "a statement of jurisdiction should be omitted unless the petition fails to assert valid grounds for jurisdiction." Those sections should be deleted and subsequent sections re-lettered.

F. Whether to add a reasons-to-grant section in the petition and brief.

The most critical function of a petition for review is to convince the Supreme Court to exercise its discretionary jurisdiction and grant review because the issue is of importance to the State. Nothing, however, in TRAP 53.2 requires the petition to expressly make that argument.

Experienced practitioners routinely do this. As an example, some practitioners have replaced the heading "Summary of Argument" with "Summary of the Argument: Review is Warranted" or "Summary of the Argument: The Court Should Grant Review" or have added an "Introduction" section at the beginning of the brief for that purpose. Similarly, some practitioners representing respondents use the heading "Summary of the Argument: Review is Not Warranted" or a responsive "Introduction" section for that purpose.

The subcommittee discussed a variety of options. The consensus was that a "Reasons to Grant" section would be very useful in the petition for review. But the subcommittee viewed a discussion of reasons to grant review as largely duplicative of the summary of the argument. It would also add more words to the word count. The subcommittee also agreed that the summary of the argument is not that useful if there is already a summary in the Reasons to Grant and also because the petition is quite short, the headings provide a summary, and the summary of the argument is largely repetitive.

The subcommittee further agreed that the new reasons to grant section should be included only in the petition and not merits briefing because they should have different focuses. While the petition for review focuses on whether the issues in the case are grantworthy, the briefing should be more focused on the merits of the substantive arguments.

Recommendations: (1) Delete the requirement for a summary of argument in TRAP 53.2(h); (2) add a new introduction section on reasons to grant and retitle the argument section; (3) as previously recommended, delete the statement of jurisdiction; (4) re-letter as needed; (5) add new exception in TRAP 53.3 to require respondent to include a response to the reasons to grant section; and (6) change TRAP 55.2 only to delete the statement of jurisdiction..

TRAP 53.2 would be amended as follows:

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

(b) *Table of Contents.* The petition must have a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The petition must have an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
(2) the name of the judge who signed the order or judgment appealed from;
(3) the designation of the trial court and the county in which it is located;
(4) the disposition of the case by the trial court;
(5) the parties in the court of appeals;
(6) the district of the court of appeals;
(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
(8) the citation for the court of appeals' opinion; and

(9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.

(e) ~~*Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.~~

~~(f)~~ *Issues Presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

(f) *Introduction and Statement of Reasons to Grant.* The petition must contain an introduction stating the reasons the court should grant review.

(g) *Statement of Facts.* The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

(h) *Optional Summary of the Argument.* The petition may include a summary of the arguments made in the body of the petition. ~~must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.~~

(i) *Reasons to Grant*~~Argument~~. The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.

(j) *Prayer.* The petition must contain a short conclusion that clearly states the nature of the relief sought.

(k) *Appendix.*

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;
(C) the opinion ~~and judgment~~ of the court of appeals; and
(D) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.

The subcommittee further recommends a new exception for respondents in TRAP 53.3 with subsequent sections re-lettered:

(c) include a statement of the reasons the Court should deny review;

Finally, TRAP 55.2(e), statement of jurisdiction, should be deleted and following sections re-lettered.

G. Whether to add a requirement to include argument-preservation citations.

In the subcommittee's experience, preservation is not an issue in most cases in the Supreme Court and, when it is, the Court is very liberal in finding preservation. Citations to the record to show where an issue was preserved is not that simple. The obligation to preserve varies depending on the burden of proof, the nature of the trial court judgment (jnov vs. non-jnov, for example), whether the party was appellant or appellee in the court of appeals, whether the issue in the court of appeals was a responsive issue or a separate attack on the judgment, etc. So the citation standing alone or the absence of a citation may not provide that much information without knowing all of that context. Currently, if there is a preservation issue, it is the obligation of the respondent to point it out. That seems more efficient than requiring the information in every case when it is rarely an issue. The subcommittee also thought that adding this section would invite more (and mostly unnecessary) disputes about preservation.

Recommendation. No change. If, however, a change is made to require citation to where the issue was preserved, add that requirement to the issues statement to exclude it from the word count.

Appendix A: Relevant Rules

9.3. Number of Copies

(b) *Supreme Court and Court of Criminal Appeals.*

(1) Document Filed in Paper Form. If a document is not electronically filed, a party must file the original and 11 copies of any document addressed to either the Supreme Court or the Court of Criminal Appeals, except that in the Supreme Court only an original and one copy must be filed of any motion, response to the motion, and reply in support of the motion, and in the Court of Criminal Appeals, only the original must be filed of a motion for extension of time or a response to the motion, or a pleading under Code of Criminal Procedure article 11.07.

(2) Electronically Filed Document. Paper copies of each document that is electronically filed with the Supreme Court or the Court of Criminal Appeals must be mailed or hand- delivered to the Supreme Court or the Court of Criminal Appeals, as appropriate, within three business days after the document is electronically filed. The number of paper copies required shall be determined, respectively, by order of the Supreme Court or the Court of Criminal Appeals.

9.5. Service

9.5. Service

(a) *Service of All Documents Required*. At or before the time of a document's filing, the filing party must serve a copy on all parties to the proceeding. Service on a party represented by counsel must be made on that party's lead counsel. Except in original proceedings, a party need not serve a copy of the record.

(b) *Manner of Service*.

(1) Documents Filed Electronically. A document filed electronically under Rule 9.2 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) Documents Not Filed Electronically. A document that is not filed electronically may be served in person, by mail, by commercial delivery service, by fax, or by email. Personal service includes delivery to any responsible person at the office of the lead counsel for the party served.

(c) *When Complete*.

(1) Service by mail is complete on mailing.

(2) Service by commercial delivery service is complete when the document is placed in the control of the delivery service.

(3) Service by fax is complete on receipt.

(4) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(d) *Proof of Service*. A document presented for filing must contain a proof of service in the form of either an acknowledgment of service by the person served or a certificate of service. Proof of service may appear on or be affixed to the filed document. The clerk may permit a document to be filed without proof of service, but will require the proof to be filed promptly.

(e) *Certificate Requirements*. A certificate of service must be signed by the person who made the service and must state:

(1) the date and manner of service;

(2) the name and address of each person served; and

(3) if the person served is a party's attorney, the name of the party represented by that attorney.

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

(b) *Table of Contents.* The petition must have a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The petition must have an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

(d) *Statement of the Case.* The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
(2) the name of the judge who signed the order or judgment appealed from;
(3) the designation of the trial court and the county in which it is located;
(4) the disposition of the case by the trial court;
(5) the parties in the court of appeals;
(6) the district of the court of appeals;
(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
(8) the citation for the court of appeals' opinion; and
(9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.

(e) *Statement of Jurisdiction.* The petition must state, without argument, the basis of the Court's jurisdiction.

(f) *Issues Presented.* The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

(g) *Statement of Facts.* The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

(h) *Summary of the Argument.* The petition must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.

(i) *Argument.* The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.

(j) *Prayer.* The petition must contain a short conclusion that clearly states the nature of the relief sought.

(k) *Appendix.*

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;
(C) the opinion and judgment of the court of appeals; and
(D) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.

55.2. Petitioner's Brief on the Merits

The petitioner's brief on the merits must be confined to the issues or points stated in the petition for review and must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel.* The brief must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

(b) *Table of Contents.* The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities.* The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

(d) *Statement of the Case.* The brief must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);
(2) the name of the judge who signed the order or judgment appealed from;
(3) the designation of the trial court and the county in which it is located;
(4) the disposition of the case by the trial court;
(5) the parties in the court of appeals;
(6) the district of the court of appeals;
(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;
(8) the citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished; and
(9) the disposition of the case by the court of appeals.

(e) *Statement of Jurisdiction.* The brief must state, without argument, the basis of the Court's jurisdiction.

(f) *Issues Presented.* The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.

(g) *Statement of Facts.* The brief must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The brief must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

(h) *Summary of the Argument.* The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review.

(i) *Argument.* The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

(j) *Prayer.* The brief must contain a short conclusion that clearly states the nature of the relief sought.

Tab D

The Supreme Court of Texas

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

March 29, 2021

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

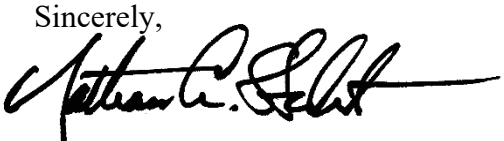
The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Ethical Guidelines for Mediators. In the attached letter, the State Bar of Texas's Alternative Dispute Resolution Section asks the Court to add a comment to Guideline 14 of the Court's Ethical Guidelines for Mediators. The Committee should review and make recommendations.

Jury Rules. The rules in Part II, Section 10 of the Texas Rules of Civil Procedure are outdated and do not reflect current practice. The Court asks the Committee to draft amendments for the Court's consideration. The Committee should consult with the Remote Proceedings Task Force on removing any barriers to remote jury proceedings.

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

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

October 22, 2020

Via email: jaclyn.daumerie@txcourts.gov
Hon. Nathan L. Hecht
Hon. Eva Guzman
Hon. Debra Lehrmann
Hon. Jeffrey S. Boyd
Hon. John Phillip Devine
Hon. Jimmy Blacklock
Hon. Brett Busby
Hon. Jane Bland
Hon. Rebeca Huddle

Re: Request for Approval of Amendment to the Ethical Guidelines for Mediators by the Alternative Dispute Resolution Section of the State Bar of Texas

To the Honorable Justices of the Supreme Court of Texas:

I am writing to you in my capacity as Chair of the Alternative Dispute Resolution Section of the State Bar of Texas (the Section). The purpose of this letter is to ask the Supreme Court of Texas (the Court) to approve an amendment to Guideline 14 of the Ethical Guidelines for Mediators (the Guidelines). Guideline 14 provides as follows:

> **14. Agreements in Writing.** A mediator should encourage the parties to reduce all settlement agreements to writing.

The following comment is the amendment to Guideline 14:

> **Comment**. A mediator may prepare a written settlement agreement that memorializes the terms agreed to by the parties, and may suggest additional terms in a draft that are consistent with terms agreed to by the parties.

The basis of this Comment is Ethics Opinion 675 of the Professional Ethics Committee of the State Bar of Texas (the PEC), issued in August 2018. Ethics Opinion 675 answered some issues that have concerned Texas mediators for years. The Comment incorporates the key language from the PEC's opinion. This letter contains contextual information and the Section's reasons for proposing the Comment.

The Confusion Created by PEC Ethics Opinion 583 in 2008

In September 2008, the PEC issued Ethics Opinion 583 in answer to the following question it received from a Texas attorney: "May a lawyer enter into an arrangement to mediate a divorce settlement between parties who are not represented by legal counsel and prepare the divorce decree and other necessary documents to effectuate an agreed divorce if the mediation results in

an agreement?" For the reasons stated in its opinion, the PEC concluded, "[A] lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effectuate an agreement resulting from the mediation. Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effectuate the terms of an agreed divorce."

Some attorneys acting as mediators interpreted the language of Ethics Opinion 583 expansively. They interpreted the opinion's conclusion, which prohibited not only the mediator's preparation of a divorce decree but also the "other necessary documents to effectuate an agreement resulting from the mediation" as a declaration that mediators should not draft a Mediated Settlement Agreement (MSA) at the conclusion of any mediation in which the parties reach an agreement.

Other attorneys acting as mediators interpreted Ethics Opinion 583 less expansively. They observed that MSAs were not within the scope of the question Ethics Opinion 583 answered. They also reasoned that assisting parties in drafting an MSA is a logical—and often expected or necessary—component of the service mediators provide to parties. They believed an expansive interpretation of Ethics Opinion 583 would impede mediators from providing a service many parties consider imperative.

In March 2016, after almost eight years of uncertainty regarding the interpretation of Ethics Opinion 583, an attorney and mediator asked the PEC to clarify the meaning of the contested language. In response, the PEC issued Ethics Opinion 675 in August 2018.

PEC Ethics Opinion 675 Addressed the Controversy in 2018

Ethics Opinion 675 considered the following questions: "May a Texas lawyer, acting as a mediator, prepare and provide to the parties in the mediation a proposed written agreement that memorializes the terms of the parties' agreement reached during the mediation? If so, may the lawyer-mediator propose terms for inclusion in the written agreement in addition to the specific terms agreed to by the parties in the mediation?"

For the reasons stated in its opinion, the PEC concluded: "A Texas lawyer, acting as a mediator, does not violate the Texas Disciplinary Rules of Professional Conduct by preparing and providing to the parties a draft of a written agreement that memorializes the terms of the parties' settlement reached during the course of the mediation, or by suggesting additional terms for inclusion in the draft agreement."

Reasons for Seeking Supreme Court of Texas Approval of this Comment

The Court first approved the Guidelines in 2005. In 2011, the Section submitted amendments to the Guidelines for the Court's approval, and the Court approved the amendments. Because the issue regarding mediators' authority to draft MSAs has concerned Texas mediators for over a

decade, the Section wishes to clarify the issue by including the relevant language of Ethics Opinion 675 in the Guidelines. Accordingly, the Section respectfully requests the Court's approval of the Comment to Guideline 14.

The Council of the Alternative Dispute Resolution Section of the State Bar of Texas, as authorized representatives of the Alternative Dispute Resolution Section, voted unanimously in favor of this Comment. The Comment has been endorsed by every statewide organization representing mediators in Texas. Those organizations are the Texas Mediator Credentialing Association, the Texas Association of Mediators, the Dispute Resolution Centers Directors' Council, the Texas Chapter of the Association of Attorney-Mediators, the Texas Mediation Trainers Roundtable, and the Center for Public Policy Dispute Resolution.

Please feel free to contact me if you have any questions regarding this request.

Respectfully submitted,

Gene Roberts, Jr., Chair
Alternative Dispute Resolution Section
State Bar of Texas
State Bar No. 50511618
Office: 936.294.1717
Mobile: 214.457.8229
Email: generob04@gmail.com